THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

INTERNATIONAL JUNIOR COLLEGE,

Docket No. 07-52-SA
Federal Student Aid Proceeding

Respondent.

DECISION OF THE SECRETARY

This matter comes before the Secretary as a second appeal in the above-captioned proceeding. Administrative Judge Richard F. O'Hair issued a Decision on Remand on June 30, 2010. Respondent appeals the Decision on Remand. Respondent raises two core arguments in this appeal; specifically, Respondent argues: (1) that Judge O'Hair improperly dismissed Respondent's argument that the decision in *Gibson Barber and Beauty College* (*Gibson Barber*)[1] should be applied to the facts of this case, and (2) that Judge O'Hair failed to consider Respondent's argument that Respondent should be granted an offset of liability in the amount of $123,117.61 for amounts owed the institution by the Department and pursuant to its compliance with "teach-out" regulations.

In light of the foregoing arguments by Respondent, which were not raised in Respondent's first appeal, a review of the matters raised in the first appeal is warranted. On September 24, 2008, Judge O'Hair issued an Initial Decision upholding the $1,365,078 liability sought by the office of Federal Student Aid (FSA). Thereafter, Respondent appealed by arguing that the Initial Decision erroneously concluded that Respondent violated the 90/10 rule[2] by

[1] *Gibson Barber and Beauty College,* U.S. Dep't of Educ., Dkt. No. 05-49-SA (Decision of the Secretary Nov. 25, 2009) (This decision was not available to Respondent prior to the first appeal because it was issued on the same date that this case was remanded for further proceedings).

[2]Respondent's liability arises from Respondent's violation of what is commonly referred to as the "90/10 rule." Section 102(b) of the Higher Education Act of 1965, as amended (HEA), 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." 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); see also 34 C.F.R. § 600.5(a)(8) (2009) (Consistent with changes established by Congress's 2008 reauthorization of the HEA, the Department removed all of the 90/10 provisions from 34 C.F.R. § 600.5 and promulgated 34 C.F.R. § 668.28(c) in October 2009, which provides that the 90/10 rule shall be enforced pursuant to an institution's program participation agreement).

deriving more than 90 percent of its revenues in audit year 2005 from Federal student financial aid programs. More directly, Respondent argued that Judge O'Hair "misapplied the law and relied on facts not supported by the record." Opposing that view, FSA argued that Judge O'Hair's decision should be upheld because Respondent did not meet its burden of proof by showing that the 34 students at issue were enrolled in an eligible program; FSA recognized that the "*sole* issue on appeal" was whether "revenue received from students attending a single class could be counted" in the 90/10 calculation.

I reversed Judge O'Hair's ruling that the students at issue were not enrolled in an eligible program because that ruling was not substantiated by fact-finding. I remanded this case and instructed the judge to render a fact-finding on whether each of Respondent's 34 students was enrolled in one of the institution's Title IV-eligible programs. In addition, I advised Judge O'Hair that fact-finding may require review of evidence concerning enrollment agreements, graduation records, and courses completed in accordance with Respondent's program requirements. Therefore, the question before Judge O'Hair on remand was: whether Respondent's 34 students actually were enrolled in an eligible program, notwithstanding that these students attended courses offered one day per week.

On remand, Judge O'Hair issued a decision noting that Respondent's evidence consisted of: "declarations from three persons formerly affiliated with Respondent," "copies of cash receipts which show that payments by a number of cash-paying Saturday-only students occurred on the same dates as payments by some students who were Title IV-eligible," student applications, and "payment ledgers which included the course name and dates of payments." In assessing Respondent's evidence, Judge O'Hair found the declarations unpersuasive, "self-serving," and conclusory,[3] and he found the student applications lacking in probative worth. The judge also found the payment ledgers unconvincing because they did not show when students attended class. In light of his assessment of the evidence in the record, Judge O'Hair concluded that Respondent had introduced "no convincing evidence the Saturday-only students enrolled in any Title IV-eligible programs."

Although the judge's fact-finding fails to assess evidence regarding any of the 34 students directly, Respondent does not straightforwardly challenge Judge O'Hair's fact-finding.[4] Accordingly, I AFFIRM Judge O'Hair's holding that Respondent violated the 90/10 rule by deriving more than 90 percent of its revenues in audit year 2005 from Federal student financial aid programs. This determination should end the matter before me, but Respondent's appeal seeks to reduce or eliminate the amount of liability upheld by Judge O'Hair.

