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

In the Matter of

BARBER-SCOTIA COLLEGE,

Respondent.

Docket No. 12-44-SA

Federal Student Aid Proceeding

Appearances: Thomas A. Duckenfield, III, Esq., Wong Fleming, Washington, D.C. for Barber-Scotia College.

Sarah W. Morgan, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Office of Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Barber-Scotia College (Respondent) is a public, post-secondary educational institution located in Concord, North Carolina. Of note, it is associated with the Presbyterian Church and is included in the list of the Historically Black Colleges and Universities. It provides a variety of post-secondary educational programs, and was eligible to participate in the federal student financial assistance programs that are authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* The Office of Federal Student Aid (FSA) is the cognizant agency within the U. S. Department of Education (ED) that administers and oversees these programs. The Respondent lost its eligibility to participate in the Title IV programs on July 13, 2004 after losing its accreditation from the Southern Association of Colleges and Schools.

As one of its obligations as a Title IV eligible institution, 34 C.F.R. §668.23 (a)(2), requires the Respondent to file yearly compliance audits, performed in accordance with the requirements contained in OMB Circular A-133. The required audit reports covering award years 2002-2003 and 2003-2004 had not been timely received by FSA and, as a consequence, FSA issued a Final Audit Determination (FAD) on June 24, 2012, demanding that the Respondent return $4,906,498, to ED, the total of all Title IV aid disbursed by the Respondent for the two award years covered by the missing audits. During the course of the ensuing appellate process, the Respondent submitted the audit report for the 2002-2003 award year and,

after FSA's review and acceptance, the then-assigned hearing official, Judge Richard F. O'Hair, reduced FSA's demand accordingly. Subsequently, on January 2, 2013, Judge O'Hair issued a decision in which he found that the Respondent had failed to submit its 2003-2004 audit report and ordered the Respondent to pay $2,617,041.75 to ED, for that failure.

The Respondent appealed Judge O'Hair's decision to the Secretary. During the appellate process before the Secretary, the Respondent requested that the Secretary remand this action to the hearing official. Respondent's Counsel asserted that the Respondent had recently recovered financial data and business records, thus enabling it to provide the compliance audit for the 2003-2004 award year. Based upon those assurances, on October 16, 2015, the Secretary set aside Judge O'Hair's decision and remanded the case to ED's Office of Hearings and Appeals for further review, with instruction to allow the Respondent a reasonable period of time to submit the audit.

On October 20, 2015, upon the retirement of Judge O'Hair from federal service, I was assigned to adjudicate this matter. On that date, I issued a Further Order Governing Proceedings, wherein I ordered the Respondent to submit the audit to me by January 15, 2016. Subsequently, Respondent informed me that the firm of WPG Murphy and Company had been engaged to perform the audit; however, the firm required additional time to complete the audit. I extended the filing date to March 31, 2016, and, on that date, the Respondent submitted the audit. In due course, FSA submitted its comments on the efficacy of the audit on June 16, 2016. Upon my review of FSA's comments on the audit report, I noted that FSA argued that the audit did not conform to the Single Audit Act, and OMB Circular A-133, as required. FSA also questioned the sampling technique reported by the auditor and requested that I approve the liability findings in total. FSA's Counsel did, however, inform me in its comments that if I accepted the efficacy of the figures arrived at by utilizing the auditor's findings, it would accept the liability finding as calculated by the auditor, i.e. $1,563,824.75.

Because of the potential substantial liability determinations, I afforded the Respondent an opportunity to respond, by August 5, 2016. I granted Respondent's request to extend the filing date to September 30, 2016, and on that date, the submission was made. Therein, Respondent's counsel submitted evidence addressing FSA's concern regarding the sampling referenced in the audit report; made a plea for acceptance of the auditor's conclusions and argued that the school has gone through a traumatic period resulting in the disarray of their records. Counsel recognized the shortcomings of the audit and requested that I find liability in the amount of $1,563,824.75, based on the error rate calculation, utilizing the statistically valid sampling technique carried out by the auditor. In further support, Counsel cited to the previous year's acceptable audit report and urged that I recognize and consider that "the 2003-2004 year was a tumultuous and anomalous year, as B-SC lost accreditation, the institution fell into chaos, records fell into disarray, and there were no fiscal resources." Finally counsel argues that "the students generally qualified for their Title IV awards and previous audits indicate that the financial aid staff customarily complied with FSA requirements.

