THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

THE SALON AND SPA INSTITUTE (TX),

Docket No. 16-23-SP

Federal Student Aid Proceeding

PRCN: 2013-306-28258

Respondent.

DECISION OF THE SECRETARY

The Salon and Spa Institute (SSI) has appealed the January 18, 2018, Decision issued by Administrative Judge Robert G. Layton. The Decision upheld a Federal Student Aid (FSA) assessment of a liability against SSI of $169,038.98.[1]

Based on the following analysis, I will affirm Judge Layton's Decision.

Background

SSI is a proprietary institution of higher education participating in federal student aid programs authorized under Title IV of the Higher Education Act of 1965 (HEA), as amended, 20 U.S.C. § 1070, *et seq*. (Title IV). FSA conducted a program review of SSI's distribution of Title IV funds resulting in a Final Program Review Determination (FPRD) issued March 22, 2016.

Among other things, FSA determined the owner and director of SSI, Aurora Lozano, falsified the results of certain Ability to Benefit (ATB) tests.[2] ATB tests establish a student's eligibility for Title IV funds where that student does not have a high school diploma or the recognized equivalent. SSI disbursed Title IV funds to 14 students based on the falsified test results.[3] Because SSI disbursed Title IV funds to ineligible students, FSA determined SSI liable to return to the Department $169,038.98.

[1] *The Salon and Spa Institute (TX)*, Dkt. No. 16-23-SP, U.S. Dep't of Educ. (Jan. 18, 2018) at 1, 6, 10.
[2] 34 C.F.R. § 668.32(e)(2) (providing as an alternative to a high school diploma that an applicant may qualify for Title IV if he or she "[h]as obtained a passing score specified by the Secretary on an independently administered test in accordance with subpart J of this part."); 34 C.F.R. Part 668 Subpart J (setting forth the Secretary's requirements for independently-administered ATB tests).
[3] In its FPRD, FSA found that 15 ineligible students received funds based on the falsified ATB tests. FPRD at 5–8. Subsequently, SSI produced a General Educational Development test (GED) for one of the students, establishing

SSI appealed the FPRD. In the appeal before Judge Layton, SSI argued its liability should be reduced or eliminated. SSI asserted that Lozano, the students, and FSA should bear some or all the culpability for the distribution of money to ineligible students. SSI also argued that its liability should be offset by its good faith actions, and its liability should be reduced or eliminated, contending the length of time elapsed during FSA's program review violated SSI's right to due process. Judge Layton rejected SSI's arguments and upheld the entire amount of the liability. SSI has since appealed to me. I now turn to my legal analysis.

Analysis

An institution has a fiduciary duty to the Department to ensure Title IV funds are only distributed to eligible students.[4] An institution "is subject to the highest standard of care and diligence" in administering Title IV programs and accounting for funds it receives.[5] A student must qualify for Title IV assistance prior to distribution of Title IV funds.[6] Thus, even where students who improperly receive funds actually graduate from programs, the institutions are still liable to the Department for the ineligible distribution of funds.[7]

In this case, the undisputed facts show that SSI distributed Title IV funds to 14 students who were not eligible to receive them.[8] These students did not satisfy the basic requirement for Title IV eligibility of holding a high school diploma or GED, and as detailed in the FPRD, SSI did not properly administer ATB tests to these students.[9] As the Department's fiduciary, SSI is liable for the return of those funds to the Department. SSI makes a series of arguments about why its liability should be lessened. I will consider each argument in turn.

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that student's eligibility apart from the falsified ATB tests. Therefore, FSA reduced the liability to the amount of funds distributed to the other 14 students, which is the $169,038.98 at issue in this appeal. Decision at 2.

[4] 34 C.F.R. § 668.82(a) ("A participating institution or a third-party servicer that contracts with that institution acts in the nature of a fiduciary in the administration of the Title IV, HEA programs. To participate in any Title IV, HEA program, the institution or servicer must at all times act with the competency and integrity necessary to qualify as a fiduciary."); 34 C.F.R. § 668.82(b) ("In the capacity of a fiduciary—
(1) A participating institution is subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs; and
(2) A third-party servicer is subject to the highest standard of care and diligence in administering any aspect of the programs on behalf of the institutions with which the servicer contracts and in accounting to the Secretary and those institutions for any funds administered by the servicer under those programs."); *In re Hope Career Institute*, Dkt. No. 06-45-SP, U.S. Dep't of Educ. (Jan. 15, 2008) at 3.

[5] 34 C.F.R. § 668.82(b)(1).

[6] *In the Matter of Fortis College*, Dkt. No. 12-55-SP, U.S. Dep't of Educ. (Mar. 17, 2015) (Decision of the Secretary) at 7 (citing *In re Hamilton Professional Schools*, Dkt. No. 02-49-SP, U.S. Dep't of Educ. (June 11, 2003)).

