UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
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In the Matter of

THE HAIR CALIFORNIA BEAUTY ACADEMY (CA)

Respondent.

Docket No. 18-13-SP

Federal Student Aid Proceeding

PRCN: 201120927403

Appearances: Nathalie D. Lopez, Esq., John C. Kang., Esq., and Patricia Cymerman, Esq., For The Hair California Beauty Academy (CA).

Caroline Hong, Esq. for the Office of the General Counsel, U.S. Department of Education, Washington, DC for Federal Student Aid.

Before: Robert G. Layton, Administrative Judge

DECISION

This decision involves an appeal by The Hair California Beauty Academy of Orange, California (HCBA), a proprietary for-profit institution. It participated in the Federal Pell Grant and Direct Loan Programs authorized by Title IV of the Higher Education Act of 1965, as amended 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq* (Title IV). Within the U.S. Department of Education (the Department) the office having jurisdiction over and oversight of these programs is the office of Federal Student Aid (FSA).

In this proceeding, HCBA is appealing the Department's FPRD that was issued on December 26, 2017. To ensure compliance, FSA conducted an audit and program review of HCBA. The Department provides grants, loans, and work-study funds to eligible students attending institutions of higher education through Title IV. HCBA participated in Title IV programs through a Program Participation Agreement ("PPA").

Subpart H proceedings provide for audit and program review proceedings. In such a proceeding, the respondent has the burden of proving by the preponderance of the evidence that the Title IV funds it received were lawfully disbursed. 34 C.F.R. § 668.116(d). If the respondent fails to establish the correctness of its expenditure of federal education funds, it must return all such funds to ED. Once the respondent is given adequate notice of the demand by FSA in its FPRD, the established burdens of proof are implemented.

ISSUES

The FPRD at issue in this appeal was based on a program review conducted from January 11, 2011 to January 14, 2011. The review found that HCBA owed the Department $259,012.65 for improperly disbursed Title IV funds. The review process included communications in 2014, 2015 and 2016, including letters by the new owners. The September 16, 2015 response from HCBA stated they became owners in January, 2014, and said that "We, in no way, can be held responsible for the previous owner's oversight, ignorance and/or neglect." *Id, Appendix G, HCBA's September 16, 2015 response to Program Review Report.* A second response also stated the owners had not owned HCBA when the program review was conducted, and that they had purchased HCBA in 2014. *Id., Appendix D, HCBA's January 28, 2016 response to Program Review Report.*

HCBA also responded by contending the amount sought was a monetary fine, and that it was barred by a statute of limitations.

The issues to be addressed are:

1. Is HCBA responsible for Title IV liabilities incurred prior to its change in ownership in 2014?

2. Are the amounts sought from HCBA in this matter monetary fines, which are subject to a five-year statute of limitations, or are they liabilities for improper expenditures of Title IV federal funds, and not subject to a five-year statute of limitations?

SUMMARY OF DECISION

HCBA is liable for all Title IV funds disbursed on behalf of the Department during the audit periods. The Department's decision is AFFIRMED. HCBA is liable for $248,051.00 and any additional interest.

FINDINGS OF FACT

Sale of HCBA

On December 13, 2013, HCBA was sold for $600,000 by Thuy Witham to its current owners, the New America Beauty Education Corp.[1] *Respondent's Exhibit R-1, Sale Agreement.* The sale agreement was six single-spaced pages in length, with an additional page for a separate bill of sale. The agreement was prepared by the attorney for the current owner. The seller did not have an attorney, although the agreement recites that he was advised to have independent

[1] HCBA in its brief contends the date of business and asset transfer was actually January 1, 2014. The differences in dates have no impact on the decision in this appeal.

counsel. *Id, Paragraph 18.*

The sale agreement required seller to give the buyer $34,000 in payments due from the U.S. Department of Education for financial aid for three students attending HCBA. Another provision stated the seller would train and assist the buyer on student admissions and federal aid application. *Id, Paragraph 2.*

The sale agreement also specified a range of remedies available to the buyer for any breaches of the agreement, (*paragraph 5 and 6*) and included a provision to award attorneys fees to any party prevailing in litigation arising from the sale agreement. (paragraph 19). The seller warrantied to the buyer that the "seller owes no un-discharged obligations and has contracted no liabilities affecting" HCBA that affect the purchase and sale of the school. The seller also warrantied that "no litigation or action or proceeding, legal, equitable or administrative through arbitration or otherwise, is pending or threatened" against HCBA, and that no judgment is pending or threatened against the seller or HCBA. *Id, Paragraph 7.*

The sale agreement also detailed the school's documentation the seller was required to provide to the buyer, including equipment inventories, student records and financial records. *Id, Paragraph 12.*

