



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
OFFICE OF ADMINISTRATIVE LAW JUDGES
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In the Matter of

Docket No.: 16-21-SP

Georgia Northwestern Technical College,

**Federal Student Aid Proceeding
PRCN: 2013-40-428393**

Respondent

Appearances:

Michael Brustein, Esq. and Michael Bender, Esq., Brustein & Manasevit, PLLC.,
for the Respondent.

Angela L. Sierra, Esq. and Donna S. Mangold, Esq. United States Department of
Education, Office of the General Counsel, for Federal Student Aid.

Before: Angela J. Miranda, Administrative Law Judge

DECISION

I. Jurisdiction and Procedural History

Georgia Northwestern Technical College (GNTC) is a postsecondary education institution offering associate degrees. GNTC is accredited by Southern Association of Colleges and Schools Commission on Colleges and is a postsecondary education participant in Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1070 et seq. (Title IV, HEA programs). The United States Department of Education (Department), the Office of Federal Student Aid (FSA) has jurisdiction and oversight over Title IV programs.

A program review was conducted by the Department's School Participation Division – Atlanta at GNTC from August 19 to 23, 2013. A Program Review Report (PRR) covering GNTC's administration of programs authorized by Title IV for the 2011-2012 and 2012-2013 award years (AY) was issued on May 8, 2014. The PRR included 29 findings against GNTC. Following review of GNTC's response to the PRR, a Final Program Review

Determination (FPRD) was issued on March 18, 2016.

The FPRD included six findings with Final Determinations (Finding 1, 2, 3, 4, 6, and 23) but Finding 23, arising from GNTC's failure to comply with the requirements of the Drug Free Schools and Community Act Amendments of 1989 (DFSCA), did not result in any financial liability, and, therefore, is not appealable unless and until an adverse administrative action is initiated. Total liability assessed in the FPRD was \$2,143,271.00 (Finding 1: \$1,545,014.72; Finding 2: \$430,111.75; Finding 3: \$17,038.13; Finding 4: \$20,177.46, and Finding 6: \$130,929.75).¹

GNTC timely filed an appeal with Administrative Actions and Appeals Service Group (AAASG), which was received on May 2, 2016. GNTC appealed Findings 1, 2, 3, 4, and 6. GNTC's appeal specified issues and facts in dispute, identified pertinent facts and reasons in support of the appeal, and provided legal arguments in support of the appeal. An Order Governing Proceeding (OGP), providing direction and establishing a briefing schedule, was issued on May 24, 2016.

Thereafter, GNTC filed a Motion to Stay the proceeding to allow FSA to review documentation submitted with the appeal, to allow the Respondent to obtain and submit additional supporting documentation to FSA, to allow the parties to resolve some of the outstanding liabilities, and to allow the parties to narrow the scope of issues in the appeal. The Respondent reported that FSA consented to the Motion to Stay and that the parties agreed to submit a Status Report on July 15, 2016, which was timely filed.

The period of stay was beneficial, as it appears to have allowed the Respondent and FSA to continue to communicate and collaborate by providing additional information, record review, and argument toward resolution of the enumerated Findings, and resulted in agreement to further reduce the total liability assessed in the FPRD. By Joint Stipulation, filed August 23, 2016, this Tribunal was advised the Respondent provided FSA with additional documentation relating to seven students from the projection sample in Finding 1. Upon further review and evaluation, FSA agreed to reduce the liabilities as to those students and, therefore, further reduced the liability for Finding 1 by \$275,446 from \$1,545,014 to \$1,269,568. Consequently, the projected liability for all the findings of the FPRD was reduced from \$2,143,271 to \$1,867,825.

Thereafter, a formal briefing schedule was reestablished and the Respondent timely filed an initial brief on August 26, 2016. In addition to legal arguments, GNTC provided documents as related to two students in the projection sample for Finding 1 and argued these two students were making satisfactory academic progress. Consequently, GNTC argued this additional evidence required further reduction in the projected liability for Finding 1.

FSA timely filed its brief on September 23, 2016 and acknowledged the documentation provided by GNTC as related to Finding 1 supported a further reduction in liabilities for Finding 1 by \$87,176 to \$1,182,392. FSA further explained this additional reduction resulted in a reduction of total liability for all the findings of the FPRD to \$1,780,649.

¹ The March 18, 2016 FPRD issued by FSA rounds the dollar amount down from \$2,143,271.81.

This appeal is governed by the procedures set out in 34 C.F.R. Part 668, Subpart H. A timely request for review was submitted, the Parties were notified of the hearing process, briefs along with relevant evidence have been accepted and reviewed, and this matter is ready for decision (*See*, C.F.R. §668.11, *et seq.*).

