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

In the Matter of	**Docket No. 17-54-SP**
HIWASSEE COLLEGE,	Federal Student Aid Proceeding
Respondent.	PRCN: 2013-1-07-28136

Appearances: Christopher J. Bayh, Esq., and Lauren V. Nottoli, Esq., BARNES & THORNBURG LLP, Washington, D.C., for Hiwassee College.

Oluwaseun O. Ajayi, 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

Hiwassee College (Hiwassee) is a Private, Nonprofit Institute of Higher Education located in Madisonville, Tennessee, authorized to provide up to a Bachelor Degree in various postsecondary programs. It is accredited by the Transnational Association of Christian Colleges and Schools, and is eligible to participate in the various federal student financial assistance programs that are authorized under the provisions of 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 federal implementing regulatory provisions applicable to the Title IV program are found in 34 C.F.R. Parts 600 thru 676. Within the U.S. Department of Education (ED), the Office of Federal Student Aid (FSA) is the organization that is responsible for administering these federal education programs.

PRELIMINARY MATTERS

During the period from December 17, 2012 to December 21, 2012, a team of program reviewers from FSA's Kansas City School Participating Division conducted an on-site program review at Hiwassee. As is typical, the focus of such FSA review was the examination of policies and procedures regarding institutional and individual student eligibility. The team reviewed a

randomly selected sample of 30 student files from each of the 2011-2012 and 2012-2013 award years. The review included examination of individual student financial aid and academic records, as well as, school attendance and fiscal records. On April 4, 2013, a Program Review Report (PRR) containing 34 findings of regulatory non-compliance was issued. After considering various inputs submitted by Hiwassee, FSA issued a Final Program Review Determination (FPRD) on July 28, 2017, wherein a number of the findings in the PRR were dismissed as resolved, and eight findings were affirmed. As a consequence, FSA demanded the return of $410,014.32 for the affirmed violations. By letter, dated September 11, 2017, the President of Hiwassee appealed and requested a hearing to challenge the findings contained in the FPRD. In such appeal, the major argument raised by the President was that Kiwassee had received the FPRD an unreasonable 842 days late, this delay resulting in a number of burdens on Kiwassee. The President requested, as a consequence, that all liabilities resulting from the FPRD be waived. FSA forwarded the appeal to the Office of Hearings and Appeals on October 2, 2017, and I was assigned to preside in this matter.

In order to participate in the various Title IV Student Financial Assistance Programs, an institution must, under the provisions of 34 C.F.R. § 6648.14, enter into a participation agreement with the Secretary under which it agrees to comply with all regulatory provisions applicable to Title IV. Further, it agrees to act as a fiduciary in its actions involving Title IV funds. As a consequence, pursuant to 34 C.F.R. § 668.116(d), in this proceeding, Hiwassee has the burden of proving that its expenditures were proper and that it has complied with all program requirements of Title IV of the Higher Education Act of 1965, as amended. Accordingly, on October 5, 2017, pursuant to the applicable appeal procedures set out in 34 C.F.R Part 668, Subpart H, I issued an Order Governing Procedures (OGP) directing the parties to follow the briefing schedule I set forth and encouraging the parties to engage in a good faith effort to exhaust all possibilities of settlement while complying with my scheduling order. Hiwassee's brief and evidentiary matters were due on November 8, 2017; however, on October 30, 2017, I granted Hiwassee's requested concurred-in 90 day stay to pursue settlement negotiations with FSA. At the request of the parties, on February 5, 2018, and March 13, 2018, I extended such stay for an additional thirty days. On April 9, 2018, the parties informed me that they were unable to settle the differences between them. Subsequently, and upon my Order, the following pleadings were submitted: Hiwassee filed its brief on August 27, 2018; after three approved extensions, FSA submitted its brief on August 39, 2018; Hiwassee submitted an authorized reply brief on September 14, 2018; and, FSA submitted a sur-reply brief on October 1, 2018.