In the bill of sale that accompanied the sale agreement, the seller gave his warranty that he owned the business free and clear of encumbrances, and promised to indemnify and defend the buyer from any claims on HCBA and its assets. *Id, Bill of Sale.*

HCBA's Provisional Program Participation Agreement

On July 22, 2014, in order to continue receiving Title IV funds, HCBA's new owners entered into a provisionally approved Program Participation Agreement ("PPA"). *Id, Appendix I.* The agreement was signed by the new owners on July 22, 2014. The first paragraph of the signed agreement's section that detailed the reasons and special conditions for the HCBA's PPA being provisional stated:

> A program review of the institution's administration of Title IV, HEA Program was conducted. The institution is accountable for all program review liabilities and fines and to resolve all deficiencies. The program review liabilities must be paid by the date specified in the Final Program Review Determination Letter establishing the liabilities, and paid in full prior to the expiration of the Program Participation Agreement unless (a) the determinations of the program review are under appeal or (b) alternative payment arrangements have been made with the Department's Debt Collection Services. *Id, Appendix I, p. 3.*

The provisional PPA also noted that HCBA's new owner had not provided two fiscal years of audited financial statements as required by 34 CFR 600.20(g)(2)(iv), and imposed surety through an irrevocable letter of credit as a special term of the provisional PPA. *Id, Appendix I, pp. 3-4.*

On April 5, 2016, FSA notified HCBA that it's disbursements would be significantly restricted through a Heightened Cash Monitoring 2 method of payment, which allowed FSA to offset any claims against HCBA before disbursing funds to HCBA. That notification stated the method of payment was changed because of HCBA's "failure to submit complete responses to significant findings contained in the Program Review Report, after repeated requests for such." *Id, Appendix J.*

HCBA's Final Program Review Determination

In a letter dated December 26, 2017, HCBA was notified by certified mail of the FPRD liabilities. The letter informed HCBA that it could appeal, and the appeal procedures are those provided in 34 C.F.R § 668, Subpart H. *Id, p 10-13.*

The FPRD included nine findings as the basis for liability, for program liabilities for the 2009-2010 and 2010-2011 Award Years. HCBA has not contested the factual accuracy of any individual finding in this proceeding, but a detailed understanding of the nature of those findings is required to consider the arguments HCBA puts forth in this appeal. The first and largest of the nine findings is for Finding 2, in the amount of $248,051.00. Many of the findings include duplicated liabilities—that is, certain repayments are required for more than one reason or basis. The following is a summary of the liabilities by finding:

Actual Liabilities By Finding – Including Duplicate Liabilities

Liabilities	Pell Grant	Interest
Finding 2	$248,051.00	$10,961.65
Finding 3	$2,795.00	$135.01
Finding 5	$13,462.00	$598.31
Finding 6	$10,277.00	$415.91
Finding 9	$95,122.00	$4,369.37
Finding 10	$155,752.00	$6,303.25
Finding 11	$7,708.00	$338.69
Finding 12	$38,141.75	$1,742.65
Finding 14	$32,389.00	$1,481.57
Totals	**$603,697.75**	**$26,346.41**

Id, FPRD, p. 50.

Established Liabilities – Duplicate Liabilities Removed

Liabilities	Pell Grant
Finding 2	$248,051.00
Finding 3	$60.00
Subtotal	$248,111.00

Interest	$10,961.65
Subtotal	$10,961.65
TOTAL	**$259,072.65**
Payable To Department:	**$259,012.65**
Student	**$60.00**

Id, FPRD, p. 51.

Finding 2

Finding 2 is for HCBA failing to maintain an adequate audit trail. It is the first finding to impose a monetary liability, and imposes the largest liability.[2] When a school is entrusted with Title IV spending, it must maintain records of each student, to document attendance, payments, credits, refunds and their account balance. The required records include dates and amounts of disbursements, and charges to each student's account. At HCBA, of the student records selected to audit for the periods, every single student's record had missing documentation. HCBA kept two sets of books-a manual institutional ledger, and an electronic software based ledger provided by a third-party servicer. *Id, FPRD, p. 9.*

Neither of HCBA's ledgers reflected all the student account transactions. For the manual ledger, no Title IV transactions were included, there were no current account balances, and the manual ledgers were inconsistent with the software based ledger. Meanwhile for the software based ledger, no cash payments by students were included, and no payments by third parties were included. Payments received by HCBA from a local community college were not reflected in either of the two ledgers. *Id, FPRD, p. 9.*