II. Issues

The general issue is whether the Findings of the FPRD, as related to the appealed Findings are supported by facts and controlling legal authority. More specifically, as to the appealed Findings the following issues are before this Tribunal:

1. Whether Title IV funds were properly distributed by GNTC to only those students who were eligible to receive Title IV aid because the students were making satisfactory academic progress;
2. Whether GNTC properly verified applicant information on the Free Application for Federal Student Aid (FAFSA);
3. Whether GNTC correctly calculated Return of Title IV Funds;
4. Whether GNTC correctly determined Student withdrawal dates as related to Return of Title IV Funds; and
5. Whether GNTC properly met the non-Federal share as related to the Federal Work Study Program.

III. Legal Framework/Applicable Laws and Regulations

As related to Finding 1, a student is eligible to receive Title IV aid if the eligibility requirements of 34 C.F.R. Part 668, Subpart C are met. More specifically, a student must maintain satisfactory academic progress (SAP) consistent with the institution's published standards (Higher Education Act §484(a)(2), (c), 20 U.S.C. § 1091, 34 C.F.R. §668.32(f)). An institution's SAP policy is reasonable if it meets specific regulatory criteria (34 C.F.R. §668.34). The policy must contain a provision to measure qualitative progress that identifies a minimum grade point average or its equivalent and a quantitative measure of progress to ensure that the student will complete the program within the maximum timeframe (34 C.F.R. §§668.34(a)(4) and (5)). Maximum timeframe is specifically defined as a period that is no longer than 150 percent of the published length of the educational program, whether measured in credit hours or clock hours (34 C.F.R. §668.34(b)). A student may, however, be eligible for Title IV aid despite not making SAP for a subsequent payment period under certain exceptions (34 C.F.R. 668.34(c)(2), (3), and (4)).

As related to Finding 2, an institution has administrative capability if the institution develops and applies an adequate system to identify and resolve discrepancies in a student's application for financial aid under Title IV, HEA programs (34 C.F.R. §668.16(f)). The institution must establish and use written policies and procedures to verify a student's application for financial

aid (34 C.F.R. §668.53). Unless an exception applies, an institution must require an applicant to verify financial aid information if so requested by the Secretary (34 C.F.R. §668.54). The Secretary identifies the information to be verified (34 C.F.R. §668.56).² If the information on an application changes as a result of the verification process, the institution shall require the applicant to resubmit the application information to the Secretary for corrections if the institution recalculates the applicant's expected family contribution (EFC) and determines that any change in EFC changes the applicant's Federal Pell Grant Award (*See* 34 C.F.R. §668.59 and 34 C.F.R. §690.80).³ The PRR revealed verification violations as related to four students in the statistical sample.⁴

As related to Finding 3 and 4, institutions of higher education must follow specific rules to determine the amount of Title IV grant or loan assistance that was earned by a student when a student, who was a recipient of such funds, withdraws from that institution of higher education (34 C.F.R. §668.22). The institution is responsible for correctly identifying the withdrawal date and calculating the percentage of payment period or period of enrollment when a student withdraws on or before 60 percent of the payment period or period of enrollment is complete (34 C.F.R. §668.22(b), (c), (e), and (f)). Identification of the withdrawal date for an institution that is not required to take attendance may occur in a variety of ways including: as of the date the student begins the withdrawal process prescribed by the institution; the date the student otherwise provided official notification to the institution of the intent to withdraw; the midpoint of the payment period or period of enrollment if no notification is provided by the student; a date related to an illness, accident, grievous personal loss, or other circumstance that occurred that prevented notice to the institution; the date a student began an approved leave of absence if the student does not return from an approved leave of absence; or the date a student started a leave of absence that was not approved consistent with the regulatory definition (34 C.F.R. §668.22(c)). The institution is responsible for calculating the amount of the Title IV funds earned by the student and the return of unearned aid (34 C.F.R. §668.22(e) and (g)).

As related to Finding 6, the Federal share of Federal Work Study (FWS) may not exceed 75 percent unless the Secretary approves a higher share under certain circumstances (34 C.F.R. §675.26). The Secretary authorizes a Federal share of 100 percent of the compensation earned

² For each award year, as of July 1, 2012, information to be verified is published by the Secretary in the Federal Register (34 C.F.R. §668.56 (2012)). Up to June 30, 2012, the regulation specified the information to be verified (34 C.F.R. §668.56 (1994)).

