UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616

In the matter of

HELMA INSTITUTE OF MASSAGE THERAPY,

Respondent.

Docket No. 11-83-SP
Federal Student Aid Proceeding

DECISION OF THE SECRETARY

This matter comes before me on appeal by Helma Institute of Massage Therapy (Respondent or Helma) of the Initial Decision by Administrative Judge Richard F. O'Hair. On March 21, 2013, Judge O'Hair upheld the findings of the Final Program Review Determination (FPRD) letter issued on September 19, 2011, by the Office of Federal Student Aid (FSA) of the U.S. Department of Education (Department).[1] As a result, Respondent was ordered to pay $783,510.95 to the Department and $1,233,940.92 to Federal Family Education lenders.[2]

In this case, FSA's program review report spanned three academic years and multiple violations were found. The report concluded that Helma had failed to maintain current financial records, incorrectly calculated and made invalid awards of Pell Grants, offered incomplete academic programs, and incorrectly and untimely paid refunds.[3] In response, FSA directed Helma to conduct a full file review for these violations. Respondent explained that it lost or inadvertently destroyed many of its student files when it closed in May 2008. As a result, Respondent conceded that the alleged violations occurred, and that it failed to meet its burden as a fiduciary of Departmental funds.[4] On appeal, Helma raises the same four issues that Judge O'Hair addressed in his opinion, and argues that its liabilities should be reduced.[5]

[1] FSA issued a preliminary program review report on December 31, 2008, charging Helma with 14 violations of Title IV regulations. Helma responded to the preliminary report on August 10, 2009. FSA concluded that the Respondent did not adequately respond to any of the 14 findings. On September 19, 2011, FSA issued an FPRD finding Helma responsible for all 14 findings. FPRD, p. 4.
[2] The most significant finding in the FPRD was finding two. FSA concluded that Respondent was late and in some instances failed to refund students who withdrew from the institution. The failure to reimburse impacted 331 students through the 2004-2005, 2005-2006, and 2006-2007 school years. *Id.*, p. 8-10. FSA calculated the total liability for these violations to be $1,558,843.00. *Id.*
[3] Initial Decision, p. 1-2.
[4] Initial Decision, p. 2; Helma Appeal, p. 3. *See* 34 C.F.R. §§ 668.14 and 668.82(a).
[5] Helma Appeal, p. 4.

Two of the issues raised by the Respondent on appeal are straightforward, and I will address them first. First, Helma asked that Judge O'Hair reimburse the institution by applying an offset for its alleged "teach-out" efforts. Specifically, Helma claimed that it lost its Title IV eligibility on February 28, 2008, but continued to provide instruction to its students until it closed on May 31, 2008. As such, Respondent argued that it is entitled to receive funds earned during the final phase of operation.[6]

In response, Judge O'Hair noted that under both the regulations and case law his authority is limited to determining whether the FPRD is supportable and should be affirmed.[7] I agree, and consistent with the Secretary's certification in the *Modern Trend Beauty School* matter, affirm that this tribunal does not have the authority to offset any funds.[8] Moreover, even if this tribunal could offset funds, Helma has provided no evidence to establish the existence of a "teach-out" plan.[9]

Second, Respondent asks that I offset the amount of money that Helma paid under its Heightened Cash Monitoring 2 (HCM2) plan.[10] In particular, Helma contends that its FPRD liability should be offset by the amount of Title IV funds properly requested by Helma under the HCM2 process but not paid by FSA prior to the termination of Helma's Title IV eligibility on February 28, 2008.[11] As with Helma's argument regarding the "teach-out" credit, the law is clear – administrative judges do not have the authority to approve requests for offsets.[12]

Helma's third argument builds on its previous argument regarding HCM2 monitoring. Respondent claims that because FSA had to approve Respondent's student eligibility documentation before the Department released any Title IV funding for the 2006-2007 school year, Helma should be entitled to a complete refund of that money.[13] In short, Respondent claims that it could not have received any Title IV funds unless FSA was fully satisfied that Helma met *all* of the student eligibility requirements. To support its argument, Respondent cites one of my earlier decisions, and suggests that it stands for the proposition that the HCM2 process may account for the lawful distribution of funds.[14]

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[6] Helma Appeal, p 7-8.