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[3] Judge O'Hair further noted that the declarations "were all in Spanish and…contain[ed] only minimal information, none of which support[ed] a conclusion [that the 34 students] were enrolled in Title IV-eligible programs."

[4] In a footnote of its brief, Respondent indicates that it "is not appealing this part of the hearing official's decision on remand" because it cannot produce "additional or better documentation" than the evidence submitted.

Respondent urges that the decision in *Gibson Barber,* [5] which was issued on November 25, 2009, the date this matter was remanded to Judge O'Hair, provides support for Respondent's position that it should be relieved of any obligation to pay the liability authorized by Judge O'Hair. [6] Assuming without deciding that Respondent has appropriately raised this issue on appeal, I reject Respondent's assertion that my decision in *Gibson Barber* offers any basis for equitable relief benefitting Respondent. [7] The scope of the equitable remedy authorized in *Gibson Barber* does not encompass the facts of this case.

In *Gibson Barber,* I recognized that the institution's effort to execute corrective measures to bring it within compliance of the 90/10 rule warranted consideration pursuant to 34 C.F.R. § 668.113(d). Section 668.113(d) identifies the circumstances of a limited exception to a repayment liability, if the Secretary finds that the institution has corrected or cured the error that resulted in liability. Applying this exception to the facts, I examined the circumstances of the donation provided to the institution by the institution's owner as a corrective measure to meet the 90/10 requirement.[8] In doing so, I concluded that it was consistent with the Secretary's authority to accept an institution's corrective measures in the administration of Title IV funds when in the Secretary's judgment such measures "eliminate[] the basis for the liability" sought by FSA.

My analysis in *Gibson Barber* focused on three factors: (1) the conspicuously small amount of money constituting the amount by which Respondent exceeded the 90 percent threshold of revenues derived from Title IV for the 2002 compliance year;[9] (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. Applying those factors to the facts in *Gibson Barber*, I concluded that it was appropriate to accept the institution's corrective measures, which eliminated the basis of liability in that case. The holding in *Gibson Barber* is purposely restricted; the decision does not leave the door open for many cases to enter. I do not view violations of the 90/10 rule as administrative errors or intend that such violations routinely be subject to the extraordinary remedial exceptions of section 668.113(d). Rather, *Gibson Barber* stands for the limited proposition that under

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[5] Respondent points out that although it could not raise arguments based on *Gibson Barber* before *Gibson Barber* was issued, it raised similar equitable arguments throughout the hearing process, and the precise equitable arguments presented in this appeal are the same as those presented to the hearing official on remand.

[6] In his decision on remand, Judge O'Hair noted that "Respondent's reliance on *Gibson* presents an equitable solution to its dilemma which is available only to the Secretary, not to me."

[7] FSA argues that Respondent's argument is implicitly barred by the law of the case. In FSA's view, *Gibson Barber* is unavailable to Respondent because I implicitly rejected applying that case to this one when I remanded this case on the same day I issued *Gibson Barber*. This is incorrect. This case required fact-finding on the 90/10 issue, given that the parties disputed factual claims and the lack of fact-finding in the Initial Decision. Consequently, without a dispositive ruling on the merits of whether the 90/10 rule had been violated, it would have been improper to consider the equitable remedy provided by 34 C.F.R. § 668.113(d) in my remand decision.

[8] *See, e.g.,* 34 C.F.R. § 668.113(d) (where there is no evidence of fraud or allegation of a pattern of errors, the Secretary is authorized to permit the institution to correct or cure the error in a manner that eliminates the basis of liability). Notably, I did not hold in *Gibson Barber*, nor do I here, that as a general matter violations of the 90/10 rule are mere administrative errors or that such violations are always subject to the extraordinary remedial exceptions of section 668.113(d).

[9] 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.

circumstances that the Secretary deems applicable, the Secretary may exercise his authority to accept a corrective action of an isolated regulatory violation that eliminates the basis of liability where the record reveals that there is no evidence of fraud and no allegation of a pattern of errors by the institution.

