UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY

In the matter of

HIWASSEE COLLEGE

Docket No. 17-54-SP

Federal Student Aid Proceeding

Respondent.

DECISION OF THE SECRETARY[1]

Hiwassee College (Hiwassee) has appealed the December 31, 2018, decision (Decision) issued by Chief Administrative Judge Ernest C. Canellos. The Decision upheld liabilities totaling $384,294.14[2] against Hiwassee assessed by the office of Federal Student Aid, Kansas City office (hereinafter alternatively referred to as "FSA" and "FSA Kansas City") in its July 28, 2017, Final Program Review Determination (FPRD).

Based on the following analysis, I affirm the administrative judge's Decision.

Background

At one time, Hiwassee was a private, nonprofit higher education institution in Madisonville, Tennessee, participating in federal student aid programs under Title IV of the Higher Education Act of 1965 (HEA), as amended, 20 U.S.C. § 1070, *et seq*. (Title IV).[3] From

[1] Secretary of Education Betsy DeVos resigned as Secretary effective January 8, 2021. In accordance with 20 U.S.C. § 3412(a)(1) which states in pertinent part ". . . in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary," Deputy Secretary Mitchell M. Zais began his service as the Acting Secretary upon the vacancy.

[2] FSA notes that the administrative judge erroneously calculated the total liabilities figure. FSA Brief to the Secretary at 1 ("The Initial Decision calculated the total liabilities by using the correct liabilities but reached an incorrect conclusion in saying that Hiwassee owes liabilities of $344,289.14."). As discussed in my analysis below, I will use the correct total of liabilities, $384,294.14, in this decision. *See infra* n.35.

[3] Hiwassee College closed after its spring 2019 semester ended on May 10, 2019. Monica Kast, *Hiwassee College to close after 170 years for financial reasons*, KNOXNEWS.COM, (Mar. 28, 2019, 5:10pm) located at https://www.knoxnews.com/story/news/education/2019/03/28/hiwassee-college-close-after-170-years/3303581002/ (last visited Jan. 14, 2021).

December 17 through December 21, 2012, FSA conducted a program review of Hiwassee's policies and procedures regarding institutional and individual student eligibility.[4] Soon afterwards, FSA placed Hiwassee on Heightened Cash Monitoring 2 status (HCM2), which requires the institution to provide institutional funds to Title IV eligible students and then seek reimbursement from the Secretary.[5]

On April 4, 2013, FSA issued a program review report (PRR) containing 34 proposed findings of non-compliance with the regulations implementing Title IV, broadly encompassing recordkeeping deficiencies, mismanagement of funds, and failure to properly disclose information.[6] Hiwassee submitted responses to FSA's proposed findings seeking to explain and resolve them.[7] While still deliberating on Hiwassee's responses, in November 2014, FSA informed Hiwassee it intended to undertake a "Reimbursement Program Review" to evaluate Hiwassee's reimbursement submissions under its HCM2 status.[8] This Reimbursement Program Review began in December 2014.

On July 28, 2017, FSA issued its FPRD, which retained only eight unresolved findings, as follows:

- Finding 1 (Return to Title IV Calculation Errors)
- Finding 2 (Over Award – Financial Need and Cost of Attendance Exceeded)
- Finding 3 (Verification Incomplete/Incorrect)
- Finding 4 (Federal Pell Grant Overpayment)
- Finding 6 (Satisfactory Academic Progress Policy Not Adequately Developed and Monitored)
- Finding 10 (Failure to Document PLUS Loan Denial Prior to Awarding Additional Unsubsidized Loan Funds to Dependent Students)
- Finding 11 (Federal Direct Loan – Incorrect Grade Level)
- Finding 12 (Improperly Documented Dependency Overrides)

FSA found Hiwassee liable for $410,014.32 based on the eight unresolved findings. Hiwassee appealed the FPRD to the Department's Office of Hearings and Appeals (OHA), which assigned the administrative judge to hear the case.

On appeal before OHA, Hiwassee made no arguments against FSA's Findings 2, 4, 10 and 11.[9] Hiwassee bore the burden of demonstrating some error in FSA's findings to provide

[4] Decision at 1.
[5] Hiwassee Brief to OHA, Ex. R-3 (Email dated Jan. 7, 2013, from FSA to Hiwassee); Hiwassee Brief to the Secretary, App'x at App. 505 (Letter dated Jan. 7, 2013, from FSA to Hiwassee at 1); 34 C.F.R. § 668.162(d) ("Under the heightened cash monitoring payment method, an institution must credit a student's ledger account for the amount of title IV, HEA program funds that the student or parent is eligible to receive, and pay the amount of any credit balance due under § 668.164(h), before the institution" seeks reimbursement from the Department.).
[6] PRR at 4–5, 8–69.
[7] FPRD, App'x G – Hiwassee's Response to the Program Review Report.
[8] Hiwassee Brief to the Secretary, Ex. R-16 (Email dated Nov. 12, 2014, from FSA to Hiwassee).
[9] Decision at 3–4 ("Hiwassee has not affirmatively defend[ed] against . . . these four findings, Findings 2, 4, 10 and 11.").

grounds for the judge to reverse them.[10] Because Hiwassee did not provide a basis to challenge these findings, Hiwassee failed to carry its burden, and the administrative judge summarily affirmed these four findings, upholding FSA's collective liability demand based on those four findings of $11,957.[11]

The administrative judge analyzed Hiwassee's arguments about the four remaining findings on appeal, Findings 1, 3, 6, and 12 listed above. Below I review the findings and the administrative judge's related holdings.

