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

Cosmetology Career Institute,

Docket No. 23-04-SA

Federal Student Aid Proceeding

ACN: 06-2016-62005
OPEID: 03275300

Respondent.

Appearances: Douglas M. Seacord, Esq., and Ronald L. Holt, Esq.,
Rouse Frets White Goss Gentile Rhodes, P.C., for
Respondent Cosmetology Career Institute

Christle Sheppard Southall, Esq., Office of the General Counsel, for
U.S. Department of Education, Federal Student Aid Office

Before: Elizabeth Figueroa, Chief Administrative Law Judge

DECISION

I. Introduction

A. Summary of this Decision

This Decision upholds the findings and liabilities in the Revised Final Audit Determination (FAD) that Respondent Cosmetology Career Institution (CCI) has challenged in this matter. Specifically, the finding of liability in the total amount of $416,091.27, for repayment of Title IV funds CCI received during the unaudited period, unreconciled funds for the award year 2016-2017, estimated losses for Direct Loans, and related cost of funds is supported and, therefore, affirmed. 34 C.F.R. § 668.118(b).[1]

[1] CCI also challenged the findings and liability in the amount of $4,772.00 assessed to it in the FAD for closed school loan discharges from one student. However, in the course of this appeal, the Department withdrew its claim for the closed school loan discharge liability, and represented that it is seeking only the $416, 091.27 liabilities established in the FAD for unaccounted funds for the unaudited period, unreconciled

B. Procedural History of this Case

On January 19, 2023, CCI, through its counsel, filed a Request for Review dated January 18, 2023.[2] The request challenges the Revised Final Audit Determination issued by the Federal Student Aid Office (FSA) of the U.S. Department of Education (Department) on December 5, 2022.

By Order Governing Proceeding issued on February 16, 2023, the Office of Hearings and Appeals (OHA) set deadlines by which the parties' briefs, including any reply brief, and any exhibits, were to be filed.

On March 30, 2023, CCI filed an opening brief, in which it asserts that it should not be held liable for the liabilities as assessed in the FAD, together with Exhibits (Exh.) R-1 through R-8. On May 12, 2023, FSA responded with a brief outlining the reasons that the FAD is supportable and the full amount of liabilities, except liabilities of $4,772.00 for closed school loan discharges, assessed in the FAD should be upheld, together with Exhs. ED-1 through 2. On May 26, 2023, CCI filed a reply brief.

The issues having been fully briefed, the administrative record is closed, and this matter is ripe for decision.

II. Jurisdiction

On December 5, 2022, FSA sent the FAD to CCI. By request for review dated January 18, 2023, CCI requested review of the FAD, pursuant to 20 U.S.C. § 1094(b) and 34 C.F.R. § 668.113. CCI's request for review was received by the Administrative Actions and Appeals Service Group, U.S. Department of Education (AAASG), on January 19, 2023, and was, therefore, timely filed within 45 days of CCI's receipt of the FAD, as required by 20 U.S.C. § 1094(b)(1) and 34 C.F.R. § 668.13(b). OHA has authority to hear this case. 20 U.S.C. § 1234; 34 C.F.R. § 668.117. Jurisdiction is established.

III. Findings of Fact

Based on the evidence presented by the parties, I make the following findings of fact:

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funds for the award year 2016-2017, and estimated losses for Direct Loans, plus costs of funds. Brief of Federal Student Aid at 2. FSA stated the liability amount as $416,091.17 upon withdrawing its claim for school loan discharges, but later stated the liability amount as $416,901.27. *Id*. at 2 and 8. The correct aggregate amount for the claims that remain is $416,901.27. *See* Finding of Fact 12 on pages 4-5 herein.

[2] The Request for Review was received by AASG by e-mail on January 19, 2023, and by United States Postal Service mail on January 20, 2023. Administrative Record (AR) 1.

1. CCI was a proprietary cosmetology educational institution located in Greenville, Texas, and owned by New Growth Partners, LLC. It operated for nearly sixty years before its closure in 2016. Request for Review; Exh. R-3.

2. Effective November 19, 2013, CCI, by and through Thomas Kube, its Chief Executive Officer,[3] entered into a Program Participation Agreement with the Department to participate in federal student aid programs, including the Federal Pell Grant Program, the Federal Family Education Loan Program, the Federal Direct Student Loan Program, the Federal Perkins Loan Program, the Federal Supplemental Educational Opportunity Grant Program, the Academic Competitiveness Grant and National Science Mathematics Access to Retain Talent Grant Programs, and the Iraq and Afghanistan Service Grant programs. Exh. ED-2. Under the Program Participation Agreement, CCI agreed, among other things, to account for Federal funds entrusted to it and to comply with the program statutes and regulations for eligibility, as well as the general program provisions set forth in Part F and Part G of Title IV of the Higher Education Act and the Student Assistance General Provisions regulations set forth in 34 C.F.R. Part 668. *Id*. at 002-003.