There were eight unresolved findings of the FPRD. They include: Return to Title IV errors; Over awards of Title IV aid; Incorrect verification; Overpayment of Pell Grants; Errors in monitoring of satisfactory academic progress, Failure to document Plus loan denials; Use of incorrect grade level on Federal Direct Loans; and Improper documentation of dependency overrides. As I indicated above, Hiwassee has the burden of proof in this type of proceeding and as a condition of assigning that burden to Hiwassee as the Respondent, it must be established that Hiwassee was given adequate notice of the allegations against it. I find that the PPR and the FPRD provided such notice. Further, I note that other than some general arguments over the timeliness of this appellate process as well as complaints over a tangential process taken by FSA,

Hiwassee, as the Respondent, only specifically contests portions of four of the eight findings of the FPRD, before me. I will address the general timeliness questions first, after which, I will address those specific findings.

Essentially, Hiwassee's complaint regarding the timeliness of FSA's actions against it involves first a separate issue of it being placed on the Heightened Cash Monitoring 2 ((HCM2) status shortly after the program review, and being retained on that status for an extended period of approximately five years. The significance of such action is that rather than the normal practice of being forward funded for federal student financial aid disbursed to eligible students, under HCM2, the school is only reimbursed for the student aid it has already provided. More specifically, Hiwassee complains that it was maintained on such status by the Kansas City FSA regional office until it took an extraordinary step of having its President visit Washington, D.C. to complain to higher-up authority within FSA. Upon doing so, Hiwassee's status was almost immediately returned to the normal method of forward funding rather than the reimbursement system applicable to HCM2. Because of that delay, Hiwassee alleged it suffered significant financial losses. Upon my review of the facts and the timing of each of the events, it appears that FSA's explanation for the delays in that process to be not convincing. Having said that, I must point out my jurisdiction in this proceeding is limited – I can only make a determination as to findings with monetary demands in the FPRD and have no jurisdiction to review FSA's actions relative to the HCM2 placement and continuation.

Separately, I note that Hiwassee's complaint that the FPRD was received 842 days later than the period that is delineated in FSA's Program Review Guide as a stated goal, is also not properly before me. Although not directly claimed as such by Hiwassee, there is no Statute of Limitations defense applicable to Audit/Program Review actions under Subpart H, as there is in Subpart G, Fine actions. *See, In re Lincoln University,* Docket No. 13-68-SF, U.S. Dep't of Educ. (9/13/2016). Further, although not similarly raised as such, the equitable defense of Laches is an extraordinary remedy that has been determined not to be available in such Audit/Program Review actions, as well. *See, In re Community College System of New Hampshire,* Docket No. 09-35-SA, U.S. Dep't of Educ. (June 21, 2010). Finally, in a separate supplemental pleading filed before me, Hiwassee complained that it had filed a request for information involving Hiwassee and FSA under the Freedom of Information Act (FOIA). Hiwassee claims that since ED's action on its request was not properly handled, it has separately filed an appeal of that action. Unfortunately, like the other tangential actions that have been raised before me, this FOIA appeal issue is not within my area of jurisdiction. Consequently, I will only discuss the merits relative to the four findings that Hiwassee has presented evidence and argument and whether such presentation is sufficient to satisfy its assigned burden of proof in this proceeding.

DISCUSSION

As a starting point, I note that included as an increment of FSA's demand in the FPRD, is the sum of $11,957.00 for the four findings that are part of this proceeding, but that Hiwassee has not affirmatively defend against. On that basis, I FIND that Hiwassee failed to meet its mandated

burdens of proof and persuasion as to these four findings, Findings 2, 4, 10 and 11, and they are AFFIRMED in the total amount of $11,957.00.