³ The regulations regarding consequences of a change in application information as a result of the verification process include a threshold before an applicant is required to resubmit the financial aid application. From July 1, 2007 to June 30, 2012 the threshold amount was \$400.00, based on a specific calculation, as represented by FSA in the FPRD (34 C.F.R. 668.59(a)(2)(ii)(2006)). As of July 1, 2012 the threshold amount was and continues to be \$25.00 (34 C.F.R. §668359(a)(2)(2012)).

⁴ Student 7's documentation showed an error related to reported student/spouse untaxed income. Student 11's documentation revealed the student received unemployment income which was not included in the verification and GNTC did not have a provision to exclude unemployment income in the professional judgment or verification policy. Student 21's and 29's documentation revealed GNTC did not have parental tax returns in GNTC's internal records. The PRR concluded verification was not completed for these four (4) students and therefore GNTC was required to perform a 100 percent file review of students who were selected for verification and awarded Title IV aid during the 2011-2012 and 2012-2013 award years (excluding students identified in the Program Review Sample) or perform a file review for only the remainder of the statistical sample not tested by the Department in the program review. In addition to the review, GNTC was required to revise and submit a copy of its Verification Policies and Procedures which clearly address the verification violations identified in the PRR.

by a student if the work performed by the student is for the institution itself, a Federal, State, or local public agency or for a private nonprofit organization and the institution requested that increased Federal share as part of the regular FWS funding application for that year while being designated as an eligible institution serving specifically identified groups (34 C.F.R. §675.26(d)(1) and (2)(i)). Other situations where the Secretary may authorize a Federal share of 100 percent include when the work performed by the student is for the institution itself, for a Federal, State, or local public agency or for a private nonprofit organization and the student is employed as a reading tutor for preschool age or elementary age children, is performing family literacy activities in a family literacy project that provides services to families with preschool age children or children who are in elementary school, is employed as a mathematics tutor for children in elementary school through the ninth grade, or is employed in community service activities and is performing civic education and participation activities in community service projects (34 C.F.R. §675.26(d)(1) and (2)(ii)-(v)).

IV. Analysis

Finding 1: Ineligible Student – Not Making Satisfactory Academic Progress

The FPRD found GNTC improperly dispersed Title IV funds to students who were not making SAP. The total liability projected was \$1,545,014.72, including cost of funds (interest) in the amount of \$26,202.15. During a period of stay of this proceeding, GNTC submitted and FSA reviewed additional documentation as related to student accounts included in the statistical sample identified at the program review. Thereafter, the parties filed a joint stipulation reducing the projected liability for Finding 1 by \$275,466 to \$1,269,568.

GNTC argued in its brief that the liabilities associated with two additional students, specifically Student 1-29 and 1-36, in the statistical sample were erroneously assessed. Upon review of GNTC's argument and supporting documentation, FSA accepted GNTC's argument and reduced the projected liability for Finding 1 by \$87,176 to \$1,182,392. FSA notes that GNTC does not specifically dispute any of the other liabilities identified for Finding 1 of the FPRD and requests affirmation of the remaining liability of \$1,182,392 for Finding 1.

GNTC filed a Motion for Leave to File a Reply Brief and simultaneously filed a Reply Brief. The Reply Brief offers no additional specific argument as to the projected liability for Finding 1, except for a general argument as related to a "cooperative resolution process" which is addressed separately in this decision. GNTC presumably accepts FSA's calculation of reduction for this Finding by \$87,172 to \$1,182,392. I therefore affirm this liability as to Finding 1.

Finding 2: Verification Violations

In response to the PRR, GNTC did not dispute Finding 2 as related to two students (Students 11 and 29). As related to Student 7, FSA found and the FPRD noted that the verification by GNTC was correctly performed. In its response to the PRR, GNTC asserted that the missing parent tax return for Student 21 was found⁵ and thus the verification was completed

⁵ GNTC explained in its response to the PRR that it had been undergoing a transfer of paper files to digital files and in that process, the entire file for Student 21 was not digitized and, therefore, the parent tax forms were not available

correctly. While the Department accepted the inclusion of the parent's tax return as submitted in GNTC's response, the FPRD noted that GNTC failed to correct a mistake that identified taxes paid by the parent as \$251.00 when the documentation actually showed no taxes were paid and instead the parents had a \$251.00 tax credit. Therefore, FSA, as noted in the FPRD, found the verification was not performed properly for Student 21 despite the result that there was no overpayment of Title IV aid. On the basis of a verification error rate of 13 percent in the program review sample GNTC conducted a file review for the remainder of the statistical sample and the FPRD projected liabilities across the entire student population.