3. The Program Participation Agreement also provided that CCI could terminate the agreement. Exh. ED-2 at 009, para. (f)(2).

4. The independent auditors who conducted compliance audits of CCI for the years ending December 31, 2014 and December 31, 2015, to fulfill its obligations concerning the Federal Pell Grant Program and the Federal Direct Loan Program opined that CCI complied, in all material respects, with the specified requirements regarding Institutional Eligibility, Reporting, Student Eligibility, Disbursements, Refunds/Return of Title IV Funds, G5 and Cash Management, and Case Management and Administrative Capability, listed in Section II of the U.S. Department of Education's Audit Guide, Audits of Federal Student Financial Assistance Programs at Participating Institutions and Institution Services. Exhs. R-4 and R-5.

5. On December 10, 2016, New Growth Partners, LLC, doing business as CCI, sent a letter to the National Accrediting Commission for Career Arts and Sciences, the Department's Dallas FSA office, and the Texas Department of Licensing and Regulation's Education and Examination Division, informing them that CCI permanently closed and ceased all training and education activities as of December 10, 2016. Exh. R-7. The address contained in the letterhead of CCI's December 10th letter was 5015-A Wesley St., Greenville, TX 75402-6314, and no other address or forwarding address was provided. *Id*. In its letter, among other things, CCI informed FSA that, "Student records have been transmitted to the TDLR through SHEARS and hard copies remain on-site at the school in the storage Pod at the rear of the building." *Id*. CCI copied its counsel, Ron Holt, Esq., on the letter. *Id*.;

[3] Upon signing the Program Participation Agreement, Mr. Kube identified himself as CCI's Chief Executive Officer. Exh. ED-2. In its request for review and briefs, CCI refers to Mr. Kube as CCI's former President. In the independent auditor reports submitted by CCI, Mr. Kube is identified as CCI's President and Chief Executive Officer. Exhs. R-4 and R-5. Mr. Kube is identified in this Decision as CCI's President and Chief Executive Officer.

Respondent's Opening Brief on Appeal at 2.

6. CCI withdrew from participation in Title IV Federal Student Aid (FSA) programs on December 10, 2016. Exh. ED-1 at 001 and 029.

7. CCI attributed its closure to not having the funds to continue to operate due, in part, to declining numbers of cosmetology students nationwide and an inability to obtain continued financing. Exh. R-3.

8. CCI posted notice of its closing on its website. *Id.*

9. On December 13, 2016, FSA emailed Mr. Kube with a list of questions concerning closure of the school. Exh. R-8. Mr. Kube responded to FSA's e-mail on December 13, 2016. *Id*. Among FSA's questions to Mr. Kube was "What arrangements have been made to store the academic and/or financial aid records/transcripts? Please include the address where the records will be stored." Mr. Kube answered, "This was provided to the Dallas Office and the TDLR. Please refer to closure notice." Exh. R-8, Question 6. Neither FSA's e-mail nor Mr. Kube's responsive e-mail mentioned a close-out audit. *Id*.

10. On December 30, 2016, FSA sent a letter by certified mail, return receipt requested, to Mr. Thomas Kube, Cosmetology Career Institute, 5015 A Wesley Street, Greenville, TX 75402-6314. Exh. ED-1 at 029 - 030. In that letter, FSA reminded CCI of obligations identified in its Program Participation Agreement, including its obligation to submit a letter of engagement for an independent audit of all funds the institution received under the Title IV, HEA program, followed by submission of a close-out audit within 45 days. *Id.* FSA also instructed Mr. Kube to advise the Dallas School Participation Division of the arrangements CCI had made for proper record retention and storage. *Id*. at 30.[4]

11. As of December 5, 2022, the Department had not received CCI's close-out audit, or annual compliance and financial statement audits for the fiscal year ending December 31, 2016. Exh. ED-1 at 001.

12. On December 5, 2022, the Department issued the FAD to CCI, assessing CCI a total amount of $420,863.27 in liabilities for repayment of all Title IV funds CCI received during the unaudited period that ran from January 1, 2016 to December 10, 2016, unreconciled Pell Grants for the 2016-2017 award year, the estimated loss for Direct Loan liabilities for the unaudited period, the unreconciled Direct Loan balances for the 2016-2017 award year, cost of funds, and $4,772.00 for closed school loan discharges, for a total liability of $420,863.27. Exh. ED-1 at 002-004; Exh. R-1. The FAD provided breakdowns, by program, on the principal amounts and costs of funds amounts due: (1) For the Pell

[4] FSA's December 30, 2016 letter indicates it was sent by certified mail and contains a certified mail number. In its brief, CCI, through counsel, states that Mr. Kube did not receive this letter. On this record, I make no such finding. CCI has put forth no evidence that establishes Mr. Kube did not receive the mail, but instead provided only statements of counsel.

