



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

BARBER-SCOTIA COLLEGE,

Docket No. 12-44-SA
Federal Student Aid Proceeding

Respondent.

ORDER TO SET ASIDE AND REMAND

This case comes to me on appeal from a decision by Administrative Judge (AJ) Richard F. O'Hair with the Office of Hearings and Appeals (OHA), U.S. Department of Education (Department). In the underlying decision, the AJ affirmed a decision by the Office of Federal Student Aid (FSA) holding Barber-Scotia College (Barber-Scotia) liable for \$2,617,041.75 for its failure to produce an audit of student records related to the distribution of Title IV financial aid funds.

The relevant background facts are as follows. After an FSA program review, Barber-Scotia failed to provide annual compliance audits for the 2002–2003 and 2003–2004 Title IV award years. Consequently, FSA issued a Final Audit Determination holding Barber-Scotia liable for \$4,906,498, the entirety of financial aid disbursed during those two years, plus other amounts not relevant here. During its appeal, Barber-Scotia submitted an audit for the 2002–2003 award year, but reported it could not locate the records necessary to create an audit for the 2003–2004 award year. Because FSA considered Barber-Scotia's audit acceptable, the AJ reduced Barber-Scotia's liability to only the amount from the 2003–2004 award year: \$2,617,041.75. The AJ found Barber-Scotia liable for that amount in his initial decision.

Barber-Scotia appealed the AJ's initial decision. Barber-Scotia has also experienced the loss of its accreditation, the consequential loss of its eligibility to participate in Title IV programs, and more recently, the resignation of its president and the appointment of an acting president.

Counsel for Barber-Scotia has requested that I remand this matter to OHA for further proceedings. Barber-Scotia states it has located the 2003–2004 financial aid award year records it could not previously locate. In support of its statement, Barber-Scotia has submitted photographs that purportedly show physical copies of the relevant files. With these records, Barber-Scotia asserts it can create an acceptable audit. Barber-Scotia further indicates it has already engaged an auditing firm which can accomplish this task within 90 days. Barber-Scotia argues that such an audit will demonstrate "it was technically and substantially in compliance"

because "Barber-Scotia distributed most, if not all, of the student aid funds for 2003-2004, and therefore the amount owing to the Department should be eliminated or greatly reduced."¹

Citing the unique circumstances of this case, especially the length of time that has elapsed since the violations occurred, FSA does not oppose this request.

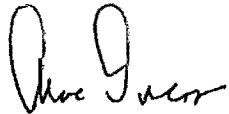
In general, after receiving an audit determination or program review determination, a party may appeal and receive a hearing before a hearing official.² Once the hearing official issues an initial decision, the party may appeal that decision to the Secretary.³ That appeal is limited to the evidence already in the record; neither party may introduce new evidence on appeal.⁴ In this case, Barber-Scotia is not asking to submit new evidence for the first time in its appeal to the Secretary. Instead, it seeks a remand so that a hearing official can consider new evidence that would have been germane during the initial hearing. In fact, this evidence is not merely relevant to the matter, but would be the very audit at issue in the original FSA determination.

In this case, I find that Barber-Scotia has presented sufficiently extraordinary circumstances to grant its request. First, FSA has not opposed Barber-Scotia's request. FSA's willingness to review an admittedly late-filed audit, rather than seek enforcement of the existing determination, weighs heavily in favor of granting a remand. Likewise, Barber-Scotia's demonstration that the relevant files exist, and its commitment to provide an audit within 90 days of remand, contribute to the likelihood that a remand would result in a mutually acceptable outcome for both Barber-Scotia and FSA. The fact of Barber-Scotia's change in leadership and the hardship posed by the pending liability also weigh in favor of granting the request.

ORDER

Accordingly, I hereby SET ASIDE the initial decision and REMAND the case to OHA for assignment to a hearing officer. On remand, the hearing officer shall provide a reasonable period of time for Barber-Scotia to prepare and submit the audit, and for FSA to review the audit and determine a new liability amount if applicable.

So ordered this 16th day of October 2015.



Arne Duncan

Washington, D.C.

¹ Barber-Scotia Brief, p. 7.

² 34 C.F.R. § 668.113.

³ *Id.* § 668.119.

⁴ *Id.* § 668.119(f).

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