(25)
05-49-SA

In the Matter of

GIBSON BARBER & BEAUTY COLLEGE,

Docket No. 05-49-SA
Federal Student Aid Proceeding

Respondent.

DECISION OF THE SECRETARY

This matter comes before me on appeal by Respondent of an Initial Decision issued by Administrative Judge Richard F. O'Hair on November 23, 2005. Respondent requests I modify or set aside the Initial Decision as a matter of fairness.

Pursuant to section 102(b) of the Higher Education Act of 1965, as amended (HEA), to be eligible to participate in Federal student financial assistance programs, a proprietary institution may derive no more than 90 percent of its revenue from Title IV, HEA programs.[1] In 2005, the office of Federal Student Aid (FSA) reviewed Respondent's compliance with the requirements of Title IV, HEA programs for the audit year 2002. As a result, FSA issued a Final Audit Determination (FAD) in which FSA sought the return of $186,958 in Federal funds from Respondent because the institution violated the 90/10 rule by deriving 92 percent of its revenue from Title IV, HEA sources for the compliance audit period January 1, 2002 through December 31, 2002. Respondent challenged the finding of the FAD before Judge O'Hair.

Judge O'Hair noted Respondent's arguments that in fiscal years both before and after 2002 Respondent satisfied the 90/10 rule, and that for compliance year 2002, the institution's owner, Evelyn Gibson, ostensibly donated $3,850 to the institution to increase the institution's revenues in 2002 sufficiently to bring the institution into compliance with the 90/10 rule.[2] But,

[1] Pub. L. No. 105-244, § 102(b), Title IV, § 493(a), Oct. 7, 1998, 112 Stat. 1622 (to be codified at 20 U.S.C. 1099c). More directly, section 102(b) provides that a proprietary institution must have "at least 10 percent of the school's revenues from sources that are not derived from funds provided under title IV, as determined in accordance with regulations prescribed by the Secretary." Consistent with the HEA, the Department's regulation further provides, pursuant to 34 C.F.R. § 600.5(a)(8), that a proprietary institution must have "no more than 90 percent of its revenue derived from title IV, HEA program funds." The statute and regulation codify what is commonly referred to as the "90/10 rule."

[2] Gibson initially provided the institution a loan, but, subsequently, converted the unpaid balance of the loan to a donation.

according to Judge O'Hair, donations do not constitute revenues; the judge opined that institutions cannot donate their way into compliance with the 90/10 rule. Judge O'Hair also found non-availing Respondent's argument that if it is required to repay $186,958, it will be forced to "increase its tuition for [] potential student bod[ies] that cannot afford such an increase and this may ultimately result in the school's closure." Judge O'Hair upheld FSA's finding and concluded that the institution was ineligible to receive $186,958 in Federal funds in 2003 because in compliance year 2002 the institution's revenues from Title IV, HEA funds exceeded 90 percent.[3]

On appeal, Respondent ostensibly reasserts the arguments made before Judge O'Hair. Upon my review, it is plainly evident that although Respondent's donation was intended to have the effect of rendering the institution in compliance with the 90/10 rule, the Department's long-standing policy forecloses donations, from parties such as an institution's owner, from "count[ing] for purposes of the 90/10 calculation."[4] Therefore, I find, as Judge O'Hair concluded, that Respondent does not satisfactorily demonstrate that it had no more than 90 percent of its revenues derived from student financial assistance program funds for compliance year 2002.

Notwithstanding the literal interpretation of the 90/10 rule, the application of the rule to the circumstance of this case ignores the context of the 90/10 rule[5] and produces a result that is not in proportion to the pertinent facts. This conclusion is not intended to adumbrate the legal standard set forth by the 90/10 rule. Instead, I am convinced that requiring Respondent to repay $186,958 because Respondent exceeded the 90/10 calculation by $3,850 is not in accord with Respondent's effort to execute corrective measures to bring the institution within compliance of the 90/10 rule.

More directly, consistent with my authority to accept an institution's corrective measures in the administration of Title IV funds when in my judgment such measures "eliminate[] the basis for the liability" sought by FSA, I find that there are notable circumstances rendering Gibson's donation to the institution as an appropriate corrective measure.[6] In this regard, the notable circumstances include three extraordinary factors: (1) the conspicuously small amount of money constituting the amount by which Respondent exceeded the 90 percent threshold of

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[3] If an institution's Title IV revenues are greater than 90 percent, the school automatically becomes ineligible to participate in Title IV programs for the following year. 34 C.F.R. § 600.5(f) and (g).

[4] 64 Fed. Reg. 58,608, 58,610 (Oct. 29, 1999) (under particular circumstances not applicable here, revenue earned on a donation may count in a 90/10 calculation).

[5] The 90/10 rule serves as a proxy for a proprietary institution's quality. *See* 59 Fed. Reg. 2863 (Feb. 10, 1994) (noting that the general purpose of the rule is to ensure that proprietary institutions attract students who will pay for their programs with funds other than Federal student financial assistance funds because of the quality of the program).

[6] *See, e.g.*, 34 C.F.R. § 668.113(d) (where there is no evidence of fraud or allegation of a pattern of errors, I am authorized to permit the institution to correct or cure the error in a manner that eliminates the basis of liability). Notably, I do not hold as a general matter that violations of the 90/10 rule are to be considered administrative errors or that such violations are always subject to the extraordinary remedial exceptions of section 668.113(d). Rather, this decision stands for the limited proposition that under circumstances that I deem applicable, I may exercise my authority to accept a corrective action of an isolated regulatory violation that eliminates the basis of liability and where the record reveals that there is no evidence of fraud and no allegation of a pattern of errors by the institution.

revenues derived from Title IV for the 2002 compliance year,[7] (2) the absence of evidence or allegation by FSA that Respondent engaged in fraud or had otherwise engaged in a history or pattern of similar regulatory violations in 2002 or any recent compliance year, and (3) the absence of *any* allegation of regulatory violation aside from the failure to meet the 90/10 rule. Therefore, I accept Respondent's corrective measures and find that such measures eliminate the basis for liability in this proceeding.

ORDER

ACCORDINGLY, the Initial Decision issued by Administrative Judge Richard F. O'Hair on November 23, 2005 is REVERSED and Respondent is RELIEVED of its obligation to pay the U.S. Department of Education the sum of $186,958.

So ordered this 25th day of November 2009.

Arne Duncan

Washington, D.C.

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[7] FSA argues that in fiscal year 2002, Respondent exceeded the 90 percent standard by $3,850, yet the Department should be entitled to recover $186,958.