[7] *Id*. (citing *In re Hope Career Institute*, Dkt. No. 06-45-SP, U.S. Dep't of Educ. (Jan. 15, 2008); *In re Avalon Beauty College*, Dkt. No. 04-24-SP, U.S. Dep't of Educ. (Dec. 20, 2005)); *In re Hamilton Professional Schools*, Dkt. No. 02-49-SP, U.S. Dep't of Educ. (June 11, 2003) ("If a student was never eligible to receive Title IV funds, the fact that the student graduated does not cure his or her ineligibility . . . . [S]tudents' ultimate completion of their academic program[s] does not mitigate the fact that an institution awarded Title IV assistance to students who were ineligible to receive the assistance under the standards measured by Congress.").

[8] Decision at 2.

[9] FPRD at 5–8.

Equitable Offset

First, SSI argues that I should provide an "equitable offset."[10] Specifically, SSI asserts that I should reduce the amount of liability because the institution self-reported the wrongdoing in question, demonstrating that it acted in good faith.[11]

An equitable offset is a remedy that reduces "a grantee's liability by allowing a grantee to substitute disallowed costs with expenditures that were not made with Federal funds but were made in furtherance of the purpose of the grant."[12] An appellant bears the burden of demonstrating that an offset "achieves the aims of the governing statute and regulations and the particular expenditure constitutes an allowable cost under the Federal grant program."[13]

The doctrine of equitable offset is inapplicable in this case. SSI is a fiduciary of the Department and is liable for the return of improperly distributed Title IV funds. In the context of this case, SSI has no non-federal expenditures "made in furtherance of the purpose of [a] grant" with which to offset its liability.[14] Accordingly, it cannot prevail in its request for an equitable offset.[15]

I further note that SSI's good faith is not relevant to the case before me. Acting in good faith is already considered in the basic legal requirement that SSI demonstrate the "highest standard of care and diligence" as the Department's fiduciary while voluntarily participating in Title IV programs.[16] As Judge Layton stated in his Decision, the amount for which SSI is liable is simply the amount of funds erroneously distributed, which the Department must recover.[17] It is not punitive in nature and, therefore, is not subject to reduction based on intervening good behavior.[18]

I next turn to SSI's argument that its liability should be shared by others.

Apportionment of Liability

SSI asserts that its liability should be reduced because the students in question "received a benefit and obtained a skill," and that eight of them are now licensed cosmetologists.[19] Further, SSI asserts that Lozano and the students in question should share a portion of the liability. SSI asserts that the students paid Lozano and another SSI employee, Rachel Garcia, to falsify the ATB tests.[20]

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[10] SSI Brief at 2, 5.
[11] *Id*. at 6.
[12] *Application of the Pennsylvania Dep't of Educ.*, Dkt. No 11-33-R, U.S. Dep't of Educ. (Dec. 29, 2014) (Decision of the Secretary) at 6.
[13] *Georgia Dep't of Educ.*, Dkt. No. 12-35-R, U.S. Dep't of Educ. (Nov. 4, 2016) (Decision of the Secretary) at 6 (quoting *Application of the Pennsylvania Dep't of Educ.*, Dkt. No 11-33-R at 6).
[14] *Application of the Pennsylvania Dep't of Educ.*, Dkt. No 11-33-R at 6.
[15] *Id*.
[16] 34 C.F.R. § 668.82(b)(1).
[17] Decision at 2.
[18] *Id.*
[19] SSI Brief at 6, 10–11. SSI does not make any assertion about the professional status of the other former students.
[20] *Id*. at 7.

I first note that students cannot become retroactively eligible for Title IV funds.[21] The accomplishments of the students in question cannot cure the falsified ATB tests, i.e. retroactively demonstrate an ability to benefit by graduating from a program or obtaining professional licenses.[22] Rather, the determination of eligibility had to be made prior to distribution of the Title IV funds, which is not the case here.

SSI also fails to persuade me that FSA erred by not apportioning part of its liability to Lozano and the students in question. The Department has previously found institutions liable for the actions of rogue or otherwise malfeasant employees whose conduct breached the institution's fiduciary duties under Title IV.[23] SSI does not persuade me to disturb this well-settled issue. Furthermore, it was SSI and not the students in question who had a fiduciary duty to the Department. Regardless of the students' conduct, SSI was "in the best position to oversee those within the school who administer FSA funds . . . [and] assume[d] the responsibility for proper administration of the federal Title IV program."[24] Thus, SSI bears the responsibility for failing to act with the highest standard of care and diligence in making certifications that students qualified for Title IV loans.[25]

Inherent in SSI's argument is the notion that it should be allowed to retain some portion of the ineligible funds it received while the Department seeks repayment of such amounts from Lozano and the students. SSI does not convincingly argue why the Department would undertake such an endeavor. SSI was the Department's fiduciary regarding all the funds in question. SSI alone is liable to the Department for these funds, regardless of whether SSI itself might have a claim against other parties for their conduct. I reject SSI's arguments that the Department should apportion the liability.