Finding 1 - Return to Title IV Calculation Errors

On Finding 1, FSA found Hiwassee liable for $39,703.94 for erroneously calculated returns of Title IV funds based on student withdrawals.[12] After reviewing a reconstruction of the Title IV files created by Hiwassee, FSA found that certain Title IV returns in award years 2010–2011, 2011–2012, and 2012–2013 were "paid late, not paid, improperly paid, improperly calculated, or not calculated in spreadsheet format."[13]

Hiwassee argued that FSA's calculation of liability was erroneous because it either miscalculated or duplicated the amounts owed based on certain students' ledgers or because FSA failed to include sufficiently specific demands in the original program review report.[14] FSA agreed with Hiwassee's arguments regarding certain students, but disagreed that liability should be waived for those students who FSA misidentified in the program review report.[15] The administrative judge reduced liabilities based on FSA's admitted miscalculations, but found that the FPRD corrected errors in the program review report and provided sufficient notice to Hiwassee of those liabilities.[16] Therefore, the administrative judge affirmed Finding 1 as modified, reducing the liability to $36,599.69.[17]

Finding 3 - Verification Incomplete/Incorrect

On Finding 3, FSA found Hiwassee liable for $257,712.21 for failing to verify students' eligibility to receive Title IV funds.[18] Hiwassee failed to use supporting documentation to verify

[10] 34 C.F.R. § 668.116(d) ("An institution or third-party servicer requesting review of the final audit determination or final program review determination issued by the designated department official shall have the burden of proving the following matters, as applicable:
(1) That expenditures questioned or disallowed were proper.
(2) That the institution or servicer complied with program requirements."); *360 Degrees Beauty Acad. (TX)*, Dkt. No. 18-28-SP, U.S. Dep't of Educ. (Nov. 13, 2020) (Decision of the Secretary) at 3 (holding that an institution appealing an audit determination or program review determination "bears the burden of showing that all expenditures were proper and that the institution complied with program requirements.").
[11] Decision at 3–4. Hiwassee does not argue the validity of these findings in the appeal before me. Therefore, I need not discuss them further in this decision.
[12] FPRD at 4–8.
[13] *Id.* at 6.
[14] Decision at 4.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] FPRD at 14.

student information, such as household size, income, and taxes, in students' applications for student aid.[19] Hiwassee's verification was deficient in three distinct categories: failure to assure that its procured documents matched the information on the Institutional Student Information Records (ISIRs); failure to obtain any documentation; and 13 instances where Hiwassee accepted tax documents rather than the required documents.[20] During the pendency of the appeal, FSA reduced the liability figure to $212,654.74 based on Hiwassee demonstrating that the tax returns it used for 13 students contained identical information to that in their ISIRs.[21]

Hiwassee asserted that FSA was not specific enough in breaking down its violations and liabilities for each student in the FPRD; therefore, Hiwassee could not adequately defend itself from FSA's assertion that violations occurred.[22] Hiwassee also argued that FSA applied a new regulatory requirement to half the students cited for award years prior to issuance of that rule.[23] Hiwassee further argued that FSA's calculation of liabilities was excessive, assessing 100 percent liability for funds disbursed to certain students based on *de minimis* noncompliance with the regulations.[24]

The administrative judge concluded that FSA "identified which violation attached to which student, so as to thereby provide adequate notice" to Hiwassee of the violations.[25] The administrative judge also found that FSA rebutted Hiwassee's argument that it erroneously applied new regulations *ex post facto* under this finding.[26] Finally, the administrative judge held that Hiwassee acted as the Department's fiduciary as a participant in Title IV programs, placing the burden of proof on Hiwassee. Despite having adequate time to do so, Hiwassee failed to carry its burden to demonstrate errors in this finding.[27] Therefore, the administrative judge upheld Finding 3 in the amount of $212,654.74.

Finding 6 - Satisfactory Academic Progress Policy Not Adequately Developed and Monitored

On Finding 6, FSA found Hiwassee liable for $123,082.71 for "violations of the 150 [percent] program length rules; inadequate monitoring and enforcing of qualitative and/or quantitative standards; and failure of individual students' academic progress, as required."[28] Hiwassee argued that FSA miscalculated the amount of liability for two students and erroneously assessed liabilities for 14 students in the FPRD who were not listed in the program review report.[29] The administrative judge found that FSA correctly made its calculations and that assessment of liability for the 14 students in the FPRD constituted sufficient notice of that

[19] *Id.* at 11.
[20] Decision at 4.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 4–5; Hiwassee Brief to OHA at 12 (citing Free Application for Federal Student Aid (FAFSA), Information to Be Verified for the 2012-2013 Award Year, 76 Fed. Reg. 41,231–01 (July 13, 2011)).
[24] *Id.* at 5.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

liability.[30] After evaluating the record, the administrative judge affirmed Finding 6 in the total amount of $123,082.71.[31]

Finding 12 - Improperly Documented Dependency Overrides

On Finding 12, FSA found Hiwassee liable for $5,768 for improperly documenting its decision to override the dependency status of two students. The FPRD stated that [a]n individual who does not qualify as an independent student may be considered an 'independent student' under section 480(d)(7) of the HEA if a financial aid administrator makes a documented determination of independence by reason of other unusual circumstances."[32] Hiwassee argued that each student's circumstances justified the override and that FSA's policy guidance gives institutions "great latitude in making such judgment."[33] The administrative judge agreed with Hiwassee and held that Hiwassee was not liable for $5,768 because Finding 12 constituted an error.[34]