The first finding of the FPRD that Hiwassee affirmatively has defended against is Finding Number 1 – Return to Title IV Calculation Errors. In the FPRD, FSA found that Hiwassee failed to comply with the requirements of 34 C.F.R § 668.22 by improperly performing such calculations and, consequently assessed a liability of $39,703.94. The errors included situations where Title IV funds were not timely returned; or if not returned, the calculations of returns were erroneous. In its defense to this finding, Hiwassee agrees with FSA's premise, i.e., if a return was properly calculated, but done so late, interest only for the time lag would be assessed, however, if the return was not made or the portion of the return was not sufficient, the insufficient amounts plus interest must be returned. Hiwassee argues that the following portions of returns should not be determined to be erroneous: Student 51 is over-penalized because it is $119.50 more that the correct return of $2,119.50; Student 53 is over-penalized $760.35 because there is no corresponding deficiency alleged in the FPRD; Student 55 is over-penalized $322.02 because Hiwassee had already paid that amount; and Student 56 is over-penalized $1,902.38 because that figure had already been paid back. Further, a group of four students, 31, 30, 32, and 37; are over-penalized, $1,430.00, $871.00, $1,481.37 and $400.00., respectively, because the record provides no support for those demands.

In its responsive submissions, FSA agrees with Hiwassee that only interest of $6.25 should be returned in each case of Students 51, 53, and 55. Further, it concurs with Hiwassee that in the case of student 51, the additional $119.50 is not collectible and concurs that for student 31, liability is only $707.00 rather than $1,430.00. However, FSA rejects the argument that the fact that students 30, 32 and 37 were misidentified in the PRR prevents a liability finding arguing that they were correctly identified in the FPRD. I find that this notification in the FPRD constituted the requisite notice to support liability. Based on my review of the state of the evidence relative to Finding 1, I find that the erroneous amounts cited above must be removed from consideration. This includes $1,195.62 ($1,201.87 less $6.25) for Students 51, 53 and 55; $1,902.38 for Student 56. As a result of such action, FSA's demand for Finding 1 is reduced from $39,703.94 to $36,599.69, and, is hereby AFFIRMED.

The next contested finding is Finding 3, titled Verification Incomplete/Incorrect. The FPRD determined that the errors resulted in a demand for the return of $257,712.21. However, as part of FSA's brief in this matter, that figure was reduced to $212,654.74. In particular, FSA alleges that Hiwassee's verification was deficient in three distinct categories: failure to assure that its procured documents matched the information on the ISIR; failure to obtain any documentation; and 13 instances where Hiwassee accepted tax documents rather than the required tax transcript. In its response, Hiwassee requests that all the liabilities contained in this finding be set aside and asserts four defenses. First, the FPRD alleges broad categories of violation and provides a list of 130 entries for students. However, it claims that nowhere in the FPRD can Hiwassee determine which violation each student is included and, therefore, it has no way to evaluate whether the allegation is possibly correct. Also, Hiwassee raises the issue of ex-post facto application of rules regarding "Information to Be Verified." Specifically, it claims that

FSA applied a new regulatory requirement, applicable to the 2012-2013 award year and beyond and applied it to roughly half the students in issue in this finding that came from earlier award years. Finally, Hiwassee argues that the sanctions imposed are excessive, noting "Nothing in this Finding suggests any noncompliance severe enough to harm FSA or the students. To the contrary, the FPRD made clear that it sought to assess 100 percent liability for alleged deficiencies as insignificant as an alleged oversight in parents' signing of a tax form."

The stated purpose of the audit and program review findings is to recapture improperly distributed Title IV funds. In that vein, FSA looks to the recipient of Title IV funds as a fiduciary, required to safeguard federal education funds and does not seek to enforce punishment. The errors complained of are specifically enumerated, and meant to recover for losses it reasonable sustained by virtue of the errors committed by the Respondent. It is for that reason that the burdens of proof are assigned to the Respondent. Given the assigned burden of proof coupled with the extended time that this dispute has been continuing, there has been clearly a sufficient time to defend against FSA's claim. In the same vein, during the extended period alluded to above, FSA's claim has identified which violation attached to which student, so as to thereby provide adequate notice required in our Title IV administrative enforcement process. Finally, the Respondent's claim that FSA has violated the precepts of Ex post facto application of laws and regulations in its rendering of the FPRD, I find that such allegation has been adequately rebutted by FSA during the briefing process. FSA reviewers determined that during award year 2011-2012, Hiwassee utilized thirteen students' tax returns rather that the tax transcript to verify their information, however, in each case, their inquiry determined that the figures corresponded with the respective ISIR and those particular findings were removed from its demand. Consistent with the above discussion, Finding 3 is AFFIRMED in the amount of $212,654.74.