In its brief, GNTC argued there was no verification error for Student 21 despite the error on the Institutional Student Information Report which listed the parent's income taxes paid for 2011 as \$251.00 when the actual Federal tax returns showed a tax credit of \$251.00 and no taxes due. In support of this argument, GNTC cited the FPRD which noted that only corrections in excess of a \$400 threshold require resubmission, recalculation, or adjustment to Pell Grant awards. In reliance on FSA's representation in the FPRD that resubmission, recalculation, or adjustment to Pell Grant awards is required only when an error allowance amount is in excess of \$400.00, GNTC argues the error rate for Finding 2 was only 6.6 percent because only one of the 15 sample files reviewed was out of compliance. Therefore, GNTC argues there was no evidence of a systemic issue as related to verification errors and, therefore, no file review should have been triggered.⁶ Consequently, GNTC argues the entire liability associated with Finding 2 must be eliminated as the basis for the 100 percent file review was not supported.

In response to GNTC's argument that the verification error rate was below 10 percent and, therefore, a file review was not warranted, FSA noted the applicable regulation changed effective July 1, 2012, lowering the threshold amount to a single dollar item of \$25.00 or more. Furthermore, FSA noted the *2012-2013 FSA Application and Verification Guide* stated resubmission of information was necessary when there is any change to a single dollar amount of \$25.00 or more, which was consistent with the recently changed regulatory language. Thus, the Department argued GNTC was on notice and should have known prior to the issuance of the FPRD that the threshold amount was a single dollar item of \$25.00 or more. FSA argued because the verification error for Student 21 was part of the AY 2012-2013 sample and the verification error was greater than \$25.00, the error rate for AY 2012-2013 was 13percent and the broader file review was appropriately triggered.

In Reply to FSA's argument, GNTC alleges FSA has violated procedural due process because FSA's FPRD failed to properly provide notice to GNTC when the threshold amount was incorrectly identified as errors in excess of \$400.00. Review of relevant case law helps in this analysis.

First and foremost in this analysis is the understanding that constitutionally adequate process

during the program review because the original paper file could not be immediately located. While preparing the response to the PRR, the original paper file was located and the parent tax forms were provided as an attachment to GNTC's response.

⁶ GNTC specifically sites FSA's Program Review Guide at III-17 (August 2001) which allows reviewers to require an institution to perform reviews of its records (file reviews) to ascertain the extent of a deficiency that appears to be systemic and material. The Program Review Guide notes an error rate of greater than 10 percent for any given award year signals a systemic problem.

is a flexible concept that cannot be divorced from the nature and the ultimate decision that is being made (*J.R. v. Hansen*, 736 F.3d 959, 965 (Ct. App. 11th Cir. 2013), *citing*, *Parham v. J.R.*, 442 U.S. 584, 608, 99 S.Ct. 2493, 2507, 61 L.Ed.2d 101 (1979)). The Supreme Court refined the concept of what process is due in *Mathews v. Eldridge*, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed.2d 18 (1976). To determine what process is due, courts must balance a number of considerations (*J.R. v. Hansen*, at 966). In the 11th Circuit, a three prong test is used in that there must be a deprivation of a constitutionally-protected liberty or property interest, state action, and constitutionally inadequate process (*Cryder v. Oxendine* 24 F.3d 175, 177, Ct. App. 11th Cir. 1994). Here the Respondent alleges failure of due process because the FPRD references regulation 34 C.F.R. §668.59(a)(2011) with parenthetical information related to the threshold of \$400.

More specifically and related to Student 21, the FPRD shows that GNTC staff could not produce the parent tax return from the internal records during the on-site review and there was an unresolved discrepancy between information from a 2011 1040EZ and the 2012-2013 Institutional Student Information Report (ISIR), and thus, a verification error was assessed. Only after the PRR was issued did GNTC produce the parent tax return from internal records and in the response to the PRR, GNTC proclaimed there was no verification error for Student 21.⁷ Specific analysis of the circumstances for Student 21 in the FPRD show that the Department accepted the inclusion of the found parent 2011 tax forms but disputed GNTC proclamation that there was no verification error. In fact, the FPRD established the income tax paid by the parents in 2011 was not \$251 as identified in the ISIR. Given this error, the Department concluded verification was not properly performed for this student despite the fact that there was no overpayment of Title IV aid due to the error. The FPRD maintained the file review requirement for AY 2012-2013 and consequently a financial liability was assessed.