Program, a principal amount of $329,232.00, which included $8,091.75 for unreconciled Pell grants for the 2016-2017 award year plus costs of funds in the amount of $13,035.27, which included $280.91 for the unreconciled Pell Grants, was due; (2) For the Direct Loan, principal amount of $46,704.00, based on an Estimated Loss calculation, was due; (3) For Closed School Loan Discharges, a principal amount of $4,772.00 was due[5]; and, (4) for Unreconciled Direct Loan Balances for the 2016-2017 Award Year, a principal amount of $26,210.00 plus costs of funds in the amount of $910.00 was due, for a total liability of $420,863.27. Exh. ED-1 at 004; Exh. R-1. The Department attached worksheets to the FAD that provided, among other things, line-item listings for each Pell Grant that comprised the principal amount of $329,232.00, including the disbursement amount and the date of disbursement, Exh. ED-1 at 008-009; (2) a worksheet that provided its calculation of the Direct Loan Estimated Loss of $46,704.00, Exh. ED-1 at 010-011; and, (3) line-item listings for each closed school loan discharged that comprised the principal amount of $4,772.00, which line items included the borrower's last name, the last four digits of their social security number, the award year, the disbursement date, the disbursement amount, enrollment begin and end dates, the loan amount, the discharge amount, and the discharge date. Exh. ED-1 at 012-015.[6]

V. The Parties' Arguments

CCI primarily argues that (1) the FAD is invalid on its face because it was not conducted in accordance with the "uniformity of practice" demanded by 20 U.S.C. § 1099c-1(b)(1), and, therefore, the liability should be eliminated in its entirety on due process grounds; and (2) the liability is being assessed in the manner of a penalty and, therefore, should be adjusted downward pursuant to 20 U.S.C. § 1099c-1(b)(4), based on the "gravity of the failure."

FSA counters that CCI is liable for all Title IV funds it received during the unaudited period based on statutes, regulations, and long-established Department practice and extensive precedent and that the liability assessed CCI is not a fine subject to downward adjustment under 20 U.S.C. § 1099c-1(b)(4).

[5] In the course of this appeal, the Department withdrew its claim for the closed school loan discharge liability and represented that it is seeking only the $416,901.27 in liabilities established in the FAD for unaccounted funds for the unaudited period, unreconciled funds for the award year 2016-2017, and estimated losses for Direct Loans, plus costs of funds. Brief of Federal Student Aid at 2.

[6] The December 5, 2022 Revised FAD, referred to in this decision as "FAD," is labelled "Revised." The FAD does not reference any previously issued FADs and the record does not contain previously issued FADs. However, in its briefs, CCI states that the December 5, 2022 FAD is the third iteration and that FSA had previously issued two FADs, most recently in February 2022. Respondent's Opening Brief on Appeal at 3. In a separate case involving liabilities for closed school loan discharges assessed by the Department in a Final Program Review Determination, *In re Cosmetology Career Institute*, Dkt. No. 21-48-SP, U.S. Dept of Educ. (May 27, 2022), in which the Initial Decision is pending appeal before the Secretary, I found that an FAD was issued on July 20, 2020.

VI. Issues Presented

Based on the challenges to the FAD that CCI has advanced, and the arguments made by the parties, the issues presented are as follows:

1. Is the FAD invalid on its face because it was not conducted in accordance with the "uniformity of practice" demanded by 20 U.S.C. § 1099c-1(b)(1), and, if so, should the liability be eliminated in its entirety on due process grounds?

2. Is CCI absolved of the liabilities assessed in the FAD for repayment of Title IV funds received during the unaudited period because its President and Chief Executive Officer was not aware of the requirement to submit a close-out audit as required by 34 C.F.R. § 668.26?

3. Should CCI be relieved of the liabilities assessed in the FAD for repayment of Title IV funds received during the unaudited period due to its not having retained records concerning the Title IV funds at issue, which failure to retain records it attributes to FSA's six-year delay in issuing the FAD following CCI's closure in 2016?

4. Has CCI satisfied its burden of proof by demonstrating that it properly accounted for its use of Federal Student Aid funds by submitting an audit after it ended participation in FSA programs in December 2016, as required by 34 C.F.R. § 668.26?

5. Has CCI demonstrated that the liabilities assessed in the FAD should be adjusted downward under the "gravity of the failure" provision of 20 U.S.C. §1099c-1(b)(4) because the liabilities are being assessed in the manner of a penalty?