Finding 6 involves FSA's allegation that Hiwassee's failed to comply with the 34 C.F.R. § 668.34 Satisfactory Academic Progress regulations. In particular there were: violations of the 150% program length rule; inadequate monitoring and enforcing of qualitative and/or quantitative standards; and failure of individual students' academic progress, as required. Seventeen students were included in this finding, three from the original sample and fourteen from Hiwassee's file reconstructions. Before me, FSA demanded the return of $123,082.71 for this finding. As an overarching argument, Hiwassee points out that FSA demands the return of all the Title IV aid that students 30 and 34 received and not merely for the courses they had allegedly taken outside the 150 percent rule. However, it is clear, that in accordance with the provisions of 34 C.F.R § 668.34 (a) (7), a student only becomes ineligible to receive further Title IV aid upon failure to achieve SAP, not retroactively. My review of the record fails to indicate any attempt by FSA to collect Title IV aid distributed prior to the failure of SAP. In addition, contra to its actions, Hiwassee cannot retroactively change a student's SAP by using a successful later grade to bolster a previous record in so far as SAP is concerned. Hiwassee also contends that FSA's claim relative to the fourteen students identified by FSA in the FPRD should not be considered because they were not noticed in the PPR and, therefore, they were not provided required notice of the claim. As indicated above, I find that notice provided in the FPRD is adequate to place the burdens of proof and persuasion squarely on Hiwassee.

Otherwise, in effect, Hiwassee only specifically presents argument in the case of Finding 6 relative to Students 30, 34, 12, 17, and 28. As to students 12, 30 and 34, the record indicates that in each case, Hiwassee upgraded the students' records to change them from non-compliant to compliant and, thereby, erroneously claim compliance with SAP. In the case of Student 17, the evidence indicates that the student completed 31 out of 64 attempted and had a cumulative 1.80 GPA, both clearly failing to maintain SAP. In the case of Student 28, as a transfer student, the previous school record, when analyzed, caused the loss of eligibility. Consistent with the above discussion, Finding 6 is AFFIRMED in the amount of $123,082.71

In Finding 12, FSA alleges improper documented dependency override for two students. FSA argued that Hiwassee failed to adequately document its decision finding unusual circumstances to justify such override and grant $5,768.00 in Title IV aid. Hiwassee argues that in one case the student was abandoned by parents, while in the other, the student lived with a grandparent who provided all of the student's support. Hiwassee points out that FSA's regulatory guidance on this subject gives a school's Financial Aid Administrator great latitude in making such judgment. Since parental abandonment is a classic instance for support for a dependency override, I find the respective sworn statements of one student's father and the second student's grandmother to be sufficient, under the stated circumstances, to support the dependency override in each of those cited cases. As a result, no liability for this finding will be approved.

FINDINGS

To recapitulate my findings in this proceeding: Findings 2, 4, 10 and 11 are APPROVED in the amount of $11,957.00; Finding 1 is APPROVED in the amount of $36,599.69; Finding 3 is APPROVED in the amount of $212,654.74; Finding 6 is APPROVED in the amount of $123,082.71, and Finding 12 is not approved.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Hiwassee College return to the United States Department of Education the sum of $344,289.14, for the approved findings of its actionable failures to comply with Title IV requirements.

Ernest C. Canellos
Judge

Dated: December 31, 2018

SERVICE

A copy of the attached document was sent by U.S. certified mail to the following:

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