



UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

Docket No. 11-09-SA

NIGHTINGALE MEDICAL INSTITUTE,

Federal Student Aid
Proceeding

Respondent.

ACN: 04-2008-82001

Appearances: Clive McNichol, of Edmonton, Alberta, Canada, for Nightingale Medical Institute.

Russell B. Wolff, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Office of Federal Student Aid.

Before: Richard F. O'Hair, Administrative Judge

DECISION

Nightingale Medical Institute (Respondent), a proprietary school located in Atlanta, Georgia, participated in the various federal student aid programs authorized under Title IV of the Higher Education Act of 1965 (Title IV), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* The Office of Federal Student Aid (FSA) of the United States Department of Education (Department) administers these programs. On November 22, 2010, FSA issued a Revised Final Audit Determination Letter (FAD) assessing a liability of \$2,961,424 on Respondent for its alleged failure to submit satisfactory compliance audits for award years 2006-2007 and 2007-2008, and a closeout audit for 2008. Respondent filed a timely appeal of this determination on January 15, 2011.

When an institution signs a program participation agreement with the Department for the purpose of disbursing federal student financial aid, that institution agrees to comply with all Title IV program requirements and to act as a fiduciary over those funds. 34 C.F.R. §§ 668.82(a), (b)(1). One of the requirements a participating institution must fulfill is to have an independent certified public accountant (CPA) annually conduct a compliance attestation of the institution's

administration of the Title IV programs, as well as an audit of the institution's financial statements. These compliance audits must be submitted no later than six months after the last day of the institution's fiscal year. 34 C.F.R. §§ 668.23(a). Further, these audits must be conducted in accordance with the general standards and the standards for compliance audits contained in the U.S. General Accounting Office's Government Auditing Standards, as well as guidelines contained in the Department's Office of Inspector General's audit guide. 34 C.F.R. §§ 668.23(b)(2)(i) and (ii).

The FAD relates that in June 2008 representatives from FSA's Atlanta-based School Participation Team conducted an on-site program review at Respondent's location. Subsequent to this review, the team learned that the auditor who had prepared all of Respondent's compliance audits since 2006, Ethel Lane Wilson, was not licensed as a CPA in Georgia. This absence of a license was confirmed by the Licensing Supervisor for the Professional Licensing Boards of the Georgia Secretary of State's office. The FAD also reports that Respondent ceased operation on November 18, 2008, and that this closure obligated Respondent to submit a closeout audit of the institution's participation in federal student assistance programs for the 2008-2009 award year through November 18, 2008. *See* 34 C.F.R. § 668.26(b)(2)(ii). The FAD concludes by finding that Respondent's annual compliance audit submissions for the 2006-2007 and 2007-2008 award years are unacceptable because the preparer, Ethel Lane Wilson, was not an independent CPA, and that Respondent has failed to submit a closeout audit. The FAD reports these failures obligate Respondent, in accordance with well-established policy and practice, to return all Title IV funds it disbursed during the periods in question. The FAD assessed a liability of \$2,961,424, which consisted of \$1,043,882 in Pell Grants, and \$1,917,542 of Direct Loans. Applying the accepted estimated actual loss formula to the Direct Loans, FSA estimates that its loss from the Direct Loans is reduced to \$327,528, thus reducing the Department's losses, and its demand here, to \$1,371,410.

Respondent does not deny it has an obligation to submit the audits described above, but requests that the FAD and the included liability be nullified and dismissed because, through no fault on its part, several of its employees perpetrated frauds against it which resulted in a poorly operated, and now a closed, school. It further alleges that FSA's attempt to recover these funds amounts to a double recovery by the Department because many of these funds are secured by individually signed federal student aid agreements.