VII. Discussion and Conclusions of Law

General requirements under Title IV, HEA

Consistent with the Higher Education Act of 1965, as amended (HEA), an institution of higher education is certified by the Department as eligible to participate in Title IV programs only upon the Secretary's approval of a program participation agreement. 20 U.S.C. §1094(a). Under the terms of the program participation agreement with the Department, the participating institution agrees to abide by a panoply of statutory, regulatory, and contractual requirements. 20 U.S.C. §1094(a). To maintain participation eligibility in Title IV programs, the institution must meet program obligations, including the requirements to exercise financial responsibility, comply with enforcement standards, and submit required audits, which must be conducted by a qualified independent auditor. 20 U.S.C. §1094(a)(4).

The Secretary has the authority to prescribe regulations as necessary and consistent with his statutory authority and has the specific authority to require that institutions participating in Title IV programs submit a variety of financial audits. 20 U.S.C. §1094(a)(4).

Consistent with the requirements of the HEA, the Secretary's regulations specify standards of conduct that must be followed by institutions participating in Title IV programs. 34 C.F.R. § 668.82. Participation in Title IV programs requires, among other things, that the participating institution act at all times with the competency and integrity necessary to qualify as a fiduciary and subjects the institution to the highest standard of care and diligence in administering the programs and in accounting for Title IV funds received. 34 C.F.R. §§ 668.82(a) and (b).

Consistent with the statutory requirement for a program participation agreement, the Secretary's regulations condition an institution's initial and continued participation upon compliance with the HEA, the Department's regulations, and the institution's program participation agreement. 34. C.F.R. § 668.14(a). The regulations provide that upon execution of a program participation agreement, the institution agrees that it will use Title IV funds solely for the purposes specified in and in accordance with the program participation agreement. 34 C.F.R. § 668.14(b).

Audit requirements under Title IV, HEA

Consistent with the statutory requirement for submission of financial audits, the Secretary's regulations address compliance audits and audits required at the end of an institution's participation in Title IV, HEA programs. 34 C.F.R. §§ 668.23 and 668.26. Audits are critical to the enforcement of Title IV, HEA program requirements. 54 Fed. Reg. 11356 (Mar. 17, 1989). Audits must be completed by an independent auditor who meets the Government Auditing Standards qualification and independence standards. 34 C.F.R. § 668.23(a)(1). A participating institution must submit compliance audits annually, no later than six months after the end of the institution's fiscal year. 34 C.F.R. § 668.23(a)(4).

Additionally, an institution is required to submit an audit upon the end of the institution's participation in Title IV programs. 34 C.F.R. § 668.26. An institution loses eligibility to participate in Title IV, HEA programs on the date the institution permanently closes. 34 C.F.R. § 600.40(a)(1)(ii). The regulations require an institution that has closed to submit all financial, performance, and other reports required by HEA program regulations, as well as a letter of engagement for an independent audit of all funds that the institution received under the program, and to inform the Secretary of the arrangements made by the institution for proper retention and storage for a minimum of three years of all records concerning the administration of the program within 45 days of the date an institution ends its participation. 34 C.F.R. §§ 668.26(b)(2) and (3). The institution then has an additional 45 days to submit the independent auditor's report, which is to account for all funds received during any unaudited period to the date of closure. 34 C.F.R. § 668.26(b)(2)(ii). When an institution fails to account for Title IV funds, the Department has an obligation to assess liabilities for all Title IV funds received during the unaudited time period. *In re Calvinade Beauty Academy*, Dkt. No. 93-151-SA, U.S. Dep't of Educ. (Decision of the Secretary) (Sept. 8, 1995), *aff'g In re Calvinade Beauty Academy,* Dkt. No. 93-141-SA, U.S. Dep't of Educ. (Mar. 21, 1995).

Burden of proof

In Subpart H appeals of final audit determinations, the institution requesting review of the final audit determination bears the burden of proving the institution complied with program requirements. 34 C.F.R. § 668.116(d).

Summary of CCI's arguments

CCI does not dispute that it failed to submit the close-out audit required by 34 C.F.R. §668.26. Rather, CCI argues that it should be relieved from its obligation to submit a close-out and any liabilities based on its failure to do so because the FAD is facially invalid, because its President and Chief Executive Officer was not aware of the requirement to submit a close-out audit and not advised by the Department of the requirement to do so, and also because it no longer has institutional records due to the protracted period of time between its closure and issuance of the FAD. Alternatively, CCI argues that any liabilities for failure to submit a close-out audit should be reduced because the liabilities are being assessed in the manner of a penalty and, therefore, should be adjusted downward pursuant to 20 U.S.C. § 1099c-1(b)(4), based on the "gravity of the failure."