Applying *Gibson Barber* to this case, I find that Respondent's circumstance does not warrant my exercise of the extraordinary remedial exception of section 668.113(d). More directly, Respondent does not satisfy two of the three factors identified in *Gibson Barber*. First, Respondent exceeds the 90/10 limitation by a greater amount than the institution in *Gibson Barber*.[10] Although there is no bright-line rule for what constitutes a conspicuously small amount of money by which Respondent may exceed the 90 percent threshold of revenues derived under the 90/10 rule, Respondent exceeded the amount by at least twice as much as the institution in *Gibson Barber*.

In addition, the record reveals that Respondent receives Title IV funding pursuant to a process known as Heightened Cash Monitoring 2 (or HCM2). Under the HCM2 method of payment, an institution must submit specific documentation to FSA *before* Federal funds will be made available to the institution;[11] this measure follows concerns by FSA regarding whether an institution is financially responsible.[12] Finally, the facts concerning Respondent's corrective measures are notably different from those in *Gibson Barber*. Unlike in *Gibson Barber*, Respondent does not show that the institution adopted corrective measures that would eliminate the basis for liability. Rather, Respondent indicates that it implemented financial measures directed toward maintaining the institution's future operations without Title IV funding. Since Respondent concedes that the institution ceased operations "more than three years ago," those measures were apparently nonavailing. Moreover, the corrective measures should have been directed toward the institution's failure to meet the requirements of the 90/10 rule for 2005, and should have been supported by evidence in the record showing that the measures were implemented. Therefore, Respondent has not established that it corrected or cured the error that resulted in liability in a manner that eliminates the basis of liability consistent with the factors in *Gibson Barber*.

Respondent's final argument is that the liability upheld by Judge O'Hair should be offset by amounts the institution should have received from the Department. According to Respondent, under 34 C.F.R. § 668.26(d), an institution may properly apply and keep previously awarded federal grants, even if it is terminated from the Title IV programs, if certain specified conditions are met. Opposing Respondent's request for offset, FSA argues that there is no basis for

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[10] The exact amount is unknown, but Respondent argues that it exceeds the 90/10 limitation by as little as $8,599.69 or as much as $61,139.32. In either case, Respondent views the amount as small enough to meet the *Gibson Barber* factors. The amount varies because the parties concede that Respondent's precise 90/10 ratio for 2005 is unknown. Judge O'Hair ruled simply that the calculation exceeds 90%. FSA argues that the calculation is "at least 90.34%" while Respondent proposes a 90/10 ratio of 92.76% or 93.9%.

[11] Under the usual payment process, institutions receive student aid funds in advance and subsequently are required to account for the proper use of Federal funds through compliance audits and on-site reviews conducted by the Department.

[12] In some cases, a finding is explicitly made that an institution is not financially responsible. *See* 34 C.F.R. § 668.15 (setting forth general factors of financial responsibility); 34 C.F.R. § 668.175(d) (some institutions are put on HCM2 funding for a temporary period and allowed to improve their status as a financially responsible institution).

providing an offset of liability in this proceeding. I agree that this is not the proper forum to seek or retain federal funds pursuant to section 668.26(d).[13] Even if Respondent's argument that it is entitled to funds under section 668.26(d) is meritorious, this is not the proper forum to seek payments by offset or any other means. As the Department's regulations clearly establish, the focus of this proceeding is whether Respondent improperly disbursed Title IV funds, and if so, how much, if any, must be returned to the Department.[14]

ORDER

ACCORDINGLY, I HEREBY ORDER that International Junior College pay the U.S. Department of Education $1,365,078.

So ordered this 19th day of November 2010.

Arne Duncan

Washington, D.C.

[13] Section 668.26(d) authorizes institutions that cease participation in Title IV programs to retain funds under specified circumstances impertinent to this proceeding.

[14] *See In the Matter of Microcomputer Technology Institute*, Dkt. No. 94-88-SA, U.S. Dep't of Educ. (May 20, 2002); 34 C.F.R. Part 668, Subpart H (2009) (A Subpart H proceeding is a necessarily limited administrative forum wherein an institution may challenge a final audit or program review determination that finds that an institution fails to meet a statutory and regulatory requirement and, as a result, owes a liability to the federal government).

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