The essential question to be answered here is whether the incorrect parenthetical information following the reference to 34 C.F.R. §668.59(a) in the FPRD rises to the level of a constitutionally inadequate process. Looking at all the circumstances here, the Respondent's assertion of a due process violation is inadequately explained. The FPRD correctly cites the controlling regulation. It is now known there was a change in this regulation effective July 1, 2012. All parties had been aware since before issuance of the PRR that the verification error for Student 21 occurred in AY 2012-2013, which is after the effective date of the changed regulation. As noted by FSA in their brief, GNTC had other notice of the change in the threshold amount, more specifically as information included in the *2012-2013 FSA Application and Verification Guide*. Therefore, FSA contends there is no due process violation. This contention is supported in light of the totality of the circumstances here. Notably, that GNTC was unable to produce the required documentation at the time of the program review and once discovered in existing records GNTC proclaimed no verification error despite clear evidence of unresolved discrepancies in the records that were eventually produced. Furthermore, GNTC alleges a due process violation only after the error in the FPRD is revealed. GNTC does not explain why the discrepancy in the records was not addressed once the records were found and there is no evidence of detrimental reliance by GNTC upon the erroneous parenthetical information in the FPRD. GNTC offer no explanation as to why it did not follow the guidance in the most current FSA Application and Verification Guide when GNTC proclaimed "no verification error." While

⁷ See Footnote 5.

it would have been better if the FPRD did not simply use boilerplate language describing a regulation that was changed over three years prior to the issuance of the FPRD, this minor error, as related to parenthetical information included in the FPRD, fails to rise to the level of a due process violation that results in a constitutionally inadequate process. This conclusion is supported by the fact there was evidence that FSA provided other accurate information to GNTC and all other program participants in the *2012-2013 FSA Application and Verification Guide*. Thus, the file review requirement for AY 2012-2013 was proper and the calculation of the liability for this Finding is affirmed.

Finding 3: Return to Title IV (R2T4) Calculation Errors

The onsite review revealed a consistent problem in correctly identifying the withdrawal date when the withdrawal was prior to October 25, 2011. The review also revealed errors when book voucher charges were not reflected in the total institutional charges. An error rate of 20 percent was identified and GNTC was required to perform a 100 percent file review. FSA established a total liability of \$17,038.13 in the FPRD, including cost of funds which is the interest expense incurred by the Department when GNTC retained ineligible funds.

In the Request for Review, GNTC asserts this liability is erroneous because the Department's methodology was flawed and the Department miscalculated the interest. GNTC did not provide any further argument to support this assertion. GNTC did not provide any evidence of flawed methodology or miscalculated interest. The Department contends GNTC failed to meet its burden of proving the liabilities established in this Finding are unfounded and the Department requests that the total liability be affirmed.

An institution requesting a review of a FPRD has the burden of proving the expenditures questioned or disallowed were proper and that the institution complied with program requirements (34 C.F.R. §668.116). GNTC has failed to meet this burden and, therefore, the liability is affirmed.

Finding 4: Unofficial Withdrawal Policy Missing/Inadequate – Incorrect or Unmade R2T4 Calculation:

At the onsite program review, it was determined GNTC did not have an official grading policy that would identify students who completed a course but failed to achieve the course objectives and students who did not complete the course due to official or unofficial withdrawal. Although GNTC had an academic policy that required instructors to enter a last date of attendance for withdrawn students, GNTC had no financial aid policy in place to review students who received final grades of F's (fail) or W's (withdrawal) in all registered courses. As a result of this failure, GNTC was required to conduct a 100 percent file review of students who received all F's or W's in a term during AYs 2011-2012 and 2012-2013 and to submit R2T4 Policy/Procedures to prevent incorrect or unmade R2T4 calculations. FSA established a total liability of \$20,177.46 for Finding 4.

Again, in the Request for Review, GNTC asserts this liability is erroneous because the Department's methodology was flawed and the Department miscalculated the interest. GNTC

also asserted the R2T4 calculations by the Department for students who had withdrawn were overestimated. GNTC did not provide any further argument to support these assertions. GNTC did not provide any evidence of flawed methodology, miscalculated interest, or overestimated R2T4 calculations. The Department contends GNTC failed to meet its burden of proving the liabilities established in this Finding are unfounded and requests that the total liability be affirmed.

Again, an institution requesting a review of a FPRD has the burden of proving the expenditures questioned or disallowed were proper and that the institution complied with program requirements (34 C.F.R. §668.116). GNTC has failed to meet this burden and, therefore, the liability is affirmed.

Finding 6: Federal Work Study Program (FWS) Matching Requirement Not Met

GNTC argues it did not fail to meet the 25 percent match requirement for FWS in award year 2010-2011 because it had a valid waiver for that time period. GNTC explains the waiver was granted to Northwestern Technical College (NTC) for the period July 1, 2006 through June 30, 2011 which merged with Coosa Valley Technical College on July 1, 2009 to form GNTC.