The administrative judge summarily upheld Findings 2, 4, 10, and 11, upheld Findings 3 and 6 based on his legal analysis, upheld Finding 1 as modified, and reversed Finding 12. The resulting liability against Hiwassee totals $384,294.14.[35]

Hiwassee's Collateral Arguments

Aside from discussing FSA's findings, Hiwassee argued that FSA violated Hiwassee's right to due process throughout its program review. Primarily, Hiwassee cited the length of time—more than 4 1/2 years—that elapsed during the program review, the imposition of HCM2 status during the program review, and the fact that FSA both removed Hiwassee from HCM2 and issued the FPRD shortly after Hiwassee met with FSA staff in Washington, DC, to request resolution of the program review.[36]

---

[30] A PRR "is the preliminary report to the institution of the findings discovered during the review of the institution[']s records." Hiwassee Brief to OHA, Ex. R-7 (FSA Program Review Guide for Institutions 2009) at 8-3. After receiving an institution's responses to the findings in the PRR, the Department issues an FPRD. *Id*. at 9-1. The FPRD declares the final status of each finding as either resolved, resolved with comments, or "with Final Determinations," meaning the finding contains liabilities or requires action by the institution. *Id*. at 9-3. FSA is not precluded from finding additional liabilities in its FPRD beyond what it cited in the PRR, which is by definition "preliminary." With the notice provided by the FPRD, an institution thereafter has a meaningful opportunity for a hearing in the Department's appeals process, which satisfies the institution's right to due process. *In re State of South Carolina*, Dkt, No. 13-43-O, U.S. Dep't of Educ. (Decision of the Secretary) (Feb. 26, 2016) at 5.

[31] Decision at 6.

[32] FPRD at 27.

[33] Decision at 6; FPRD at 28 (citing Dear Colleague Letter GEN-03-07; 2011–2012 & 2012–2013 Federal Student Aid Application and Verification Guide, Chapter 2).

[34] Decision at 6.

[35] The administrative judge erroneously concluded that Hiwassee's total liability was $344,289.14. Decision at 6. FSA asserts that the correct total is $382,148.44, but FSA's calculation is also erroneous. FSA Brief to the Secretary at 1. The total of the four upheld liability figures, $11,957, $212,654.74, $123,082.71, and $36,599.69, is $384,294.14. On appeal, Hiwassee makes no mention of the calculation error and does not offer any basis to contradict this revised calculation of the total liability figure. Accordingly, I will use the corrected total for this decision.

[36] *Id.* at 3.

With regard to its due process argument, the administrative judge concluded "my jurisdiction in this proceeding is limited – I can only make a determination as to findings with monetary demands in the FPRD and have no jurisdiction to review FSA's action relative to the HCM2 placement and continuation."[37] He also held that there is no statute of limitations establishing a deadline for FSA to conclude a program review and issue an FPRD under 34 C.F.R. Part 668 Subpart H.[38] Finally, he held that Hiwassee had no recourse under the equitable defense of laches—a defense based on the complaining party's unreasonable, prejudicial delay in bringing a legal action—because past departmental cases held laches does not apply in audits or program review actions.[39] Therefore, the administrative judge did not alter his decision based on Hiwassee's collateral arguments.

Hiwassee has appealed the administrative judge's Decision to me. I now turn to my analysis of the applicable law and Hiwassee's arguments on appeal.

Analysis

An institution has a fiduciary duty to the Department to ensure that Title IV funds are only disbursed to eligible students.[40] An institution "is subject to the highest standard of care and diligence" in administering Title IV programs and accounting for funds it receives.[41] To ensure compliance with these rules, FSA conducts program reviews of institutions participating in Title IV programs. These reviews include examination of policies and procedures, review of individual student financial aid and academic files, and other academic and fiscal records.[42] Institutions are obligated to retain the types of records enumerated in the regulations to demonstrate their compliance with all Title IV rules and to provide such records while otherwise

[37] *Id*. The appealing institution in a Subpart H hearing has the burden to prove "(1) That expenditures questioned or disallowed were proper" or "(2) That the institution or servicer complied with program requirements," as applicable to the case at hand. 34 C.F.R. § 668.116(d). At the conclusion of the appeal, the hearing official issues a final decision which is limited in scope to the final audit determination or final program review determination. 34 C.F.R. § 668.118(b) ("The hearing official's decision 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."). The FPRD did not have the effect of placing Hiwassee on HCM2 status. HCM2 status was not an appealable issue in the case before the administrative judge or the appeal presently before me.

[38] The administrative judge drew the distinction between Subpart H audit actions and Subpart G fine actions, the latter of which are subject to the statute of limitations for civil penalties at 28 U.S.C. § 2462. Decision at 3 (citing *In re Lincoln Univ.*, Dkt. No. 13-68-SF, U.S. Dep't of Educ. (Sept. 13, 2016)).

[39] *Id.* (citing *In re Comm. Coll. System of New Hampshire*, Dkt. No. 09-35-SA, U.S. Dep't of Educ. (Jun. 21, 2010)).

[40] 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."); *In re Hope Career Inst.*, Dkt. No. 06-45-SP, U.S. Dep't of Educ. (Jan. 15, 2008) at 3.

[41] 34 C.F.R. § 668.82(b)(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.").