Respondent's owner, Clive McNichol, a Canadian resident, explained that he conducted a business visit to Respondent's location in Atlanta, Georgia, from November 10-21, 2008. During that visit he discovered that Mr. Carroll Harrison Braddy, Jr., who he had hired as president of Respondent, and several other employees, had been engaging in fraudulent activities. Additionally, he notes it was Mr. Braddy who hired Ms. Lane to perform the annual compliance audits. Mr. Braddy represented to Mr. McNichol and the Department that Ms. Lane was a CPA, and that she had the necessary credentials. Mr. McNichol says that on November 11, 2008, he first heard that Ms. Lane might not be a CPA and he immediately made a number of unsuccessful inquiries about this, to include going to her office, to determine her CPA status. When confronted with the accusation that she was not a CPA, Ms. Lane explained to him that she had

changed her name since achieving CPA status and that would explain the absence of her name from the list of CPAs in Georgia. Mr. McNichol reports he was unsuccessful in his search for documentation to support Ms. Lane's position.

Respondent asserts that even though its compliance audits were not prepared by a CPA, they are a suitable attestation that it properly disbursed federal funds. In support of this it points out that a Chartered Accountant in Canada performed an informal review of financial records Ms. Lane prepared, and the records were deemed to be appropriate. From this, Respondent hypothesizes that the financial information submitted to the Department in the unacceptable compliance audits for the years in question is accurate, and that there is no evidence that the federal student assistance funds were inappropriately disbursed. Respondent further asserts that the submission of these unacceptable audits did not impair its ability to provide high quality education to its students, thus all parties' expectations were met.

Addressing the failure to submit a closeout audit, Respondent maintains that one cannot be prepared because it no longer has possession of the necessary school financial records. Those records were either stolen, removed, vandalized or destroyed to such an extent it is impossible to perform a closeout audit. In explanation, Mr. McNichol reports that during his visit he discovered that Mr. Braddy, and at least one other employee, were systematically removing funds from the institution's banking account and placing them in Mr. Braddy's private account; and in furtherance of this process, Mr. McNichol's name was forged on checks. Mr. McNichol explains that he discovered this fraudulent conduct on November 17 and he fired Mr. Braddy on that same day. On the following day, November 18, Mr. McNichol found that Respondent's offices had been vandalized and burglarized, and computers and files had been removed.

Respondent admits it is aware that the Department's Office of Inspector General (IG) has a copy of all of its records, but says the IG has ignored its requests for copies of those records so a closeout audit cannot be prepared. It adds that the IG's refusal to provide Respondent with copies of its records also prevents Respondent from having a CPA conduct replacement compliance audits for those prepared by Ms. Lane.

FSA disputes that the Department's IG's possession of copies of all of the records of Respondent's student financial assistance receipts and disbursements precludes Respondent from preparing the necessary audits. FSA explains that the IG obtained these records directly from Respondent's third-party servicer pursuant to a Federal Grand Jury subpoena, and says that for this reason it cannot provide copies of the same to Respondent. FSA says that, as an alternative, Respondent should contact its third party servicer to obtain copies of its business records; that servicer has indicated it will make those records available to Respondent. FSA also acknowledges that the IG has nine boxes of Respondent's student records which Mr. McNichol voluntarily gave to a member of the IG team during an earlier stage of the investigation; however, the IG has not received any request from Respondent for access to these records. It says if it receives one, it will honor it.

FSA relates it does not accuse Respondent of harboring an improper motive in submitting unacceptable audits. Its position is simply that audit submissions by non-CPAs are unacceptable regardless of Respondent's *mens rea*. Further, FSA explains it does not examine or evaluate improperly prepared audits to determine if they are otherwise acceptable. In fact, FSA submitted a report from Respondent's accrediting agency, Council on Occupational Education, indicating that it hired an accounting firm to review Respondent's audit submissions. That firm made 35 "observations" which challenge the correctness or completeness of the compliance audits presumably prepared by Ms. Lane and submitted to the Department by Respondent. As to Respondent's claim that it should be relieved of liability because its students received a proper education despite its submission of unacceptable compliance audits, FSA submits that the quality of the education Respondent's students received is wholly irrelevant to the issue of whether Respondent satisfied its fiduciary duties.