The "uniformity of practice" demanded by 20 U.S.C. § 1099c-1(b)(1)

CCI preliminarily argues that the FAD is invalid on its face because it was not conducted in accordance with the "uniformity of practice" demanded by 20 U.S.C. § 1099c-1(b)(1), and, therefore, the FAD is the product of an illegal process and the liability assessed in the FAD should be eliminated in its entirety on due process grounds.

FSA does not directly address CCI's arguments on uniformity of practice and due process, but generally argues that CCI is liable for all Title IV funds it received during the unaudited period based on statutes, regulations, the Program Participation Agreement, and long-established Department practice and extensive precedent.

In support of this argument, CCI contends that Final Audit Determinations are a product of program review processes and therefore fall under the "uniformity of practice" provision of 20 U.S.C. § 1099c-1(b)(1), and that the Department has provided no evidence that there are any guidelines on uniformity of practice. CCI asserts that the Department's lack of guidelines on uniformity of practice lead to the unsystematic manner in which FSA conducted the FAD in this case, as evidenced by the errors in two FADs that preceded the (third) Revised FAD at issue in this case.

The "uniformity of practice" provision set out in 20 U.S.C. § 1099c-1(b)(1) that CCI relies upon to support its request for elimination of all liabilities requires the Secretary to "establish guidelines designed to ensure uniformity of practice in the conduct of program reviews of institutions of higher education." While the statute provides no definition of "program review," later provisions of the statute clarify that a program review is not synonymous with audit, which is at issue in this case. *See, e.g.*, 20 U.S.C. §1099c-1(b)(4) ("….resulting from a program review

or audit…." (emphasis added)). Thus, CCI's argument is not supported by the "uniformity of practice" provision to which it cites.

The record does not support CCI's second argument that the liability should be eliminated on due process grounds. CCI contends that its due process rights were violated, not as relates to this proceeding but as relates to the Department's actions or inactions that preceded this proceeding. In support thereof, CCI points to the Department's failure to establish "guidelines designed to ensure uniformity of practice," citing to *Morton v. Ruiz*, 94 S.Ct. 1055 (1974), for the proposition that administrative agencies must administer their programs in accordance with procedures that conform to the law and determinations to assess liability cannot be made on an ad hoc basis out of step with necessary procedures.

In *Ruiz*, the plaintiff challenged a decision by the Bureau of Indian Affairs (BIA) to deny him benefits because he did not live on a reservation. The BIA had implemented the requirement by publishing it in an internal agency manual. The Court concluded that Congress intended the benefits to extend to Native Americans living near reservations as well as those living on reservations and ruled that benefits could not be extinguished by an unpublished ad hoc determination that was not promulgated in accordance with the BIA's own procedures requiring promulgation.

It appears that the decision in *Ruiz*, although not directly overruled, does not reflect the current state of the law or, at least, must be narrowly construed. Shortly after the Court decided *Ruiz*, it issued *National Labor Relations Board v. Bell Aerospace Co., Division of Textron, Inc.,* 94 S. Ct. 1757 (1974). In *Bell Aerospace,* the National Labor Relations Board had reversed a position that it had developed through a long series of adjudicative decisions during the course of an adjudication. In considering arguments that the change in position should have been implemented through the rule-making process rather than through the adjudication process, the Court held that rulemaking is not necessarily required in administrative proceedings. The choice between acting through rulemaking or adjudication was held to be within agency discretion. *Id*. at 1771.

Further, the case here is distinguishable from *Ruiz*, which involved an individual's eligibility for public benefits. This case does not involve an individual, eligibility, or public benefits. In *Ruiz*, the federal agency decided the applicant's eligibility based on an unpublished internal manual even though the agency's regulations required it to publish any rules. Here, there is no suggestion of an unpublished manual, but instead there are promulgated regulations, published handbooks and guidance, and publicly available adjudicative decisions. Here, CCI has not shown that FSA failed to provide notice of its program requirements or that FSA filled in gaps in legislation through ad hoc processes in circumvention of its own procedures.

CCI's argument with respect to due process ignores the express requirements placed on it, as an institution participating in Title IV, HEA programs, to account for all Title IV funds it received and to do so by complying with close-out audit requirements plainly set out in Department regulations that CCI agreed to adhere to under the Program Participation Agreement. Under the Program Participation Agreement, CCI agreed, among other things, to account for Federal funds entrusted to it and to comply with the program statutes and regulations for eligibility, as well as

the general program provisions set forth in Part F and Part G of Title IV of the Higher Education Act and the Student Assistance General Provisions regulations set forth in 34 C.F.R. Part 668. The regulations clearly require an institution that ends its participation in Title IV programs to submit a close-out audit, clearly set out the timeframe in which the close-out audit must be submitted and impose an obligation for proper retention and storage of records for a minimum of three years concerning administration of the program. 34 C.F.R. § 668.26.