[42] *Id.* § 668.24(f)(1) ("An institution that participates in any title IV, HEA program and the institution's third-party servicer, if any, shall cooperate with an independent auditor, the Secretary, the Department of Education's Inspector General, the Comptroller General of the United States, or their authorized representatives, a guaranty agency in whose program the institution participates, and the institution's accrediting agency, in the conduct of audits, investigations, program reviews, or other reviews authorized by law.").

cooperating with FSA when it undertakes program reviews and audits.[43] An institution must provide evidence to the Department that all funds were distributed to eligible students.[44]

On appeal, Hiwassee makes three categories of arguments. First, Hiwassee repeats the series of arguments it made before the administrative judge that FSA acted in a "capricious and unlawful" manner throughout the program review process.[45] Hiwassee asks me to eliminate the entirety of its liability because "justice requires that the liabilities be set aside."[46] Second, Hiwassee argues that the administrative judge "misunderstood a number of other serious flaws in the FPRD's findings."[47] Third and finally, Hiwassee argues that FSA Kansas City has engaged in a pattern of behavior that "depart[s] from FSA's mission."[48]

I consider each of Hiwassee's arguments in turn.

Alleged Capricious and Unlawful Program Review

Hiwassee's argument about FSA's program review process is itself subdivided into several different topics. Hiwassee argues that it should be relieved of liability because the amount of time elapsed during the program review process both violated FSA's internal rules and violated Hiwassee's right to due process. Hiwassee also argues that it should be relieved of liability because a second program review conducted by FSA demonstrates that FSA lacks integrity. Finally, Hiwassee asserts that FSA's decision to institute and maintain HCM2 status hurt Hiwassee sufficiently that it deserves to be relieved of liability. I address each of these topics below.

Time Elapsed During the Program Review

Hiwassee advances two alternative grounds for relieving it of liability due to FSA's "extreme delay"[49] in concluding its program review: 1) the length of the delay violated a Department policy and 2) the length of the delay violated Hiwassee's right to due process. I separately consider each assertion.

I. Hiwassee's Assertion the Length of Delay Violated Department Policy

Neither the HEA nor Department regulations require FSA to complete a program review within a specified time. Nevertheless, Hiwassee argues that the Department violated a Department policy by not issuing the FPRD "within 30 to 90 days after the Department's

[43] *Id.* § 668.24 (listing types of records that institutions are required to maintain and obligating institutions to provide them for audits and program reviews).
[44] *Id.* § 668.82(b)(1).
[45] Hiwassee Brief to the Secretary at 1.
[46] *Id.* at 2.
[47] *Id.* at 12.
[48] *Id.* at 13.
[49] *Id.* at 7.

receipt" of Hiwassee's response to the PRR.[50] Hiwassee asserts that this time range, quoted from FSA's Program Review Guide, constitutes a binding rule of the Department.[51]

FSA asserts that the Program Review Guide does not establish a binding deadline by which FSA must issue an FPRD. Rather, it provides that the FPRD is "[t]ypically . . . issued to the institution within 30 to 90 days."[52] The Program Review Guide also lists multiple factors that might extend the timetable for issuing an FPRD. Such factors include the need for a file review and whether there are multiple file reviews, the necessity of projecting liabilities, the need to seek concurrence or information from other offices, and the shifting priorities of the Department's reviewers.[53]

In a past decision, *Institute of Medical Education*, then-Secretary Arne Duncan held that an institution making Hiwassee's argument "must demonstrate that the delay between the program review and the issuance of the PRR was unreasonable, unexplained or prejudicial, as well as how FSA's failure to act during this period of time hindered [the institution's] ability to respond to the PRR. The mere passage of time does not *per se* constitute an unreasonable delay."[54] The holding in that case did not find that the Program Review Guide or any other authority imposes a specific deadline to conclude a program review.

Hiwassee focuses exclusively on the amount of time expended during the program review, asserting that it was extraordinary and unjustified. These arguments amount to an assertion that the passage of time *per se* constituted an unreasonable delay and, in essence, bars FSA from enforcing the applicable Title IV rules. Under the holding in *Institute of Medical Education*, an argument asserting an unreasonable delay unsupported by a showing of prejudice is insufficient to set aside liabilities found in an FSA program review. Furthermore, FSA asserts that the extended timetable in this case was justified because Hiwassee failed to provide a "complete and final response to the Program Review Report."[55] It was also justified by Hiwassee's "re-submittal of its policy and procedural responses" and "the six file reconstructions that the PRR required the school to complete."[56] FSA has described a basis for the time period of the review and Hiwassee has failed to show specifically how the passage of 4 1/2 years prejudiced it. Accordingly, I reject Hiwassee's argument.

II. Hiwassee's Assertion FSA's Delay Violated its Right to Due Process

In broad terms, Hiwassee argues that the "profound delay" in issuing the FPRD constitutes a due process violation because "delay is an important factor in sustaining

[50] *Id.* at 8; Hiwassee Brief to OHA, Ex. R-7 (FSA Program Review Guide for Institutions 2009) at 9-1 ("Typically the FPRD is issued to the institution within 30 to 90 days after the Department's receipt of a complete and final response to the Program Review Report.").
[51] Hiwassee Brief to the Secretary at 8.
[52] Hiwassee Brief to OHA, Ex. R-7 (FSA Program Review Guide for Institutions 2009) at 9-1.
[53] FSA Brief to the Secretary at 34; Hiwassee Brief to OHA, Ex. R-7 (FSA Program Review Guide for Institutions 2009) at 9-1.
[54] *In re Inst. of Med. Educ*., Dkt. Nos. 12-59-SA, 13-58-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Aug. 18, 2014) at 5.
[55] FSA Brief to the Secretary at 35.
[56] *Id*. at 36.

enforcement actions."[57] Hiwassee points to past departmental administrative decisions in support of its argument, in particular *Decker College*.