Alternatively, GNTC argues even if the waiver granted to NTC was not valid for GNTC, the liabilities associated with the 2010-2011 award year are barred by the statute of limitations under 28 U.S.C. §2462, which prohibits proceedings for the enforcement of any civil fine, penalty, or forfeiture more than five years from the date the claim first accrued. In support of this alternative argument, GNTC concludes the “liability attached to Finding 6 certainly qualifies as a penalty or forfeiture as these were institution amounts never expended by GNTC rather than Federal funds mis-expended.”

GNTC also argues it should not be held liable for the 25 percent non-Federal match for award years 2011-2012 and 2012-2013 because the Department would be unjustly enriched. GNTC explains it only disbursed the allowable Federal share to students, noting that the students eligible for FWS funds were only distributed 75 percent of what they should have received; therefore, no additional Federal funds were used to pay the students.

Lastly, GNTC argues it was always eligible for the waiver of the 25 percent non-Federal share requirement and therefore no liability for the award years in question should be imposed. GNTC argues the waiver granted to NTC through 2011 is evidence of eligibility for waiver prior to the 2009 merger with Coosa Valley Technical College and the granting of a waiver to GNTC for award years 2014-2015, 2015-2016, and 2016-2017 is evidence the criteria were met after the merger despite its failure to submit a waiver request for the years in question. GNTC argues there is no actual loss to the Department and, thus, would be unjustly enriched if this liability is imposed, even though the students received the benefit of only 75 percent of the FWS funds for which they were eligible.

In response to GNTC’s argument regarding the waiver granted to NTC prior to the merger that formed GNTC, the Department notes and provides evidence establishing, upon the merger, the new entity no longer used the OPE ID associated with NTC and instead continued to use the

OPE ID associated with Coosa Valley Technical College. The OPE ID is the identification number used by the U.S. Department of Education's Office of Postsecondary Education (OPE) to identify schools that have Program Participation Agreements (PPA) and its students are eligible to participate in Title IV Federal Student Assistance programs (<https://ope.ed.gov/accreditation/Glossary.aspx>). The Department, by affidavit of Pat C. Stephenson, explains the procedures for obtaining a waiver of the non-Federal share for FWS and the history of the OPE ID used by NTC, Coosa Valley Technical College, and GNTC. Presumably the PPA with NTC ceased to exist when NTC merged into the new entity and GNTC assumed the OPE ID for Coosa Valley Technical College. GNTC did not challenge this argument in its reply brief.

The Department argues the precedent cited by GNTC in support of the alternative argument that the liability for Finding 6 is a penalty or forfeiture and, therefore, barred by the statute of limitations is inapplicable here. The Department contends the statute of limitations under 28 U.S.C. §2462 expressly applies to civil fines, penalties, or forfeitures and not liabilities like those attributed to Finding 6. The Department correctly argues the liabilities attributed to this Finding arise out of the regulations at Title 34, Part 668, Subpart H which is distinct from the fines imposed under Subpart G of those regulations. GNTC's conclusion that the liabilities assessed under Finding 6 qualify as a penalty is unsupported and, therefore, rejected.

The Department rejects GNTC's argument that the Department will be unjustly enriched with the assessment of the liability in Finding 6. The Department notes GNTC's claim that it disbursed only 75 percent of FWS funds to the eligible students and concludes such a claim is an acknowledgment by GNTC that it failed to pay the appropriate amount to students. The Department argues under these circumstances, the liability assessed is necessary to meet the 75/25 percent split mandated under the regulations and is based on the dollar amounts actually paid to eligible student participants in FWS. The Department argues such an adjustment is necessary to correct GNTC's attempt to hold the Department responsible for 100 percent of the FWS funds disbursed to students. The logic and rationale offered by the Department is consistent with the applicable regulations. The argument by GNTC that it was not required to meet the 25 percent match because it shortchanged the students who were eligible to receive FWS funds is rejected.

The Department also rejects GNTC's argument that it met the eligibility requirements for the waiver of the 25 percent non-Federal share. The Department correctly argues that an institution is not eligible for the waiver if the institution does not apply for such a waiver. GNTC provides no evidence that it applied for a waiver in the years in question and the arguments presented by GNTC acknowledge this lack of application for a waiver. Therefore upon review of the evidence and arguments submitted, this liability is affirmed.

Cooperative Audit Resolution

GNTC argues that the Department is mandated to engage in cooperative audit resolution mechanisms to improve Federal program outcomes (2 C.F.R. §200.513(c)(3)(iii)). Specifically, GNTC argues the mandated use of such a mechanism will strengthen the partnership between Federal agencies and non-Federal entities, focus on current conditions and corrective actions, and

allow Federal agencies to offer appropriate relief for past noncompliance when audits show prompt corrective action has occurred (2 C.F.R. §200.25). GNTC argues application of cooperative audit resolution mechanisms is applicable to program reviews because of the similarity between audits and program reviews. In support of this argument, GNTC submits an email communication dated July 5, 2016, between an employee of FSA and an employee of GNTC's legal representative. GNTC specifically requests that this Tribunal require the Department to enter into cooperative resolution process to facilitate a more equitable outcome than the outcome as indicated in the FPRD.