In a consistent line of decisions emanating from the Office of Hearings and Appeals it has been held previously that the failure of a Respondent to present an acceptable required yearly or close-out audit resulted in a finding that the Respondent had effectively failed to establish that their Title IV expenditures were correct and, as a consequence, had to return all the Title IV funds it had received during the audited period. The rationale for this finding was that, although it was likely that most, if not all the Title IV aid, could have been disbursed properly, it was not possible for FSA to assure that such was correct, absent a clean audit. *See, In re Nightingale Medical Institute,* Docket No. 11-09-SA, U.S. Dep't of Educ. (July 18, 2011). *See also, In re Velma B's Beauty Academy,* Docket No. 13-09-SA, U.S. Dep't of Educ. Dec. 4, 2013); and *In re Samverly College of Barber/Hairstyling,* Docket No. 9-144-SP, U.S. Dep't of Educ. (June 21, 2000). Although there had been some ability to offer satisfactory alternatives to such audit that was rarely accepted as a substitute for the required audit so as to successfully relieve the respondent of liability. These decisions also alluded to the fact that a Title IV eligible institution acts as a fiduciary, and as such, has a duty to account.

That almost absolute position was modified by the Secretary when he issued his Decision, *In re Galiano Career Academy,* Docket No.11-71-SP, U.S. Dep't of Educ. (Dec. of the Secretary, July 10, 2015). Based upon my review of that decision, I find that the guidance contained therein equally applies to the current proceeding before me. In that cited proceeding, the Secretary was considering the Respondent's appeal from a finding of an Administrative Judge that, it had submitted an unacceptable audit that contained numerous errors and, as a result, the presiding judge ordered the institution to repay all the Title IV funds it received during the audited period. The Secretary found that a judge should consider any auditor's findings in the mandated audit that would indicate that certain expenditures were correctly accounted for. This inquiry could include the application of an error rate projection based on a sample, even if the institution's records were not totally reliable. I note that such finding was predicated on the fact that any evidence of fraud in the auditing process would alter that analysis. In that vein, I find that in the current proceeding, there has been no intimation of any fraud by the Respondent or improprieties by the auditor. Therefore, I will assess liability calculated on the basis of the sampling supported in the audit report.

FINDINGS

As a preliminary matter, in a resolution of any dispute that results from a FAD, and in assessing the resulting liability, it is important to recognize that after receiving an appropriate notice of a violation, the respondent has the burden of proving that the questioned expenditures were correct and that it did not violate any regulatory requirements. 34 C.F.R. § 668.116(d). In the current proceeding, it is important to note that in calculating the amount to be returned to ED, if done by the application of the error rate determined in the audit, the result is $1,563,824.75. The Respondent agrees that I should order the return of that amount; and FSA accepts that amount if I determine to take into account the audit. FSA's hesitancy in this regard is that it had some questions about some of the supporting documentation involved in the sampling process.

Specifically, FSA was concerned about the redaction of certain private information regarding some of the students in the sample. My review of the Respondent's input on this issue convinces me that the explanation and information provided by the Respondent fully addresses the concern on that particular issue and I believe that the sampling process is, otherwise, reliable. Given the confluence of all those separate factors, I find there are sufficient indicators of trustworthiness in the record that are supportive of the application of the error rate calculation that is based on the auditor's sample of sixty students, and find the resulting liability thereunder is $1,563,824.75. Following the Secretary's guidance in *Galiano*, I find that this figure is the most correct calculation of the liability of the Respondent.

ORDER

On the basis of the above findings, it is ORDERED that Barber-Scotia College return to the United States Department of Education the sum of $1,563,824.75 for its actionable failure to comply with the Title IV audit reporting requirements.

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Ernest C. Canellos
Chief Judge

Dated: November 8, 2016

SERVICE

The attached decision was sent by certified U.S. mail, return receipt requested, to the following:

Thomas A. Duckenfield, III, Esq.
Wong Fleming
4217 20th Street, NE
Washington, D.C. 20018

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