In that case, FSA issued an FPRD to Decker College (Decker), a post-secondary career college.[58] Among other things, the FPRD imposed a $31,595,885 liability for Title IV student aid disbursements for courses that FSA held were not accredited.[59] Decker appealed to the Department's OHA. On appeal, Decker and FSA agreed that the pertinent issue was a letter from Decker's accreditor, the Council on Occupational Education (COE), to FSA stating that the courses were not accredited.[60] This letter was the sole evidence upon which FSA relied to impose the financial liability. At the time, Decker was in bankruptcy and, simultaneously with the administrative appeal, Decker and COE were participating in a case in Bankruptcy Court.[61] Decker and COE agreed to have the Bankruptcy Court judge conduct a hearing on the validity of COE's letter to FSA. Decker and FSA agreed to stay the case before the Department pending the Bankruptcy Court's interim ruling.[62]

On the issue of the validity of COE's letter, the Bankruptcy Court sided with Decker, finding the letter was erroneous. However, after the stay of the OHA case was lifted, FSA's position remained unchanged. FSA continued to advocate for a finding of liability based on the validity of COE's letter even though this position conflicted with the Bankruptcy Court judge's finding. The OHA judge took official notice of the Bankruptcy Court judge's finding but conducted his own analysis. He ordered the parties to submit arguments and evidence.

FSA argued that the OHA judge should impose a stay pending final resolution of Decker's bankruptcy case, because the Bankruptcy Court judge did not certify the issues ruled on for interlocutory appeal to federal district court under 28 U.S.C. § 158.[63] The OHA judge rejected this argument, noting that the Bankruptcy Court judge already opined that the balance of the bankruptcy case "cannot be resolved until after this administrative claim is addressed."[64]

In essence, FSA's request would create "a permanent bar to either proceeding" which would "forever freeze this action" because both OHA and the Bankruptcy Court would perpetually stay their cases pending resolution in the other venue.[65] The OHA judge noted that to hold "in abeyance forever" the proceeding would be an unconstitutional denial of Decker's right to due process, because "no court has ever approved a permanent bar to a decision."[66] The OHA judge also noted that the accreditor's "letter at issue . . . is over 10 years old" and the

[57] Hiwassee Brief to the Secretary at 9.
[58] *In re Decker Coll.*, Dkt. No. 06-22-SP, U.S. Dep't of Educ. (Mar. 15, 2016) at 1.
[59] *Id*.
[60] *Id*. at 1–2.
[61] *In re Decker Coll.*, *Inc*., No. 05-61805, 2012 WL 6136708 (Bankr. S.D. Ky. 2012).
[62] *Id*. at 1–2.
[63] 28 U.S.C. § 158(a) ("The district courts of the United States shall have jurisdiction to hear appeals . . . (2) from interlocutory orders and decrees . . . of bankruptcy judges.").
[64] *In re Decker Coll.*, Dkt. No. 06-22-SP, U.S. Dep't of Educ. (Mar. 15, 2016) at 6.
[65] *Id*.
[66] *Id*. at 7.

Supreme Court has held that, to satisfy due process, a hearing must be held "at a meaningful time" and "[a]t some point, a delay . . . would become a constitutional violation."[67]

Hiwassee does not draw specific parallels between its case and the facts or holding in *Decker College*. However, Hiwassee argues that the 4 1/2 years elapsed during the program review constitute a delay rising to the level of unconstitutional denial of due process.[68] FSA argues that I should affirm the OHA Decision, which affirmed the FPRD, as the final decision of the Department.

Hiwassee's case is not comparable to *Decker College*, where FSA argued for what would amount to a permanent stay of the case, which would forever deny Decker its right to a hearing. Here, Hiwassee is receiving the benefit of due process through the appeal presently before me. To the extent Hiwassee argues that the amount of time elapsed in its case already constitutes a *de facto* denial of due process, I disagree. As discussed above, I do not find FSA's conduct to be intentionally prejudicial, violative of its internal rules, or inconsistent with any regulation or other authority. Therefore, I reject Hiwassee's request that I set aside Hiwassee's liability solely based on the amount of time that elapsed during FSA's review process.

Nevertheless, the issuance by FSA of a FPRD 4 years after receiving Hiwassee's response to the program review, while not legally deficient, is a significant shortcoming. As a general matter, the time to complete program reviews has taken far too long. Ensuring compliance with Department regulations is a key role for the Department, but the process used by FSA must be efficient. Former Secretary Betsy DeVos instructed FSA to take prompt action to ensure program reviews are completed in a more timely manner.

FSA Kansas City's Second Review

Hiwassee next argues that FSA Kansas City opened a second "pointless" program review for the sole purpose of wastefully expending government funds appropriated for that fiscal year.[69] Hiwassee asserts that FSA Kansas City's "capricious actions . . . taint[] that first review and Kansas City's resulting findings."[70] Hiwassee indicates that FSA Kansas City closed this second review with no findings of liability.

My analysis of this case is limited in scope to the Decision issued by the administrative judge, which ruled on the findings in the FPRD. Hiwassee's assertions regarding this second program review fail to demonstrate how FSA Kansas City prejudiced Hiwassee or otherwise relates to the case before me.

---

[67] *Id*. (citing *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).
[68] Hiwassee Brief to the Secretary at 9.
[69] *Id*. (Hiwassee asserts that FSA staff admitted the sole purpose of this second review was that "'budget funds are available and [we] need to use them.'").
[70] *Id*. at 10.

