



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

EDNET CAREER INSTITUTE,

**Docket No. 07-41-SP
Federal Student Aid Proceeding**

Respondent.

DECISION OF THE SECRETARY

This matter comes before the Secretary on appeal by Respondent, EdNet Career Institute, regarding an Initial Decision issued by Administrative Judge Richard F. O’Hair on August 31, 2009. Respondent requests that I reverse or vacate the Initial Decision and remand this case for further proceedings. The Initial Decision requires Respondent to pay the Department: “\$321,751, plus interest, in Pell Grant funds, and \$63,450 for the estimated actual loss owed to ED for the interest on ineligible subsidized Federal Family Education Loans [as well as] pay \$26,812.73, plus interest, owed to FFEL accounts of individual student borrowers.”¹ Notwithstanding the voluminous record before Judge O’Hair, Respondent argues in favor of a remand with additional administrative proceedings, including being provided an opportunity to submit a new compliance audit, because the judge “unfairly” rejected Respondent’s evidence. More directly, Respondent requests that, on remand, I instruct the judge to reconsider his rulings on each finding requiring him to make a fact-finding “on each student-case.” For the reasons set forth below, I deny Respondent’s requests and find that Respondent must return \$385,201 to the Department and \$26,812.73 to student FFEL accounts for its failure to fully account for disbursement of Title IV funds during the 2001-2002 and 2002-2003 award years.

FSA issued a Final Program Review Determination (FPRD) containing nine findings, four of which are at issue on appeal, including Finding 2 – Respondent’s failure to properly verify files selected for verification; Finding 3 – Respondent’s failure to exercise professional judgment with adequate or consistent documentation; Finding 4 – Respondent’s failure to ensure that student files contained adequate documentation to resolve inconsistent and discrepant

¹ In footnote 5 of his opinion, Judge O’Hair notes that his liability calculations were based on computations he adopted from FSA’s September 24, 2008 brief.

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information; and Finding 10 – Respondent’s failure to ensure that satisfactory academic progress standards were adequately monitored and applied.

Prior to issuance of the FPRD, FSA issued a program review report which covered the 2001-2002 and 2002-2003 award years. The report identified deficiencies in Respondent’s administration of Title IV funds, and required Respondent to conduct a complete review of its compliance with Title IV during the 2001-2002 and 2002-2003 award years. Respondent also was required to obtain the services of an independent auditor and to submit an auditor’s attestation as to the accuracy and completeness of Respondent’s review of its student files regarding the findings in the program review report. Apparently, FSA intended to use the auditor’s attestation as a basis for assessing whether Respondent’s compliance review was credible. Months after the attestation was requested, FSA concluded that it had not received the auditor’s report and attestation; therefore, FSA completed its work on the program review report and issued the FPRD establishing liabilities owed by Respondent.

The parties agree that at least one copy of the auditor’s attestation and work papers was received by FSA, but the timing of receipt is disputed.² Even so, FSA reviewed the auditor’s attestation and argued to Judge O’Hair that the attestation is not credible. FSA’s position is based on three grounds: that the auditor’s sampling methodology reflects “unknown criteria,” that the attestation does not comply with Department guidelines and FSA instructions, and that the auditor’s conclusions frequently are contrary to FSA’s examination of Respondent’s student files. In light of these reasons, FSA argued to Judge O’Hair that the auditor’s attestation cannot serve to meet Respondent’s burden of proof or otherwise account for Respondent’s disbursement of Title IV funds. Judge O’Hair agreed.

Taking FSA’s position a step further, Judge O’Hair reached three conclusions based on Respondent’s “failure to provide a timely, comprehensive auditor’s attestation: that Respondent’s untimely filing (1) significantly delayed the publishing of the FPRD, (2) enhanced the validity of the FPRD, and (3) diminished the probative value of the auditor’s attestation.” In light of those findings, Judge O’Hair ruled that Respondent’s “request that the attestation serve as the dominant source of authority in this proceeding is denied.” In its appeal, Respondent challenges this ruling. This challenge leaves a threshold question at issue on appeal; namely, whether the auditor’s attestation is entitled to the customary deference accorded to an independent audit by the Department.