That initial audit of HCBA's financial records for selected students found a 100 % error rate. As a result, HCBA was directed to provide an audit trail: to reconstruct records for all students who received Title IV funds for the period, and to reconstruct a ledger that was complete, accurate and current. Each account was directed to include cash transactions, Title IV disbursements, payments to students, third party receipts such as from the community college, and funds required to be returned to Title IV (R2T4). HCBA was also required to hire an independent auditor to prepare attest file review and report on the results.. *Id, FPRD, p. 10.*

HCBA responded by saying it could not get the required information from the previous school owner. There was no audit trail provided, and there was no independent auditor-conducted file review and results report. Because HCBA could not establish that the Title IV funds were properly disbursed, in Finding 2 the Department found all Title IV funds were liabilities due to the Department. The liability for Finding 2 of Title IV funds was $259,012.65, including interest. *Id, FPRD, p. 12.*

[2] Although it imposed no monetary liability, Finding 1 found that HCBA is incapable of adequately administering the Title IV program due to its failure to establish and maintain the required student financial records. 34 C.F.R § 668.24. Finding 1 found HCBA systemically failed to provide accurate and complete records to demonstrate proper payments to each student under the Title IV, HEA program.

Finding 3

The Department requires schools to have a system to identify and resolve any discrepancies in information received from different sources. There were numerous discrepancies not resolved by HCBA's system found in the audit, for items such as too many or too few clock hours for a particular program length, to financial and family information for enrollment verification for funds. Many discrepancies were addressed and, therefore, not found to create liabilities for Finding 3. The two discrepancies in Finding 3 that were not addressed after being identified in the audit were for Student 13 (incorrect family birth date information) and Student 18 (improperly billed $60 more than the tuition charge in the enrollment agreement). Student 13's liability of $2,810.01 was duplicative of Finding 2. HCBA's liability to repay $60 to Student 18 was also a result of Finding 3. *Id, FPRD, p. 13-15.*

Finding 5

Title IV aid is only available for U.S. citizens. Although the software-based ledger showed two students as not confirmed as U.S. citizens, HCBA simply changed the notation in the software ledger, without ever securing documentary evidence the students were citizens and eligible to receive aid. HCBA did not respond to the audit with documentary evidence, and failed to demonstrate the students were eligible to receive the $14,060.31 in Pell Grant funds, including interest. *Id, FPRD, p. 16-18.*

Finding 6

Schools must show that they can monitor their students' academic progress, to insure that Title IV funding is only used for students making satisfactory academic progress (SAP) in an educational program. HCBA's policy was to evaluate the SAP at the time 25 % of the course should be completed, and again at the time 75 % of the course should be completed. The audit found that for Student # 16 and Student # 20, the audit showed no evaluation took place, either at the 25 % mark, or any time in the future. HCBA did not respond showing the students were monitored for SAP. Funds paid out after the 25 % mark totaled $10,692.91. *Id, FPRD, p. 18-20.*

Finding 9

Schools in the Title IV program are required to verify and document the income, household size and number of household members in college, including tax returns. Although it too is a duplicate liability for Finding 2, Finding 9 was contained a very large number of Title IV student applications that had inaccurate information. Students' information was incomplete or contradicted by other student information submitted. HCBA was required to review the previous verifications for accuracy, and if inaccurate, required to collect the required documentation from students to compare to their applications. HCBA was also required to have an independent auditor test that file review and report on the error rate, and to attach documentation and work papers for the report.

As with Finding 2, HCBA responded to the audit by saying it could not get the required information from the previous school owner. There was no documentation provided, and there was no independent auditor-conducted file review and results report. Because HCBA disbursed Title IV funds with inaccurate documentation of eligibility, in Finding 9, for all the students with inaccurate information, the Department found all Title IV funds disbursed were liabilities due to the Department. The liability for Finding 9 of Title IV funds was $102,166.37, including interest. *Id, FPRD, p. 25-29.*

Finding 10

Finding 10 revealed more troubling errors by HCBA. It was not pertaining to inaccurate or undocumented information. With proper documentation, schools are allowed on a case-by-case basis to make modification to the figures used to calculate financial aid a student may receive. That ability is through what is referred to as the school's "Professional Judgment" (PJ). The Expected Family Contribution (EFC) is an index number used in Title IV to determine the amount of financial aid a student is eligible to receive. The higher the income, the less aid is available. In Finding 10, HCBA inexplicably used PJ with no documentation or explanation. For one of the two students found in the initial audit sample, instead of using the provided Adjusted Gross Income (AGI), HCBA inexplicably and significantly dropped the parental incomes, from $76,675 to $19,200. For the second student, the student reported their AGI as $58,436, but HCBA dropped that amount to zero income. For both students, HCBA also designated the income recipient as "dislocated workers," even though there was no evidence to support that designation. For all those changes, HCBA simply made the changes as what it deemed PJ, while providing no basis for the changes.