[7] *See* 34 C.F.R. § 668.118; *In the Matter of Modern Trend Beauty School*, Dkt. No. 98-109-SP, U.S. Dep't of Educ. (March 14, 2001); Certified by the Secretary (October 11, 2001).

[8] 34 C.F.R. § 668.118; *See In the Matter of Modern Trend Beauty School*; *See New Concept Beauty Academy v. U.S. Department of Education et al.*, No**.** 97-CV-7939, E.D. Pa (October 29, 1998) ("District court upheld holding that administrative judge is without authority to order the Department to reimburse Pell grant funds.").

[9] The Title IV regulations define a "teach-out" plan as a written agreement developed by an institution that provides for students in the event an institution ceases to operate prior to all students completing their course of study. 34 C.F.R. § 600.2. Helma has provided no evidence that it had a written agreement to provide for its students' ongoing studies. As such, Helma's argument that it deserves a credit for a "teach-out" is misplaced.

[10] HCM2 is one of the tools that FSA utilizes for high-risk institutions. FSA places an institution on HCM2 if it determines there is a need to more closely monitor the school's participation in FSA programs. *See* 2013-2014 FSA Handbook, p. 4-13. Under HCM2, FSA directed Helma to submit all student eligibility documentation to FSA before FSA would release Title IV funds to the school.

[11] Helma Appeal, p. 7.

[12] *See* 34 C.F.R. § 668.118; *In the Matter of Modern Trend Beauty School*, Dkt. No. 98-109-SP, U.S. Dep't of Educ. (March 14, 2001); Certified by the Secretary (October 11, 2001).

[13] Helma Appeal, p. 4-5

[14] *In the Matter of Harrison Career Institute*, Dkt. Nos. 05-60-ST, 07-18-ST, 07-55-SA, 07-63-SA, U.S. Dept't of Educ. (March 18, 2009) (Decision of the Secretary).

FSA responds that HCM2 works as an oversight mechanism for a sample of students, not all eligible students. FSA notes that under the HCM2 protocol, an institution submits only basic documentation, such as hard copy documentation for a portion of its students. In turn, FSA points out that its staff only reviews a sampling of the student files. In sum, FSA concludes that the review contemplated by the HCM2 process is not as extensive as a full file review.[15]

I believe that FSA has the stronger argument here. The HCM2 process is merely a sampling and a much narrower review of documentation prior to the release of Title IV funds.[16] Further, in answering this question, I rely on a series of cases involving the *Harrison Career Institute*. One of the issues in *Harrison* concerned whether the HCM2 process would take the place of an *audit review* for the purposes of liability. In *Harrison*, I remanded the case to the tribunal to determine if the liabilities assessed by the Department for failure to submit audits should be reduced as a result of the HCM2 process.[17]

On remand in *Harrison*, Judge O'Hair concluded that the HCM2 process was not a substitute for a close-out audit because it is not a comprehensive review of all the documents typically required in such an audit. Judge O'Hair specifically stated "the HCM2 process does not fully account for the lawful distribution of Title IV funds."[18]

I conclude that the rationale articulated by Judge O'Hair in *Harrison* regarding close-out audits should apply equally to full file reviews. In both instances, the purpose of the review is to provide a complete accounting of how the institution spent Title IV funds. In contrast, the HCM2 process is merely a sampling of basic institutional documentation. In short, I affirm the decision reached below on this argument.