Respondent argues that Judge O’Hair erroneously disregarded the auditor’s attestation. According to Respondent, by disregarding the auditor’s attestation and failing to make findings of liability for each student identified in the FPRD, the judge ostensibly imposed a punitive sanction against Respondent by requiring repayment of all Federal funds disbursed during the 2001-2002 and 2002-2003 award years rather than requiring only repayment of improperly

² The auditor contends that he sent the attestation to FSA in February 2004 and submitted his work papers to FSA in June 2004. Resp. Ex. RR-6. Judge O’Hair concluded that FSA received the auditor’s attestation on July 30, 2007. The evidence in the record shows that on August 1, 2007, FSA received a copy of the auditor’s attestation and work papers, which also includes a cover letter from the auditor indicating that he submitted the original attestation to the Department in February 2004.

disbursed funds. In Respondent's view, a punitive sanction should be rejected because it runs counter to the purpose of a subpart H proceeding, which should result in an institution being required to repay only Title IV funds spent contrary to Title IV program requirements. Moreover, Respondent argues that if the auditor's attestation is given the customary due regard, Respondent's liability to the Department would be substantially reduced from the amount upheld by Judge O'Hair.

In response, FSA argues that the auditor's attestation did not attest to the completeness of Respondent's review of its disbursements during the 2001-2002 and 2002-2003 award years; as a result, according to FSA, the attestation is not entitled to deference on the matter of liability. In FSA's view, "imposing liabilities equal to all funds for which an accounting was not meaningfully provided" is warranted by the Department's case law and by the fact that the auditor's attestation does not provide a reliable statement regarding Respondent's review of its student files. Judge O'Hair agreed.

Judge O'Hair properly noted that to satisfy its burden of proof in this proceeding, an institution must present evidence that not only rebuts the findings in the FPRD, but also accounts for the institution's expenditure of Title IV funds.³ I am persuaded that the record in this case reveals that Respondent's evidence failed in both respects.

As an initial matter, the auditor's three-page attestation does not comport with the requirements of the program review. In FSA's program review, Respondent was directed to complete a full file review for each finding identified in the program review report. In addition, Respondent was required to secure the services of a professional independent auditor, who was directed to "render an audit opinion on the compliance with specific requirements" applicable to each finding. The auditor was also instructed to "identify the process used to complete the audit." The auditor identified his process as "examining, on a test basis, evidence about [Respondent's] compliance with [specified] requirements in the [program review report] and performing such other procedures as we considered necessary under the circumstances." Yet, instead of complying with FSA's instructions, Respondent's auditor submitted an audit report that concluded that except for conflicting information regarding one student file under finding 4, Respondent "complied, in all material respects, with the aforementioned requirements." Although the auditor's opinion presumptively is based on his professional judgment, the reliability of that judgment is undermined by the evidence in the record showing that Respondent did not comply with Title IV program requirements.

Pursuant to Department regulations, auditors are bound by the auditing standards set forth in 34 CFR § 668.27 (Appendix A) which, in addition to embracing generally accepted auditing standards (GAAS), require auditors to be independent and impartial. As set forth in GAAS,⁴ generally accepted auditing standards include the standard of due professional care and

³ See *In re Pan American School*, U.S. Dep't of Educ., Dkt. No. 92-118-SP (Oct. 18, 1994).

⁴ Generally Accepted Auditing Standards ("GAAS") are promulgated in written form by the American Institute of Certified Public Accountants. The Government Accountability Office (formerly the General Accounting Office) promulgates very similar standards, known as Generally Accepted Government Auditing Standards, which apply by executive order to all federal auditors.

independence. These standards require, among other things, that the auditor document a judgment and rationale identifying the circumstances leading the auditor to decline to follow a procedure suggested by FSA or required by Department policy.

Here, the auditor's attestation failed to disclose any such rationale, and, more troublingly, did not disclose why the auditor failed to attest to the completeness of Respondent's review of its disbursements during the 2001-2002 and 2002-2003 award years.⁵ In addition, the attestation failed to include any aspect of the audit work confronting the extensive instances in which Respondent's student files contained conflicting information. An auditor's standard of due professional care under GAAS and 34 CFR § 668.27 embraces the obligation to resolve conflicting information, when confronted with such, by obtaining all pertinent facts and making an impartial judgment as to the evidence. Yet the record reveals that the attestation failed to include these clarifications.