Not only do the regulations clearly state when compliance and close-out audits must be conducted, they also contain specific instructions with respect to standards and procedures on how audits are to be conducted. 34 C.F.R. § 668.23(b)(2). Regulations direct adherence to the standards contained in the U.S. General Accounting Office's Government Auditing Standards. 34 C.F.R. § 668.23(b)(2)(i). Additionally, regulations instruct that procedures for audits are contained in audit guides developed by the Department's Office of Inspector General. 34 C.F.R. § 668.23(b)(2)(ii).

CCI's own audits for 2015 and 2016 provide summaries of and adhere to the audit processes set out in the regulations. Exh. R-4. In fact, those audits list in detail the responsibilities of CCI's management and those of the third-party servicer, as well as describe the auditor's responsibilities. *Id*. As explained by the auditor, institutional eligibility, student eligibility, student file maintenance, record retention, verification, disbursements, and other compliance requirements all fall within the purview of the CCI's management responsibilities. *Id*. at 3-6. As explained in the 2015 Independent Auditor's Attestation Report on Compliance with Specified Requirements Applicable to the SFA Programs, CCI's management is responsible for compliance relative to participation in the Federal Student Assistance programs while the auditor's responsibility is to express an opinion of CCI's compliance based on its examination of management's assertions as specified in the Department's Audit Guide. *Id*. at 7-8.

Finally, the FAD issued on December 5, 2022, provided adequate notice of the basis for the liability and the amount sought by FSA in this matter. In the FAD, FSA articulated both factual and legal grounds for the liabilities assessed for unaccounted Title IV, HEA funds. FSA provided evidentiary support with itemization for the unaccounted funds. The FAD provided breakdowns by program on the principal amounts and costs of funds due. The FAD included attachments with line-item breakdowns. Thus, FSA established a prima facie case, sufficiently identified the basis for the liability and the amounts sought by FSA, and, together with the appeal rights extended through this proceeding, provided CCI with adequate due process.

It is clear from the entire record that CCI had adequate notice of the requirement to properly store and retain records, of the requirement to submit a close-out audit that accounted for all unaccounted funds and the time frame for doing so, and the basis for the liability and the amount sought by FSA in this matter. Substantive and procedural due process have been provided to CCI. As discussed below, CCI had notice that it was required to submit a close-out audit following its closure and was provided the opportunity to come forward with a close-out audit but did not. *See In the re New York Paralegal School*, Dkt. No. 10-16-SA, U.S. Dep't of Educ. (Decision of the Secretary) (Apr. 19, 2011) (Hearing procedures followed by OHA were sufficient. The institution had opportunity to come forward with a close-out audit but did not.)

Requirement to submit a close-out audit

CCI also argues that it should not be held liable for the liabilities as assessed in the close-out audit because Mr. Kube was not aware of the requirement to submit a close-out audit and the Department did not inform him of the requirement to do so.

FSA counters that CCI is liable for any unaccounted funds based on its obligation to act as a fiduciary in its administration of Title IV, HEA programs and the standard of care and diligence in administering those programs and accounting to the Secretary for funds received under those programs imposed on it by statute, regulation, and the Program Participation Agreement.

CCI's contention that CCI was not aware of the close-out audit requirement and, therefore, did not retain records for or submit a close-out audit is not persuasive. Most significantly, CCI agreed to comply with Title IV, HEA statutory and regulatory provisions when it executed the Program Participation Agreement in 2013. Under the terms of the Program Participation Agreement it entered into, CCI was responsible for knowing and adhering to Title IV, HEA statutory and regulatory provisions. CCI's own evidence establishes that its President and Chief Executive Officer was well aware of the audit requirements attached to Title IV funds. As CCI points out in its briefs, it timely submitted the required compliance audits for 2014 and 2015, which audits it holds out to show its previous adherence to regulatory requirements and to support its request for reduction of the liabilities sought by the Department.

Despite that evidence of audits CCI submitted for 2014 and 2015, CCI offers no explanation for its failure to submit an annual compliance report for 2016, even though it operated until December 10, 2016. The regulation that requires submission of a close-out audit is included in the same regulations that require annual compliance audits and very clearly sets out the timeframe for submission of the close-out audit.

Additionally, in its December 30, 2016 letter to Mr. Kube, FSA informed CCI that within 45 days after the date its participation ended it must submit all financial, performance and other reports required by Title IV HEA regulations and a letter of engagement for an independent audit of all funds, followed by a report within 45 days after the date of the engagement letter. The letter also instructed Mr. Kube to advise FSA of the arrangement it had made for proper record retention and storage.