Because of those students in the audit with unexplained PJ, HCBA was ordered to provide a report on all of the times it used PJ for any student, and to provide documentation.

As with Finding 2, HCBA did not provide any file review for any of the requested students whose documentation involved HCBA invoking PJ. Finding 10 goes beyond a failure of record-keeping. Because HCBA disbursed Title IV funds based on figures arrived at through PJ with no documentation of the basis, in Finding 10, for all the students with inaccurate information, the Department found all Title IV funds disbursed were liabilities due to the Department. The liability for Finding 10 of Title IV funds was $162,055.25, including interest. *Id, FPRD, p. 29-32.*

Finding 11 – Dependency Override

Under Title IV, certain situations will qualify a student to be designated an "independent" student. For those students designated as independent, parental income will not be considered in calculating expected family contributions and resulting allowable aid fund qualifications. Those situations include six specific criteria, as well as an "unusual circumstances" provision that allows for "dependency override," but only with a detailed written explanation and supporting documentation. In Finding 11, HCBA simply overrode the dependency status for one student with no documentation or explanation. The funds expended for Finding 11 totaled $8,046.69, including interest. *Id, FPRD, p. 32-33.*

Finding 12 – Return to Title IV (R2T4)

Like Finding 2, Finding 12 imposes the largest liability. It is a duplicate basis liability for the total amount of Title IV funds disbursed by HCBA on behalf of FSA during the audit period. If a student drops out of an institution, the institution must calculate the amount of Title IV assistance the student earned as of the date of the student's withdrawal. Any unearned Title IV amounts must be returned to the Department. All such Return to Title IV (R2T4) repayments must be made within 45 days of the student's withdrawal date. In the audit, HCBA said they did not have a policy or procedure for calculating R2T4 funds, and 100 % of the student records that were examined in the audit were incorrect.

Because every record that was audited was incorrect, HCBA was directed to reconstruct complete and accurate records of withdrawals, to prepare a spreadsheet showing the corrected R2T4 calculations, and to have an independent auditor to test HCBA's review and report on any errors.

As with Finding 2, HCBA responded by saying it couldn't get the required information from the previous school owner. There was no review or calculations provided, and there was no independent auditor-conducted file review and results report. Because HCBA could not establish that the Title IV funds were properly disbursed, in Finding 12 the Department found all Title IV funds were liabilities due to the Department. The liability for Finding 12 of Title IV funds was $259,012.65, including interest.[3] *Id, FPRD, p. 34-38.*

Finding 14

Finding 2 was based on HCBA's relationship with a nearby community college (Rancho Santiago Community College District) for HCBA to provide part of the college's educational program. In such situations, the providing school such as HCBA may only receive payment from the college, which administers and pays out Title IV funds for students such as those taking classes at HCBA. The providing school is expressly prohibited from any additional charges to the student or Title IV. Despite that, HCBA disbursed Title IV funds and charged the students, thus receiving double payment for such students.

HCBA did not respond to directions to provide a full accounting for students receiving education in its agreement with Rancho Santiago Community College District. FSA determined the liability from their failure to account for these students was $33,870.57, including interest. *Id, FPRD, p. 39-41.*

PRINCIPLES OF LAW

HCBA contends that (1) because it changed owners, it lacked the ability to provide records from the prior owner of the business, (2) that the monetary amount is a "fine" which is inconsistent with the fine size factors set forth in 20 U.S.C. Section 1094, and (3) that 28 U.S.C. Section 2462's statute of limitations applies to preclude the liabilities.

[3] Finding 13 found additional noncompliance by HCBA through its late payments of R2T4 refunds, but did not duplicate the liability, since Finding 12 included all liability for the R2T4 deficiencies. *Id, FPRD, p. 38-39.*

If an institution participating in the Title IV, HEA programs undergoes a change in ownership, the Secretary may continue the institution's participation in Title IV on a provisional basis upon application by the institution. If the Secretary approves the application, the institution is provided a provisional program participation agreement (PPA) that extends the terms and conditions of the program participation agreement that was in effect for the institution before its change of ownership. 34 C.F.R. § 600.20(g-h).

In the context of a Subpart G proceeding, the Secretary considered an institution's fiduciary obligation when a change of ownership occurs. In affirming program liabilities when there was a change in ownership, the Secretary noted:

> The fiduciary obligation of an institution participating in a Title IV, HEA program may not be ignored or overlooked when it becomes inconvenient. This evidence of neglect bears directly on the issue of the institution's trustworthiness, and the level of confidence Education should repose in their integrity and fidelity.