The Department challenges this request and asserts the Federal regulations at Title 2 are not applicable here. The Department maintains GNTC is bound to use the administrative process in place under Title IV, specifically Part 668, Subpart H by virtue of having entered in a program participation agreement with the Department. In response to GNTC's suggestion the Department should offer "appropriate relief for past noncompliance" when there was prompt correction action, the Department contends such "appropriate relief" in the form of corrective action is only available under Subpart H when there is an administrative, accounting, or recordkeeping error that is not part of a pattern of error and other fraud or misconduct is not involved and the correction of the error eliminates the basis for the liability associated with the error (34 C.F.R. § 668.113(d)(1)). Lastly, the Department contends the submitted email should be struck from the record because counsel for the Respondent has violated the District of Columbia Rules of Professional Conduct by contacting an FSA employee and obtaining a communication regarding the Department's use of cooperative audit resolution mechanisms when counsel for GNTC made the contact knowing FSA was represented but, nonetheless, engaged in communication without the prior consent of the Department's representative of record.

GNTC's argument regarding the applicability of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards is unpersuasive and the request that this Tribunal require the Department to enter into cooperative resolution process to facilitate a more equitable outcome than the outcome as indicated in the FPRD is not supportable by the applicable regulations. While GNTC argued the provisions of Title 2 of the Code of Federal Regulations are mandated upon Federal agencies, GNTC fails to recognize an audit in accordance with Title 2 must be in lieu of any financial audit of Federal awards which a non-Federal entity is required to undergo under any other Federal statute or regulation (2 CFR §200.503(a)). Furthermore, if a financial audit is required by another statute or regulation and that audit provides the Federal agency with the information it requires to carry out its responsibilities under Federal statute or regulation, a Federal agency must rely upon and use that information (*Id.*). Here the applicable regulation is the Appeal Procedures for Audit Determinations and Program Review Determinations found at 34 C.F.R. §668.111 *et seq.* GNTC's request that the applicable regulation be ignored in favor of the more general provisions of Title 2 of the Code of Federal Regulations is not supported. Furthermore, the process under Title 34 of the Code of Federal Regulations, including onsite audit, Program Review Report, Final Program Review Report, and appeal procedure has provided an opportunity to GNTC to continually communicate and collaborate with FSA - by providing additional information, record review, and argument toward resolution of the enumerated Findings. Clearly the entire process under Title 34 of the Code of Federal Regulations parallels the mandates to be achieved by the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal

Awards found in Title 2 of the Code of Federal Regulations.

The request by GNTC that this Tribunal require the Department to enter into cooperative resolution process is denied. The regulations provide this Tribunal with the authority to regulate the course of the proceeding and to take necessary steps to conduct fair and impartial proceedings (34 C.F.R. § 668.117(a)). As the hearing official, I am bound by all applicable statutes and regulations and may not waive applicable statutes and regulations (34 C.F.R. §668.117(d)). My decision is limited to explaining whether the FPRD was supportable in whole or in part (34 C.F.R. §668.118(b)). The request by GNTC exceeds this Tribunal's regulatory authority.

I have carefully considered the Department's request that GNTC's Exhibit R-13 be struck from the record. This request is denied. The applicable regulation provides that evidence that is admissible, timely, and relevant and material will be accepted into the record (34 C.F.R. § 668.116(f)). This same regulation identifies with specificity evidence that is deemed irrelevant and immaterial (*Id.*). The Department's request does not rise to the level of irrelevant and immaterial. Generally, the rules of evidence are not applicable to administrative proceedings and as such, material and relevant evidence submitted should be considered and accorded the appropriate weight. In this particular instance given the denial of GNTC's request, limited weight, as appropriate, has been given to this exhibit.