FSA's Decision to Maintain Hiwassee on HCM2

Hiwassee argues that FSA imposed HCM2 status on Hiwassee "without any findings" and it refused to reevaluate this imposition based "on a policy [FSA] apparently created by itself."[71] Hiwassee states that HCM2 status was the greatest source of prejudice it experienced during the course of its review, causing "an extreme financial burden" which was "purely punitive."[72] Because "Hiwassee College has suffered enough," Hiwassee asserts that the liabilities should be set aside.[73]

The Secretary has the "sole discretion to determine the method under which the Secretary provides title IV, HEA program funds to an institution."[74] Placement on HCM2 status is not a liability and not subject to review in an appeal of an FPRD under Subpart H.[75] FSA's decision to place Hiwassee on HCM2 status was compelled by a significant number of systemic, serious, and material regulatory violations discovered by the program review team in the program review beginning in December 2012.[76] FSA communicated to Hiwassee that its HCM2 status could be reevaluated, but "the institution will remain on . . . [HCM2] until all outstanding issues of the program review or audit have been resolved."[77]

Both the administrative judge's review and my own are limited to the FPRD. The decision to place Hiwassee on HCM2 status is not within the scope of this appeal.[78] To the extent Hiwassee seeks to shoehorn the HCM2 status into this appeal, Hiwassee's argument boils down to a desire to offset its liability under the FPRD with purported financial hardship triggered by the program review process. However, it is well settled that liability for Title IV funds is neither punitive nor subject to an offset for extraneous reasons such as "good behavior," or in this case, peripheral financial hardship.[79] Funds which are disbursed erroneously or not properly accounted for must be returned to the Department.[80] Hiwassee cannot reduce its liability based on extraneous hardship. As such, I find no basis to reduce or set aside Hiwassee's liability of $384,294.14 because FSA placed the institution on HCM2 status.

Next, I consider Hiwassee's arguments pertaining to the substance of FSA's FPRD.

---

[71] *Id*. at 10–11.
[72] *Id*. at 11.
[73] *Id*. at 11–12.
[74] 34 C.F.R. § 668.162.
[75] *Id*. Part 668 Subpart H.
[76] Hiwassee Brief to the Secretary, App'x at App. 505 (Letter dated Jan. 7, 2013, from FSA to Hiwassee at 1).
[77] *Id*. at App. 508 (Letter dated Jan. 7, 2013, from FSA to Hiwassee at 4).
[78] *Compare* 34 C.F.R. § 668.162 (providing discretion to the Secretary to impose heightened cash monitoring procedures) *with* 34 C.F.R. Part 668 Subpart H (providing for reviews of audits and program reviews with no authority to review imposition of HCM2 status).
[79] *In the Matter of Salon and Spa Inst. (TX)*, Dkt. No. 16-23-SP, U.S. Dep't of Educ. (Nov. 13, 2020) (Decision of the Secretary) at 3 (holding that liability for mishandled Title IV funds "is not punitive in nature and, therefore, is not subject to reduction based on intervening good behavior.").
[80] *Id*.

Alleged Flaws in the Findings in the FPRD

In its brief on appeal, Hiwassee challenges the substance of FSA's findings in the FPRD. First, Hiwassee incorporates by reference all its arguments before the administrative judge challenging the substance of FSA's findings.[81] Next, Hiwassee asserts that FSA's most consequential error is its "failure to provide the requisite explanation for the specific liabilities assessed in Finding 3."[82] According to Hiwassee, FSA merely summarized an alleged deficiency and then referenced a table in Appendix J of the FPRD, which contains 130 data entries for a total of 67 students.[83] Hiwassee asserts that FSA's finding is lacking because "[n]owhere does the FPRD connect these entries to their corresponding alleged deficiency" leaving Hiwassee with "no way to know [for] what it is being penalized."[84] Hiwassee argues that the lack of transparency in the FPRD violates its due process right to a meaningful hearing.[85] These are the same arguments Hiwassee made before the administrative judge, who found that "FSA's claim has identified which violation attached to which student, so as to thereby provide adequate notice."[86]

Institutions are required to retain records that can be used to verify student eligibility for Title IV funds.[87] In this case, FSA indicates the institution must provide five categories of data to complete verification: 1) household size; 2) number enrolled in college; 3) adjusted gross income; 4) U.S. income tax paid; and 5) other untaxed income and benefits.[88]

In the original program review, FSA's Finding 3 indicated that Hiwassee had failed to complete the required verification process for 10 students whose records were selected while

---

[81] Hiwassee Brief to the Secretary at 12.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] Decision at 5.
[87] 34 C.F.R. § 668.16 ("To begin and to continue to participate in any Title IV, HEA program, an institution shall demonstrate to the Secretary that the institution is capable of adequately administering that program under each of the standards established in this section. The Secretary considers an institution to have that administrative capability if the institution— (f) 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 Title IV, HEA programs. In determining whether the 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.").
[88] *Id*. § 668.24(c)(1)(i) (requiring institutions to maintain copies of Student Aid Reports (SARs) or Institutional Student Information Records (ISIRs) "used to determine eligibility for title IV, HEA program funds."); *Id*. §§ 668.56(a) ("For each award year the Secretary publishes in the Federal Register notice [of] the FAFSA information that an institution and an applicant may be required to verify."), (b) ("For each applicant whose FAFSA information is selected for verification by the Secretary, the Secretary specifies the specific information under paragraph (a) of this section that the applicant must verify."); FPRD at 11.