Judge O'Hair concluded, for example, that Respondent's student files for students 6, 22, and 36 contained documents that revealed discrepant or conflicting information regarding various factors including marital status, household size, student income, and missing tax returns. Yet the auditor's attestation made no reference to these conflicts. Moreover, for students "6, 14, 21, 34, 37, [4]9, and 52," Judge O'Hair concluded that Respondent failed to properly verify files selected for verification pursuant to 34 C.F.R. § 668.54(a)(3), and failed to resolve conflicting information in those files; the attestation provided no comment or reference regarding those files.⁶ These findings and others made by Judge O'Hair convince me that the auditor's attestation lacks credibility as to its general accuracy, and, therefore, is not entitled to the customary deference of an independent audit.⁷ Accordingly, I reject Respondent's position that the auditor's attestation is sufficient to meet its burden of proof showing that Title IV funds were disbursed properly.⁸

I am also persuaded that Respondent's submitted student files are similarly insufficient to meet its burden of proof. For Finding 3, for example, FSA alleged that Respondent failed to

⁵ In a June 16, 2008 letter addressed to Respondent, the auditor states that the attestation was based on specified requirements set forth in FSA's February 2003 program review. Respondent's Ex. RR-6. Yet, instead of reviewing Respondent's entire student file review as requested by FSA, the auditor adopted a sampling methodology that resulted in a review of only a few files. Although FSA does not challenge the validity of sampling methodology directly, the evidence in the record clearly undermines its accuracy.

⁶ The student numbers are identified by FSA as part of Finding 2 in the FPRD.

⁷ I note, however, that I do not embrace Judge O'Hair's ruling under Finding 2, that Respondent's "auditor's attestation failed to substantiate that funds were properly disbursed" for "the students in Appendix G" and for students "6, 14, 21, 34, 37, 39, and 52" because the "late submission of an auditor's attestation" failed to assure him that the verification procedures at issue under Finding 2 were "properly applied." I agree with Respondent and FSA that the timing of the submission of the attestation has no bearing on its probative value in this proceeding. Indeed, it is the inadequacy of the auditor's attestation that cuts against its evidentiary worth, not the timing of its submission.

⁸ Notwithstanding the inadequacy of the auditor's attestation, Respondent is not entitled to an opportunity to file an additional audit report on that basis alone. The record in this case is voluminous. Both parties have submitted hundreds of pages of evidence and argument. Moreover, Respondent presents no compelling basis for me to conclude that Judge O'Hair or the hearing procedures he adopted failed to provide Respondent with ample opportunity to account for the disbursement of Title IV funds.

exercise professional judgment supported by adequate or consistent documentation. Judge O'Hair noted that this finding involves nine students -- 7, 36, 38, 42, 45, 46, 47, 51, and 53.⁹ After reviewing the evidence regarding the specifically identified nine students, Judge O'Hair concluded that none of the student files contained credible documentation showing that Respondent exercised professional judgment on a case-by-case basis as a result of special circumstances. Judge O'Hair similarly found Respondent's evidence unconvincing regarding the 46 students listed in the FPRD Appendix. The tribunal concluded that the auditor's attestation finding no errors in Respondent's exercise of professional judgment was not credible because the auditor sampled student files rather than reviewing each of the 46 student files.¹⁰

Judge O'Hair also found that the reported incomes of students 150, 113, 149 and 153, each of whom reported an earned income of \$4,000 in 2000, required Respondent to verify the student's documentation because the reported income was conspicuously low. Section 668.54(a)(3) requires an institution to insist that a student verify information reasonably believed to be inaccurate, if the information is used to calculate a student's estimated contribution to the costs of attending a postsecondary institution (also known as EFC). In this regard, Judge O'Hair concluded that reported annual income of \$4,000 for a student or family living in the United States should result in an institution verifying the accuracy of the student's information. Here, Respondent provided no evidence that it inquired about the reported incomes of students 150, 153, 149, and 113. In each of these instances, Judge O'Hair concluded that Respondent failed to submit relevant and persuasive evidence convincing him that Respondent met its burden of proof. In light of these examples and the fact-finding of Judge O'Hair, I am persuaded that Respondent failed to account for the disbursement of Title IV funds during the 2001-2002 and 2002-2003 award years.

ORDER

ACCORDINGLY, I HEREBY ORDER EdNet Career Institute to repay \$385,201 to the U.S. Department of Education and \$26,812.73 to student FFEL accounts.

So ordered this 12th day of November 2010.



Arne Duncan

Washington, D.C.

⁹ Judge O'Hair notes that the finding also involves "46 cases later identified by EdNet and FSA" listed in the appendix to the FPRD.

¹⁰ This is not to say that sampling methodology is not within the proper bounds of auditing standards -- that matter is not raised in this case. Rather, I find that whatever methodology the auditor adopted, its reliability is undermined by the straightforward evidence in the record showing Respondent's violations of findings 2, 3, 4, and 10.

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