In its brief, CCI states, through counsel, that CCI did not receive FSA's December 30, 2016 letter. Counsel's statement is not supported by evidence in the record and, by itself, only an unsupported assertion.

In fact, the evidence in the record supports a contrary conclusion. FSA sent the December 30, 2016 letter to the address provided by CCI in its December 10, 2016 letter advising FSA and others that CCI had closed. In its December 10, 2016 letter, CCI provided no forwarding address or address other than that provided in CCI's letterhead, and FSA mailed the December 30, 2016 letter to CCI at that address in less than three weeks of CCI's letter informing of its closure.

Without more, CCI has not established that it did not receive FSA's letter informing it of the requirement to submit a close-out audit. Moreover, record evidence establishes that the Program Participation Agreement charged CCI with knowing and adhering to Title IV requirements and that CCI was well aware of audit submission requirements imposed on Title IV program participants.

Retention of records

CCI does not challenge the underlying factual basis for the liabilities assessed it or the amounts of the liabilities assessed but asserts that it is unable to account for funds received in 2016 because it no longer has applicable records due to the protracted period of time between its closure and issuance of the FAD and also because CCI's President and Chief Executive Officer did not know a close-out audit was required but believed that all matters between CCI and the Department had been resolved.

FSA counters generally that CCI is liable for any unaccounted funds based on its obligation to act as a fiduciary in its administration of Title IV, HEA programs and the standard of care and diligence in administering those programs and accounting to the Secretary for funds received under those programs imposed on it by statute, regulation, and the Program Participation Agreement.

While CCI correctly describes FSA's delay in issuance of a Final Audit Determination following CCI's closure as protracted, the delay is not as lengthy as the six years that CCI claims. As CCI acknowledges, the FAD is this case is the third iteration, previous FADs that CCI challenged having been issued (and challenged by CCI) in July 2020 and February 2022. *See* FN 6 herein.

In any event, neither the delay itself nor the length of the delay excuses CCI's failure to retain records. By entering into a program participation agreement, an institution agrees that it will comply with all statutory and regulatory provisions applicable to Title IV of the HEA. 34 C.F.R. § 668.14(b)(1). Institutions, including closed schools, are required to retain records until the latter of resolution of loans, claims or expenditures questioned in the program review, or the end of the retention period otherwise applicable under 34 C.F.R. § 668.24(d)(4), (e), and closed schools are specifically required to properly retain and store records for a *minimum* of three years. 34 C.F.R. 668.26(b)(3) (emphasis added). Records may be kept in hard copy or in microform, computer file, optical disk, CD-ROM, or other media formats. 34 C.F.R. § 668.24(d)(3). The passage of time does not absolve an institution from its duty to provide records. *In the Matter of the Hair California Beauty Academy*, Dkt. No. 18-13-SP (Sec. Dec. Jan. 15, 2021) at 4-5.

It is axiomatic that an institution's records are integral to compliance with the audit requirements of regulatory provisions applicable to Title IV of the HEA. Those regulatory provisions require that a participating institution must at least annually have an independent auditor conduct a compliance audit of its administration of that program and an audit of the institution's general purpose financial statements. 34 C.F.R. § 668.23(a)(2). The institution must submit that compliance audit and its audited financial statements to the Secretary no later than six months after the last day of the institution's fiscal year. 34 C.F.R. § 668.23(a)(4).

If an institution ends its participation in Title IV, HEA programs, it is required to submit to the Secretary within 45 days after the date that the participation ends all financial, performance, and other reports required by Title IV, HEA program regulations, as well as a letter of engagement for an independent audit of all funds that the institution received under that program, followed by submission of the auditor's report within 45 days after the date of the engagement letter. 34 C.F.R. § 668.26(b)(2).

CCI's contention that CCI was not aware of the close-out audit requirement and, therefore, did not retain records for or submit a close-out audit is not persuasive. Most significantly, CCI agreed to comply with Title IV, HEA statutory and regulatory provisions when it executed the Program Participation Agreement in 2013. By virtue of the terms of the Program Participation Agreement, CCI was responsible for knowing and adhering to Title IV, HEA statutory and regulatory provisions. CCI's own evidence establishes that it timely submitted the required compliance audits for 2014 and 2015, which audits it holds out to show its previous adherence to regulatory requirements and to support its request for reduction of the liabilities sought by the Department.