Last, I turn to SSI's argument that the Department engaged in undue delay and violated SSI's right to due process in resolving this case.

Undue Delay and Due Process

SSI argues that I should reduce its liability because FSA infringed on its right to due process. Due process is flexible and calls for such procedural protections as a particular situation demands.[26] Due process in an administrative proceeding is not the same as in a judicial proceeding, because administrative and judicial proceedings are inherently different.[27] The key

[21] *In the Matter of Galiano Career Academy*, Dkt. No. 11-71-SP, U.S. Dep't of Educ. (July 10, 2015) (Decision of the Secretary) at 4.
[22] *Id*.
[23] *In the Matter of the University of Birmingham, the Shakespeare Institute*, U.S. Dep't of Educ., Dkt. No 99-83-SP (Mar. 30, 2001) at 3 (citing *In re Huston-Tillotson College*, Dkt. No. 99-2-SP (Feb. 10, 2000) at 2 ("an institution is subject to liability arising from the criminal conduct of its employees in administering the Title IV programs.")).
[24] Decision at 2.
[25] 34 C.F.R. § 668.82(b)(1).
[26] *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013); *State of South Carolina*, Dkt. No. 13-43-O, U.S. Dep't of Educ. (Feb. 26, 2016) (Decision of the Secretary) at 5.
[27] *Id*.

provision is some form of hearing that allows the individual a meaningful opportunity to be heard.[28]

SSI asserts that FSA both engaged in undue delay and failed to give SSI notice prior to discharging the loan balances of the students in question. SSI argues the passage of time prior to issuance of the FPRD resulted in "a chilling effect on the students' participation in this proceeding" and the denial of "access to witnesses and information that could assist it in these proceedings."[29]

FSA conducted its program review of SSI from April 22–26, 2013.[30] FSA issued its Program Review Report on July 10, 2013, and its FPRD on March 22, 2016.[31] The record does not indicate what circumstances resulted in 32 months elapsing between the issuance of the Program Review Report and the FPRD. Nevertheless, SSI does not persuasively argue that FSA infringed on its rights.

The basis of SSI's liability is its erroneous distribution of Title IV funds, the amount of which is uncontested. As discussed earlier in this decision, I reject SSI's theories regarding equitable offset and apportionment of liability. Therefore, any evidence or witnesses regarding these theories are irrelevant to my analysis. SSI has failed to show how the duration of FSA's review process materially infringed on its due process right to notice and a hearing. SSI incurred its liability the moment it distributed Title IV funds to students who were not eligible to receive them. SSI's liability was in no way exacerbated by the subsequent timetable of the investigation, nor does SSI point to any legally established deadline FSA was obligated to meet during its program review. SSI has since availed itself of the Department's administrative appeal process under Part 668, Subpart H of Title 34 of the Code of Federal Regulations, through which SSI's right to due process was safeguarded.

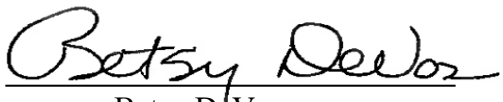
Likewise, I reject SSI's assertion that FSA infringed on its rights by discharging student loan balances. FSA followed the regulation for false certification loan discharge in 34 C.F.R. § 685.215.[32] Under that regulation, the Secretary discharges the loans of students who were falsely certified for Title IV eligibility.[33] As discussed above, the discharge of these loans had no bearing on SSI's liability. SSI had no right to notice prior to the discharges, nor does 34 C.F.R. § 685.215 require such notice.

[28] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1975); *State of South Carolina*, Dkt. No. 13-43-O at 5.
[29] SSI Brief at 14–15.
[30] FPRD at 4.
[31] *Id.*
[32] 34 C.F.R. § 685.215(a)(1) (2016) ("The Secretary discharges a borrower's (and any endorser's) obligation to repay a Direct Loan in accordance with the provisions of this section if a school falsely certifies the eligibility of the borrower (or the student on whose behalf a parent borrowed) to receive the loan.").
[33] *Id*.

ORDER

ACCORDINGLY, the Decision of Administrative Judge Layton is hereby AFFIRMED. SSI is hereby ordered to pay to the U.S. Department of Education the sum of $169,038.98 as required by the FPRD.

So ordered this 13th day of November 2020.



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