In re Puerto Rico Tech. & Beauty Coll., U.S. Dep't of Educ., Dkt Nos. 90-34-ST & 90-38-ST (Decision of the Secretary)(Oct. 7, 1991).

34 C.F.R Part 668, Subpart G contains the Department's provisions for Fine, Limitation, Suspension and Termination Proceedings. 34 C.F.R § 668.81 specifies that it is the regulation which governs the imposition of fines. Under 34 C.F.R § 668.89, the Department has the burden of persuasion for any Subpart G fine, suspension, limitation or termination proceeding. A fine proceeding under Subpart G is begun by sending a notice of the fine to the institution. That notice informs the institution of the intent to fine, the amount of the fine, and the basis of the violations for the fine. 34 C.F.R § 668.84(b). 34 C.F.R § 668.93 states that the amount of fines is based on, among other factors, the size of the institution and the gravity of the violation. That section specifies that it is based on the statutory authority of 20 U.S.C. 1094.

34 C.F.R Part 668, Subpart H provides the proceedings when an institution requests a review of a Final Program Review Determination. In such a review, the institution has the burden of proving: 1) that the institution's expenses questioned or disallowed by the FPRD were proper; and/or 2) that the institution or servicer complied with the program requirements. *Id.* § 668.116(d). After reviewing each party's submissions and oral arguments if applicable, the hearing official "states and explains whether the final audit determination or final program review determination issued by the designated ED official was supportable, in whole or in part." *Id.* § 668.118(b).

An institution may participate in Title IV programs only if it enters into a written program participation agreement. An institution participating in Title IV is a fiduciary responsible for administering Federal funds. 34 C.F.R § 668.14.

Where an institution follows a policy of systematically failing to comply with the requirements of Title IV, FSA is entitled to recover the Title IV funds disbursed by the institution during the period in question. *In the Matter of Long Beach College of Business,* Dkt.

No. 92-132-SP, U.S. Dep't of Education (July 14, 1994).

Principles of Law for Specific Findings

Finding 2: An institution must maintain records of each student's account showing costs of attendance, payments, credits, refunds, and account balance. These records must be established and maintained on a current basis. An institution must document the disbursement and delivery of Title IV program funds. By failing to record the actual dates of disbursements, amounts of disbursements, and charges to students' accounts, it is impossible to determine the actual status of an account and whether an institution has paid credit balances within 14 days, returned Title IV funds in a timely manner for withdrawn students, or disbursed Title IV funds within three days of receipt of those funds - all of which are required by the Higher Education Act (HEA) and the applicable regulations. 34 C.F.R. §§ 668.24, 668.166, and 690.83(b)(l).

Finding 3: The Secretary considers an institution to have administrative capability if, among other factors, the institution develops and applies an adequate system to identify and resolve discrepancies in the information that the institution receives from different sources with respect to a student's application for financial aid under the Title IV, HEA programs. In determining whether an institution's system is adequate, the Secretary considers whether the institution obtains and reviews (1) all student aid applications, need analysis documents, Statements of Educational Purpose, Statements of Registration Status, and eligibility notification documents presented by or on behalf of each applicant; (2) any documents, including any copies of state and federal income tax returns, that are normally collected by the institution to verify information received from the student or other sources; and (3) any other information normally available to the institution regarding a student's citizenship, previous educational experience, documentation of the student's social security number, or other factors relating to the student's eligibility for funds under the Title IV, HEA programs. 34 C.F.R. § 668.16.

Finding 5: An institution is required to maintain documentation of a student's citizenship and residency requirements to be eligible to receive Title IV aid. 34 C.F.R. § 668.24(c)(l)(iii).

Finding 6: To determine if a student remains eligible for Title IV funds, an institution must establish and apply reasonable standards to measure if the student is maintaining satisfactory academic progress in their educational program. 34 C.F.R. § 668.16(e)(2)(iii).

Finding 9: An institution must verify information used for Title IV eligibility if it has reason to believe there is inaccurate information used for the calculations. 34 C.F.R. § 668.54(a). This includes using tax returns to verify income, household size and tax filing status. 34 C.F.R. § 668.57.

Finding 10: An institution may use Professional Judgment on a case-by-case basis to alter the data used to calculate a student's Expected Family Contribution (EFC), but can't modify the formula or tables used for the EFC calculations. Higher Education Act, § 479A(a).

Finding 11: Higher Education Act, § 480(d) provides that a student may be "independent" for financial aid calculation purposes under six specific conditions. An institution may also use a "dependency override", but only for "a documented determination by reason of other unusual circumstances".