FSA also rebuts Respondent's charge that FSA's attempt at recovery of funds will result in a double recovery by the Department, by pointing out that the bulk of the funds it is seeking to recover are for the return of Pell Grant funds which students do not have to repay. As for the Direct Loan funds, FSA is seeking only the estimated actual loss of those funds, which eliminates the possibility of a double recovery.

In this 34 C.F.R. Subpart H proceeding Respondent has the burden of proving by a preponderance of the evidence that the disbursements of federal student assistance funds were proper and that it complied with all program requirements. *See* 34 C.F.R. § 668.116(d); *In the Matter of Du Quoin Beauty College*, Dkt. No. 06-51-SP, U.S. Dep't of Educ. (May 14, 2009). I find it has not met this burden. Respondent readily admits it was aware of the program requirements at issue here: its obligation to submit acceptable annual compliance audits for the 2006 and 2007 award years, plus the necessary closeout audit covering the period from the last compliance audit to the date the institution closed. Following Respondent's informal investigation into the professional status of Ms. Lane, and formal investigations completed by the Department's IG, it is a certainty that the audits Respondent submitted for 2006 and 2007 were unacceptable because they were not prepared by a CPA. The submission of unacceptable audits is the equivalent of not submitting any audits, and the recourse to FSA in such a case is to demand the return of all Title IV funds disbursed during the affected award years. *See In the Matter of Quality College of Culinary Careers*, Dkt. No. 08-36-SA, U.S. Dep't of Educ. (June 10, 2009).

Respondent has presented two separate defenses to this proceeding, none of which afford it any relief. First, it claims that it did not know Ms. Lane was not a CPA, and that the audit may have been satisfactory, but for the status of the preparer. Respondent derives no benefit here because the regulatory requirements and case law are unambiguous: an acceptable compliance or closeout audit must be prepared by an independent certified public account or government auditor. Ms. Lane does not fall into either category; therefore, the reports she prepared for Respondent are unacceptable. Furthermore, although irrelevant here, despite Respondent's assertion to the contrary it appears Ms. Lane's reports were error-laden. Thus, FSA is left without any reliable assurance that Respondent's disbursement of federal student financial

assistance funds was appropriate. Respondent's final defensive position is that the true measure of its educational programs is that its students were properly trained, and that its unacceptable audits had no adverse impact on the quality of the education its students received. This argument, too, must be dismissed. Regardless of the quality of the audits submitted or the education provided, there is no substitute for the regulatory requirement of annual compliance audits, and a closeout audit following the institution's closure. An acceptable audit, not the quality of the education, is the only legitimate means of complying with the regulation's requirement of the submission of the annual audit. *See In the Matter of Climate Control Institute*, Dkt. No. 02-4-SA (Nov. 14, 2002). There are no substitutes or compromises available to an institution that either submits no audit or one that is unacceptable.

Respondent's claim that it is physically impossible for it to submit any audits because it no longer has the necessary business files as a result of the November 2008 burglary must also be dismissed. Respondent's third party servicer has copies of all these records and it has indicated it would make these records available to Respondent upon request. Similarly, the IG's office in Atlanta has informed Respondent that the student records it removed from Respondent's offices are available to Respondent. It would appear from this information that it is within Respondent's power to acquire sufficient records to provide a CPA with all the documents necessary to complete the requisite audits.

Despite Mr. McNichol's assertion it was the victim of fraudulent activities by Mr. Braddy and others, I find Respondent has not complied with the annual compliance and closeout audit requirements. Without doing so, it is unable to meet its fiduciary responsibilities, and it cannot properly account for its disbursement of federal student assistance funds for the award years 2006-2007, 2007-2008, and through its closure on November 18, 2008. The findings of the November 22, 2010, Revised Final Audit Determination Letter are upheld.

ORDER

On the basis of the foregoing, it is hereby **ORDERED** that Nightingale Medical Institute pay \$1,371,410 to the U.S. Department of Education.

Judge Richard F. O'Hair

Dated: July 18, 2011

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested, to the following:

Mr. Clive McNichol
Nightingale Medical Institute
Box 17 Site 5
RR#1
Edmonton, Alberta, Canada T6H 4N6

Russell B. Wolff, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110