Finally, Respondent argues that the liability FSA found in Finding Two of the FPRD ($1,558,843.00) was incorrectly calculated. In particular, the Department chose to use an actual loss formula that sums the actual amount owed by the institution to each individual student for services paid for but not provided. Helma argues that the Department should have used the "estimated annual loss" formula to determine the amount due under this finding.[19] Respondent notes that FSA applied the estimated annual loss formula for Findings One, Three, Six, Nine, Thirteen, and Fourteen.[20] Respondent claims that FSA's refusal to use the formula for Finding Two will result in a windfall for its former students because the students owe institutional

[15] FSA Response to Appeal Brief ("FSA Response"), p. 6.
[16] 2013-2014 FSA Handbook, p. 4-13.
[17] *In the Matter of Harrison Career Institute*, Dkt. Nos. 05-60-ST, 07-18-ST, 07-55-SA, 07-63-SA, U.S. Dep't of Educ. (Mar. 18, 2009) (Decision of the Secretary).
[18] *In the Matter of Harrison Career Institute*, Dkt. Nos. 07-55-SA and 07-63-SA, U.S. Dep't of Educ. (Decision upon Remand), p. 5.
[19] The estimated actual loss formula calculates the past and future financial damages to the Department caused by an institutional error. The formula uses reasonable estimates of the net cost to FSA of payments that have been and will be made on the loan. Specifically, the institutions' applicable cohort default rate is multiplied by the amount of liability for a given award year, and that number is then added to estimated loan subsidies and special allowances. *See* July 17, 1996 memo ("1996 Memo") from Shirley Brown to all Regional Directors and Institutional Review Branch Chiefs.
[20] Helma Appeal, p. 6.

charges to Helma under their enrollment agreements.[21] Helma adds that the application of the estimated annual loss formula is appropriate here because almost all of Helma's former students are repaying their loans.[22]

FSA responds that Respondent's arguments do not address FSA's long-standing policy for refund scenarios such as the determination in Finding Two. Specifically, FSA cites the July 17, 1996, memo that established the Department's approach for applying the estimated actual loss formula. The memo succinctly states that "the estimated loss formula is inapplicable to refund situations because refunds are made on a student-specific basis and cannot be satisfactorily addressed via a lump-sum payment to ED."[23] FSA adds that refunds must be paid by the institution. As such, FSA maintains that the refund in this case must be paid on a student-specific basis, and not by the application of the estimated annual loss formula.[24]

I find the 1996 FSA memo to be dispositive. The memo states that as a policy matter a refund scenario is unique because the institution pays refunds to students on a case-by-case basis. This conclusion is also supported by the tribunal's case law.[25] Judge O'Hair noted in his opinion below, "These refunds are student specific … [and] there is no correlation between the rate at which students default on their student loans and the amount of refunds an institution owes because a student dropped out of the program after securing a Title IV loan."[26]

Given the clarity of the 1996 Memo as well as previous decisions by the tribunal, I affirm Judge O'Hair's reasoning on FSA's decision not to apply the estimated annual loss formula. In sum, because Respondent has not established that it spent the funds properly, nor offered any new analysis or persuasive arguments to reduce its liability on appeal, I find that Helma must pay the full amount of $783,510.95 to the Department, and $1,233,940.92 to the Federal Family Education lenders.

ORDER

ACCORDINGLY, the Initial Decision by Administrative Judge Richard F. O'Hair is

[21] *Id.*, p. 6.
[22] *Id.*, p. 6-7.
[23] *See* 1996 memo, p. 4.
[24] FSA Response, p. 8.
[25] *See In the Matter of William Tyndale College*, Dkt. No. 03-58-SP, U.S. Dep't of Educ. (Apr. 7, 2004); *In the Matter of Christian Brothers University*, Dkt. No. 96-4-SP, U.S. Dep't of Educ. (January 8, 1997).
[26] Initial Decision, p. 3

HEREBY AFFIRMED. Respondent is ordered to pay $783,510.95 to the U.S. Department of Education, and $1,233,940.92 to the Federal Family Education lenders.

So ordered this 1st day of October 2014.

/s/
Arne Duncan

Washington, D.C.