Finding 12: When a Title IV grant or loan recipient withdraws from an institution during a payment period or period of enrollment, the institution must determine the amount of Title IV funds the student earned as of the withdrawal date, and all unearned funds must be returned to Title IV. 34 C.F.R. § 668.22.

Finding 14: An institution may enter into a written arrangement with another institution to provide part of the educational program to students enrolled in the first institution. 34 C.F.R. § 668.5(a)(1). If an institution enters into such an agreement, unless otherwise provided in writing, the institution at which the student is enrolled as a regular student must determine the student's eligibility for Title IV, HEA program funds, and must calculate and disburse those funds to that student. 34 C.F.R. § 668(5)(d)(1-2).

28 U.S.C. Section 2462 Statute of Limitations

28 U.S.C. §2462 states: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

20 U.S.C. §1094(c)(3)(B)(ii) states: "Any civil penalty may be compromised by the Secretary. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of the penalty to the size of the institution of higher education subject to the determination, and the gravity of the violation, failure, or misrepresentation shall be considered. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the institution charged."

In.*Kokesh v. SEC,* 137 S.Ct. 1635 (2017), the Supreme Court addressed whether an SEC disgorgement, an equitable recompence proportionate to unfair monetary gain, constituted a penalty for the purposes of 28 U.S.C.A. §2462, which places a 5-year statute of limitations upon a "civil fine, penalty, or forfeiture." The *Kokesh* Court required two elements to be examined in determining whether a punishment is a penalty for the purposes of §2462. First, the Court asks whether a civil penalty is a pecuniary response to violation of public law. Central to this consideration is whether the punishment seeks to remedy a misfeasance against an identifiable individual or class of individuals or whether the aggrieved party is the United States. Second, the penalty is not structured for victim compensation, but rather must be for pecuniary and deterrent purposes. The Court proceeded to find disgorgement to be a penalty under §2462 because it is levied in response to a violation aggrieving the United States and because disgorgement primarily serves to disincentivize similar illegal behavior "by depriving violators of their ill-gotten gains."

This Tribunal previously considered whether a similar statute of limitations applies to audit determinations in the case *In the Matter of Platt Junior College,* U.S. Dep't of Educ., Dkt. No. 90-2-SA at 4 (Initial Decision on Remand)(Oct. 31, 1991). This Tribunal rejected the applicability of 28 U.S.C. §2415 limitations for United States actions for money damages against a contractor arising from the institutional audit determination. Upon that determination, the *Platt* Tribunal concluded that no other statute of limitations is applicable to audits of Student Financial Aid Programs. The *Platt* decision stated:

> [There is no] expressed administrative statute of limitations in either United States Code or Code of Federal Regulations which states that ED must audit, complete its audit, assess, or collect any assessment for an alleged violation of … obligations to the United States as a participating institution in the various student financial assistance programs audited.
> *Platt, at 4.*

ANALYSIS

Change of Ownership

HCBA argues that because of its change of owners, it did not have the ability to provide records from the prior owner of the business. HCBA is correct that the violations at issue in this appeal all predated the purchase of HCBA by its current owners. HCBA's current owners do not claim there any sort of undue influence when they purchased the institution from the seller, and the indications from the purchase agreement and the circumstances around its signing show the current owners understood the agreement.

The current owners signed a detailed, six-page purchase agreement that had been prepared by their attorney, while the seller chose not to be represented by an attorney. The purchase included a requirement the new owners receive $34,000 in payments for financial aid for three students attending HCBA. The seller, as part of the agreement, promised that there were no un-discharged obligations or liabilities affecting HCBA that would affect the purchase and sale of the school. The seller also promised there was no litigation pending or threatened, including no administrative proceedings. Federal Student Aid was not a party to the agreement, and could not be responsible for inaccurate representations by the seller concerning its fiduciary liabilities. While the new owners may have a claim against the seller, that does not change the fact only the new owners were in a position to conduct due diligence prior to the purchase, including an audit of HCBA, to determine whether the seller's representations were accurate.

Unfortunately, instead of such due diligence, the buyers chose to rely upon the seller. The purchase agreement specified that the seller would provide all student and financial records, and that the seller would also train and assist the buyer in regulatory matters, specifically including federal aid application from the U.S. Department of Education.