FSA reviewed award years 2011–2012 and 2012–2013.[89] The program review report briefly described the nature of the violation for each of the 10 students.[90] As a result of these findings, among other things, FSA required Hiwassee to review all student files for award years 2010–2011, 2011–2012, and 2012–2013 who were selected for verification and provide the required information to FSA. Upon receiving Hiwassee's response, FSA "found instances where Hiwassee collected many/most of the pieces of required documentation to complete verification but did not ensure the information mirrored the information provided on the ISIR."[91] The Department made its own recalculations where possible with the information provided to determine Hiwassee's exact liability.[92] In those instances where Hiwassee had not obtained the required documentation for a given student, FSA assessed all distributed funds as liabilities.[93]

Detailed information on the students considered for these calculations appear in FPRD Appendix F (Federal Pell Grant, Federal Work-Study, and FSEOG funds), Appendix J (Federal Pell Grant, Federal Work-Study and FSEOG interest) and Appendix I (estimated actual loss for Direct Loan funds). For Finding 3, Appendix F lists students' names and social security numbers along with the amount of liability associated with each student account, the applicable award year, and the date of the funds' disbursement.[94] Appendix J shows interest calculations per student for ineligible disbursements based on the date when the funds were repaid.[95] Appendix I shows worksheets on which estimated loss calculations are made based on ineligible loans separated by award years.[96]

In the FPRD, FSA indicated that 34 C.F.R. §§ 668.16(f), 668.24(c)(1)(i), and 668.56 required Hiwassee to retain supporting documentation as evidence of the institution verifying students' eligibility for Title IV program funds.[97] In enforcing those regulations, FSA required Hiwassee to submit evidence of its compliance, which would include the prescribed information for each student. Ultimately, FSA assessed liability in Finding 3 for 67 separately identified students for whom sufficient information was not submitted by Hiwassee.[98] Hiwassee bears the burden of producing evidence of its compliance with all Title IV requirements. Hiwassee is obligated to act with the highest standard of care and diligence while demonstrating its compliance, including maintaining complete and adequate student records and providing them upon request by the Department. Hiwassee asserts it does not know for what it is being penalized or how to come into compliance, but its avenue for becoming compliant and avoiding liability is clear: Hiwassee needed to submit to FSA the complete records of the 67 students listed in the FPRD containing information demonstrating their eligibility for Title IV funds. Hiwassee did not make such a submission during the ample time allowed by the program review

[89] FPRD at 11.
[90] *Id*. at 11–13.
[91] *Id*. at 13.
[92] *Id*. at 13–14.
[93] *Id*. at 14.
[94] *Id*. at 48–58.
[95] *Id*. at 157–167.
[96] *Id*. at 146–156.
[97] 34 C.F.R. §§ 668.16(f), 668.24(c)(1)(i)), and 668.56 (providing that the Secretary "publishes in the Federal Register notice [of] the FAFSA information that an institution and an applicant may be required to verify" and uses such information to verify applicant eligibility.).
[98] Hiwassee Brief to the Secretary at 12 ("Appendix J . . . spans three pages, with over 130 entries, listing liability for 67 students.").

process, nor after it received the FPRD, nor during its appeal before the administrative judge. Therefore, I affirm the administrative judge's decision upholding FSA's Finding 3 in the FPRD.

To the extent Hiwassee seeks to incorporate its entire brief before the administrative judge into the appeal before me, I find no issue inadequately addressed by the administrative judge's Decision. In this appeal, Hiwassee bears the burden of persuasion by "explaining why the decision of the hearing official should be overturned or modified."[99] Hiwassee does not point to any particular error made by the administrative judge in his consideration of the findings that would be a basis for me to reverse or modify his rulings on the substance of FSA's FPRD. Accordingly, I affirm the entirety of his Decision.

Finally, I address Hiwassee's assertion that FSA Kansas City has engaged in a pattern of misconduct.

Alleged FSA Behavior that Departs from FSA's Mission

Hiwassee's final argument pertains to its assertion that FSA Kansas City has departed from FSA's mission.[100] For evidence of this misconduct, Hiwassee points to three previously adjudicated matters: *Decker College*,[101] discussed earlier, *Saint Catharine College v. King*,[102] and *Southwest Baptist University.*[103] Hiwassee asserts that these three cases demonstrate a pattern of erroneous behavior by FSA Kansas City severe enough that "all liabilities under the FPRD should be set aside, as they violate due process and FSA policy, and they are incompatible with basic principles of fairness and justice."[104]

Decker is discussed earlier in this decision. In that case, a Bankruptcy Court judge ruled that the letter sent by Decker's accreditor to FSA was erroneous. Both the Bankruptcy Court judge and the Department's administrative judge opined that FSA Kansas City erred by relying solely on the accreditor's letter without conducting "any examination of the facts and circumstances."[105]

The judicial analyses pertaining to *Decker* indicated a flawed process regarding that institution alone. The judges in both the OHA case and Bankruptcy Court case found that FSA failed to conduct an independent examination of Decker's circumstances, relying solely on the accreditor's letter to make a finding of liability. In Hiwassee's case, the FPRD provides an extensive and detailed basis for Hiwassee's liability grounded in FSA's review of Hiwassee's

[99] 34 C.F.R. § 668.119(a) ("Within 30 days of its receipt of the initial decision of the hearing official, a party wishing to appeal the decision shall submit a brief or other written material to the Secretary explaining why the decision of the hearing official should be overturned or modified.").
[100] Hiwassee Brief to the Secretary at 13; *see* About Us, Federal Student Aid located at https://studentaid.gov/about (last visited Nov. 23, 2020) (describing FSA's mission).
[101] *In re Decker Coll.*, Dkt. No. 06-22-SP, U.S. Dep't of Educ. (Mar. 15, 2016).
[102] Hiwassee Brief to OHA, Ex. R-33 (Transcript of Mar. 16, 2016 Hearing, *St. Catharine Coll.*, *Inc. v. King*, 3:16CV-113-GNS (W.D. Ky.)
[103] *In re Southwest Baptist Univ.*, Dkt. No. 16-32-SP, U.S. Dep't of Educ. (Mar. 7, 2017).
[104] Hiwassee Brief to the Secretary at 14.
[105] *In re Decker Coll.*, Dkt. No. 06-22-SP, U.S. Dep't of Educ. (Mar. 15, 2016) at 5.

records. There is no lack of independent examination in Hiwassee's case, setting it apart from the facts in *Decker*.