V. Findings of Fact

1. Georgia Northwestern Technical College (GNTC) is a post-secondary education institution offering associate degrees and is accredited by Southern Association of Colleges and Schools Commission on Colleges.
2. An onsite program review was conducted by the Department's School Participation Division – Atlanta from August 19 to 23, 2013.
3. A Program Review Report with twenty nine findings, dated May 8, 2014, covered GNTC's administration of programs authorized by Title IV for the 2011-2012 and 2012-2013 award years.
4. GNTC submitted a Program Review Report Response with attachments, supporting documents, and file reviews that were considered by FSA prior to issuance of the FPRD on March 18, 2016.
5. The FPRD included six findings as related to GNTC's compliance with the statutes and regulations as they pertain to the institution's administration of the Title IV, HEA programs. Five of those findings assessed liabilities in the amount of \$2,143,271.00 (Finding 1: \$1,545,014.72; Finding 2: \$430,111.75; Finding 3: \$17,038.13; Finding 4: \$20,177.46, and Finding 6: \$130,929.75).⁸
6. GNTC timely filed an appeal with the Administrative Actions and Appeals Service

⁸ See, Footnote 1.

Group (AAASG) appealing Findings 1, 2, 3, 4, and 6.

7. The parties continued to communicate and collaborate during the pending of this proceeding, eventually stipulating to reduce the liability associated with Finding 1 from \$1,545,014 to \$1,269,568, a reduction of \$275,446.
8. With the filing of GNTC's initial brief, GNTC provided additional documents showing two additional students in the projection sample for Finding 1 were making satisfactory academic progress. Upon review of this documentation, FSA acknowledged that the liabilities for Finding 1 should be reduced by \$87,176 to \$1,182,392.
9. The PRR revealed verification violations for four students in the statistical sample, including Student 7, Student 11, Student 21, and Student 29. The verification error as related to Student 21 and 29 arose from the absence of parental tax returns from GNTC's records for Student 21 and 29. GNTC's response to the PRR did not dispute Finding 2 as related to Students 11 and 29. Upon review of GNTC's response to the PRR, the FPRD found verification by GNTC was correctly performed for Student 7. Upon review of the parental tax returns for Student 21, found in GNTC's records after the issuance of the PRR but prior to the submission of GNTC's response to the PRR, a verification error remained for Student 21.
10. GNTC's verification error rate in the program review sample as related to Finding 2 was 13 percent, supporting the requirement that GNTC conduct a file review for the remainder of the statistical sample for the 2012-2013 award year and the liability for Finding 2 is properly assessed at \$430,111.75.
11. GNTC incorrectly identified the withdrawal date for students when a student withdrawal date was prior to October 25, 2011 and, consequently, GNTC was required to perform a 100 percent file review due to an error rate of 20 percent. Based on that file review a total liability, including cost of funds, is established at \$17,034.13 and there is no evidence of flawed methodology or miscalculation of interest.
12. At the time of the onsite program review, GNTC did not have an official grading policy that identified students who completed a course but failed to achieve the course objectives and students who did not complete the course due to official or unofficial withdrawal and did not have a financial aid policy to review students who received final grades of fail or withdrawal in all registered courses. A 100 percent file review of students who received all fails or withdrawals in a term during AYs 2011-2012 and 2012-2013 revealed a total liability of \$20,177.46 due to incorrect or unmade R2T4 calculations and there was no evidence of flawed methodology, miscalculated interest, or overestimated calculations by the Department.
13. GNTC was formed by the merger of Northwestern Technical College and Coosa Valley Technical College on July 1, 2009. Upon the merger, GNTC continued the use of the OPE ID number and PPA associated with Coosa Valley Technical College.

14. GNTC dispersed FWS funds to students without any non-Federal match for award years 2011-2012 and 2012-2013.
15. Coosa Valley Technical College, prior to the merger did not have a waiver for the required twenty-five percent non-Federal match and GNTC did not apply for a waiver until award year 2014-2015.
16. The liability associated with Finding 6, \$130,929.75, is the dollar amount that is equivalent to twenty-five percent of the FWS funds dispersed by GNTC to eligible students and is not a penalty or fine.
17. Cooperative audit resolution mechanisms under Title 2 of the Code of Federal Regulations are audit mechanisms that are intended to strengthen the partnership between Federal agencies and non-Federal entities. These provisions provide for audit procedures in lieu of audits that are required by other Federal statute or regulation and do not require Federal agencies to abandon program specific audit procedures required by another statute or regulation under which a Federal agency relies upon to administer specific programs, grants, or other discernments of Federal funds.

VI. Conclusion and Order

On the basis of the foregoing findings of fact and conclusions of law, it is **HEREBY ORDERED** that Georgia Northwestern Technical College pay to the U.S. Department of Education, in a manner as required by law, the sum of \$1,780,649.00, as established in this appeal of the Final Program Review Determination dated March 16, 2016.



Angela J. Miranda
Administrative Law Judge

Dated: ___February 2, 2017_____

SERVICE

A copy of the attached document was served upon the following in the manner indicated:

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U.S. Department of Education
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Washington, DC 20202


Angela J. Miranda
Administrative Law Judge

Dated: ____ February 2, 2017 ____