After the purchase, HCBA's new owners then sought to enter into a provisional agreement with the Department of Education. An institution normally must establish a two-year track record before qualifying for Title IV funds. When an institution sells, the purchasers can avoid that two-year requirement, but only in exchange for agreeing to step into the shoes of the previous owners. Shortly after the purchase (on July 22, 2014), HCBA's new owners signed a provisional program participation agreement with the Department. The very first paragraph of the PPA's conditions noted that a program review (of HCBA) had been conducted. The new owners signed the provisional PPA, and by signing agreed that HCBA is "accountable for all program review liabilities" *Id, Appendix, p. 3.*

The agreement that HCBA's new owners signed is consistent with the regulatory requirements for a change in ownership. An institution is required to extend the terms and conditions of the PPA that was in effect before the ownership change. 34 C.F.R. § 600.20(g-h). In reviewing an appeal involving a change in ownership, the Secretary has noted that for program liabilities, the obligations resulting from an institution's fiduciary duty cannot be ignored. Neglect of that duty "bears directly on the issue of the institution's trustworthiness, and the level of confidence Education should repose in their integrity and fidelity." *In re Puerto Rico Tech. & Beauty Coll.*, U.S. Dep't of Educ., Dkt Nos. 90-34-ST & 90-38-ST (Decision of the Secretary)(Oct. 7, 1991).

The above analysis supports the conclusion that HCBA's new owners face liability from their fiduciary duty to the Department to properly administer federal funds. *See also* 34 C.F.R § 668.14. This duty includes the liability for the audit period at issue that resulted from their purchase of HCBA from the previous owner.

Nature of the Liability

HCBA sprinkles the term "fine" throughout its brief as a characterization of the liabilities it faces in this matter. There is no support for that characterization.

The above principles of law spell out the distinctions between appeals within the Department under Subpart H (which address recovery of federal funds) and under Subpart G (which address fines, penalties, terminations and other civil punishments). The findings which are on appeal are specifically identified as subject to challenge in a Subpart H proceeding. The distinctions are further reinforced by the above detailed findings of fact relating to the FPRD. The findings were not factually contested, but the above review of the nature of those findings is important, because the program review enumerates specific ways that specific amounts of federal funds were not properly spent or accounted for by HCBA. Recovery of those funds from a fiduciary is not punitive in nature.

Many of the findings in this appeal show a similar pattern involving a breakdown of HCBA's fiduciary responsibility in its overseeing of federal funds. When the information provided was not consistent with the Title IV program funding requirements, HCBA would simply override it, or insert a scenario contrary to the information that would allow the funds to be used improperly, or assert professional judgment, or anything that would result in Title IV funds being able to be accessed.

If this proceeding was punitive and not designed to recover inappropriately spent federal funds, the findings in the FPRD would be cumulative. Instead, the above detailed findings specifically and repeatedly identified when they are duplicative of fund recovery sought for other violations, to avoid an over-repayment of federal funds. These findings were limited expressly to the specific funds that HCBA held as a fiduciary for FSA.

As noted in the FPRD related findings, FSA requested that HCBA complete a review of its student financial aid files, and then submit a report of the results of the file review, with the report verified by an independent auditor. The result of such a review would have allowed FSA to calculate liability based on the school's certified data. HCBA failed to provide any of the needed file information.

Some of the FPRD findings sought recovery all Title IV funds disbursed. That was required because of the complete and systemic failures by HCBA as the fiduciary, which made any narrowing of the funds at issue impossible. Where an institution follows a policy of systematically failing to comply with the requirements of Title IV, FSA is entitled to recover the Title IV funds disbursed by the institution during the period in question. *In the Matter of Long Beach College of Business*, Dkt. No. 92-132-SP, U.S. Dep't of Education (July 14, 1994).

Enforcement of Title IV programs by using program review determinations creates the need for institutions to cooperate with FSA. The agency must be provided with complete file reviews when that information is needed to determine whether any, if not all, of the funds the institution spent as a fiduciary for the Department were spent in violation of the statutory and regulatory requirements. An institution's fiduciary duty requires it to account for the disbursement of Title IV program funds, and that requires the school to provide FSA with documentation of its expenditures while it held FSA's funds.

This fiduciary relationship is of critical benefit to institutions such as HCBA. The institutions receive a major component of their school's funding from federal tax dollars, but in exchange are entrusted with the proper spending of those dollars. Title IV is not set up to be able to function unless FSA can rely on the institutions as fiduciaries to properly spend and document the use of Title IV funds.

The Respondent claims that because *maybe* some of the Title IV funds might have been properly spent, it is a penalty. The burden of proof in Subpart H proceedings is on the institution to show the funds it held for the Department were properly spent. The reasoning of Respondent's claim suggests a requirement not supported by statute or regulation that the Department bear the burden of proving how funds that were in the Respondent's care were managed.