Saint Catharine involved an enforcement action by FSA Kansas City against an institution with "a lot of financial aid problems," described by a United States District Court judge as "so many problems that Saint Catharine College clean[ed] out their entire administration. There apparently were huge problems."[106] Hiwassee points to a transcript from a preliminary injunction hearing in United States District Court.[107] In it, the judge opined that Ms. Feith with FSA Kansas City dragged her feet in completing a program review report for that institution and made up rules "that had no basis."[108]

The sentiments of the District Court judge in *St. Catharine College* were not a legal finding, as the judge noted that at the time of the hearing he had reviewed only "written submissions without any evidence."[109] Furthermore, the judge's sentiments regarding FSA Kansas City's behavior were contested, as counsel for the government asserted that Ms. Feith did not make up rules during the course of the program review.[110] Furthermore, the judge's opinions were limited to FSA's actions in that case. The judge did not conclude that FSA's actions in that case impacted any program reviews for other institutions. Hiwassee does not show how the preliminary opinions of the judge in the case, regarding one institution, establish a departure from FSA's mission by the FSA Kansas City office.

Southwest Baptist involved the institution, Southwest Baptist, offering programs jointly with another institution.[111] The second institution voluntarily withdrew from its Title IV program eligibility, but neither the second institution nor FSA notified Southwest Baptist of this change in status, and thereafter Southwest Baptist disbursed Title IV funds to students in those joint programs who were no longer eligible to receive them.[112] The administrative judge primarily took umbrage with the position that neither FSA, nor the second institution, nor Southwest Baptist's accreditor had a legal obligation to notify Southwest Baptist that the second institution had withdrawn its Title IV eligibility.[113] In reversing the FPRD, the administrative judge found "no practical or timely way for an eligible institution, in a very similar position as [Southwest Baptist], to comply with the applicable Title IV regulations."[114] The judge went further to "question whether FSA's interpretation raises the question of, is this administrative process confiscatory, so as to violate the Constitutional Due Process mandates?"[115]

---

[106] Hiwassee Brief to OHA, Ex. R-33 (Transcript of Mar. 16, 2016 Hearing, *St. Catharine Coll.*, *Inc. v. King*, 3:16CV-113-GNS (W.D. Ky.)) at 6, 11.
[107] Transcript of Mar. 16, 2016 Hearing, *St. Catharine Coll.*, *Inc. v. King*, 3:16CV-113-GNS (W.D. Ky.).
[108] *Id*. at 18.
[109] Hiwassee Brief to OHA, Ex. R-33 (Transcript of Mar. 16, 2016 Hearing, *St. Catharine Coll.*, *Inc. v. King*, 3:16CV-113-GNS (W.D. Ky.)) at 11.
[110] *Id*. at 18.
[111] *In re Southwest Baptist Univ*., Dkt. No. 16-32-SP at 2.
[112] *Id*.
[113] *Id*. at 5 ("I look with disfavor at the arguments of Mercy, HBU, and FSA, that denied any responsibility to notify [Southwest Baptist].").
[114] *Id*.
[115] *Id*.

Finally, in *Southwest Baptist*, the judge disagreed with the interpretation of the regulations advanced by FSA and its legal counsel. The judge found the result of applying FSA's interpretation to an institution in Southwest Baptist's unique circumstances to be unworkable and potentially violative of an institution's right to due process. In making his ruling, the judge did not impugn FSA's motives for applying its interpretation of the regulations to Southwest Baptist or suggest FSA recognized the as-yet unadjudicated due process implications when it issued its findings. I find *Southwest Baptist* inapplicable to the case before me. Hiwassee's circumstances are completely distinguishable and do not involve notice by a partner institution terminating a joint program. Hiwassee does not show how a judge ruling against FSA in a completely separate matter constitutes a pattern of malfeasance in program reviews for other institutions.

I find no pattern of misconduct by FSA Kansas City based on the three cases cited by Hiwassee. Furthermore, even if such a controversy existed, the appeal before me is not the forum wherein relief might be sought. The appeal before me is limited to the facts as they pertain to Hiwassee's liability stemming from the findings in the FPRD. None of these additional arguments provide a basis for changing the FPRD or disturbing the Decision issued by the administrative judge.

ORDER

ACCORDINGLY, the Decision of Chief Administrative Judge Canellos is hereby AFFIRMED. Hiwassee College's financial liability of $384,294.14 is upheld.

So ordered this 14th day of January 2021.

Mitchell M. Zais

Mitchell M. Zais, Ph.D.
Acting Secretary

Washington, DC

Service List

Christopher J. Bayh, Esq.
Barnes & Thornburg LLP
1717 Pennsylvania Avenue, NW, Suite 500
Washington, DC 20006

Hannah R. Hodel, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW, Rm 6E213
Washington, DC 20202