This tribunal is familiar with the guidelines that are mandated by both statute and regulation in proceedings to set the amount of a monetary fine under Subpart G. Previous decisions from this tribunal have reduced penalties when proposed monetary fines sought by the Department ignored those factors. Here, HCBA argues the liabilities are "arbitrary and overbroad," because FSA did not follow the guidelines for assessing fines or penalties under the HEA. But as detailed above, the liability from the FPRD cannot be characterized as a "fine" under the HEA. Guidelines for factors to consider in assessing a fine are inapplicable in "remedial actions" such as the FRPD at issue here. Factors such as HCBA's size, or the intent of its new owners, are not applicable in this remedial action to recover improperly disbursed Title IV funds. This is not a Subpart G proceeding pertaining to the proper amount of a penalty-it is a Subpart H proceeding to recover specifically entrusted funds under the Title IV program.

Statute of Limitations

HCBA argues that *Platt* is narrow because it "only" dealt with final audit determination claims. In *Platt,* the subject matter at issue was a Subpart H proceeding, as is the present case for this FPRD. The assertion the ruling was applied only to the subject matter in *that* proceeding is not supported by the facts in *Platt.* There was nothing fact-specific to the case that presented a unique or limited review of the statute of limitations issue. Because 28 U.S.C § 2462 was enacted in 1948, it was in existence and was found to not be applicable to a Subpart H proceeding in the October 31, 1991 decision in *Platt.*

HCBA also argues that a five-year statute of limitations is required in this case under the US Supreme Court's ruling in *Kokesh*. Specifically, HCBA compares the FSA imposed liabilities to the S.E.C. disgorgement in *Kokesh*. First, HCBA argues that the liabilities are levied as a consequence of Title IV violations. Second, HCBA contends that the liabilities are the Department's punitive response for HCBA's alleged violation of fiduciary responsibilities as a means of preventing HCBA from similar misbehavior in the future. Lastly, the Department is demanding HCBA pay the liability to the government, not to victims requiring compensation. HCBA argues that this makes the liability non-compensatory and thus a penalty.

This comparison with *Kokesh* is based upon a mischaracterization of the fiduciary relationship between the Department and Title IV fiduciaries like HCBA. The clear difference between the imposed liabilities in *Kokesh* and the present matter is the origin of the funds found liable. The S.E.C.'s imposition of a disgorgement in *Kokesh* was to recover the amount of funds obtained by illegal activity. The liabilities the Department is imposing upon HCBA were funds initially transferred by the Department to HCBA to be maintained and disbursed according to Title IV requirements. As detailed above, this action is not a sanction at all, and is separate and apart from the Subpart G enumerated specific processes for sanctions such as fines. This matter is a recovery of specific funds held in trust by HCBA for the Department. As such, it is not a sanction imposed for the purpose of deterring infractions of public law. It is a monetary recovery necessary due to HCBA's failure to responsibly disburse the Department's funds, and it is designed to compensate the Department for its loss due to HCBA's failure to properly serve as its fiduciary.

The other factor specifically noted in *Kokesh* is that the disgorgements sought by the SEC there were not designed to be compensatory. The relationship between the Department and HCBA explains that, while the liabilities are levied as a consequence of Title IV violations, the Department is merely trying to recover funds to which it holds a legal right. This recovery is not a punishment, but a means of compensation for fiduciary violations. When HCBA misused Title IV funds, it was on notice from the regulations and from the PPA that the Department would recover those funds. The relationship between the Department and HCBA explains why the liabilities are to be paid to the government and not an aggrieved private party, namely that the Department, as the party who had initially disbursed the funds, is the aggrieved party. The uniqueness of the financial fiduciary relationship established between the Department and Title IV participating institutions, such as HCBA, makes 34 C.F.R. Part 668 Subpart H proceedings distinct from the statute of limitations imposed by § 2462 as interpreted in *Kokesh*.

Conclusions of Law

1. HCBA is responsible for Title IV liabilities incurred prior to its change in ownership in 2014.

2. The amounts sought from HCBA in this matter are not monetary fines subject to a five-year statute of limitations. The amounts are liabilities for improper expenditures of Title IV federal funds, and not subject to a five-year statute of limitations.

ORDER

For the above-stated reasons, HCBA is liable for all Title IV funds disbursed on behalf of the Department during the audit periods. The Department's decision is **AFFIRMED**. HCBA is liable for and is **ORDERED** to repay to the United States Department of Education the sum of $248,051.00 and any additional interest.

Robert G. Layton
Judge

Date of Order: July 2, 2019

SERVICE

Service by electronic filing and automatic notice generated by OES, and by U.S. certified mail, return receipt requested # 7006 2150 0003 2505 6042, to:

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and Patricia Cymerman, Esq.,
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And by electronic filing and automatic notice generated by OES to:

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