Other evidence establishes that Mr. Kube, CCI's President and Chief Executive Officer, was aware of the record retention requirement. In its December 10, 2016 letter informing FSA and others of its closure, CCI informed FSA that, "Student records have been transmitted to the TDLR through SHEARS and hard copies remain on-site at the school in the storage Pod at the rear of the building." FSA's responsive e-mail of December 13, 2016 also alerted Mr. Kube to the requirement to retain records, asking "What arrangements have been made to store the academic and/or financial aid records/transcripts?" and directing, "Please include the address where the records will be stored." Mr. Kube answered, "This was provided to the Dallas Office and the TDLR. Please refer to closure notice."

Additionally, in its December 30, 2016 letter to Mr. Kube, FSA instructed Mr. Kube to advise FSA of the arrangement it had made for proper record retention and storage.[7]

The record establishes that CCI had an obligation to properly retain and store records concerning the unaccounted Title IV funds for a *minimum* of three years under 34 C.F.R. 668.26(b)(3) (emphasis added). That obligation was clear from the onset of CCI's participation in the Title IV, HEA programs. The record establishes that Mr. Kube was aware of CCI's obligations with respect to record retention and storage. The record is also clear that if the obligation had been complied with, the records would have been available to CCI and FSA for the purpose of an audit following CCI's closure.

Liabilities for failing to submit a close-out audit

If an institution's participation in a Title IV, HEA program ends, the institution must,

[7] As explained in FN 4 above, CCI states, through counsel's assertions, in its brief that CCI did not receive FSA's December 30, 2016 letter. However, record evidence supports a contrary conclusion.

among other things, submit to the Secretary within 45 days an engagement letter for an independent audit of all funds that the institution received under that program, followed by submission of the auditor's report within 45 days after the date of the engagement letter. 34 C.F.R. § 668.26(b)(ii). The nature of the enforcement of Title IV programs through the use of audits and determinations creates the need for institutions to cooperate with FSA by providing it with proper and timely audits when that information is needed to determine whether Title IV funds disbursed to the institution were spent properly. *In re Calvinade Beauty Academy*, Dkt. No. 93-151-SA, U.S. Dep't of Educ. (Decision of the Secretary) (Sept. 8, 1995), *aff'g In re Calvinade Beauty Academy,* Dkt. No. 93-141-SA, U.S. Dep't of Educ. (Mar. 21, 1995) at 3.

When an institution fails to account for Title IV funds, the Department has an obligation to assess liabilities for all Title IV funds received during the unaudited time period. *Id.* at 3. In Subpart H proceedings, FSA may recover funds flowing from the breach of the institution's Program Participation Agreement. *Id*. at 2.

As FSA points out, this tribunal has continuously held that in the absence of a close-out audit, unless the institution can otherwise account for the expenditure of all federal aid since the date of the most recent audit, the institution is liable for all such funds received for that period. *See*, *e.g., In re Irma Valentin*, Dkt. Nos. 09-37-SA and 09-38-SA, U.S. Dep't of Educ. (July 23, 2010); *In re Harrison Career Institute*, Dkt. No. 07-55-SA, U.S. Dep't of Educ. (May 15, 2008); *In re Stenotopia Business School*, Dkt. No. 01-26-SP, U.S. Dep't of Educ. (July 31, 2002); *In re Hair Interns School of Cosmetology*, Dkt. No. 98-81-SP (July 25, 2000); *In re Tiffany's College of Hair Design*, Dkt. No. 96-118-SP, U.S. Dep't of Educ. (July 23, 1997); *In re Cosmetology College*, Dkt. No. 94-96-SP, U.S. Dep't of Educ. (Aug. 23, 1995), *aff'd* by the Secretary (Nov. 27, 1995); *In re Calvinade Beauty Academy*, *supra*; *In re National Broadcasting School*, Dkt. No. 94-98-SP, U.S. Dep't of Educ. (Dec. 12, 1994); *In re Lehigh Technical School*, Dkt. No. 94-193-SP, U.S. Dep't of Educ. (Mar. 17, 1995); *In re Macomb Community College*, Dkt. No. 91-80-SP, U.S. Dep't of Educ. (May 5, 1993).

Here, CCI did not submit a close-out audit, as it acknowledges, and did not otherwise account for the expenditure of all federal aid it received since the date of its most recent audit. Therefore, it is liable for all funds received for that period.

Request for downward adjustment of liabilities

CCI argues, as an alternative to elimination of the liabilities in their entirety, that the liabilities assessed here should be reduced based on the "gravity of the failure" provision of 20 U.S.C. § 1099c-1(b)(4), and its application to "a number of observations" made by CCI. Respondent's Opening Brief on Appeal at 9. Those observations include the lack of any allegations by the Department of fraud or mismanagement beyond the failure to perform the audit; CCI's two-year compliance history with Title IV, HEA requirements, as evidenced by favorable compliance audits CCI submitted for years ending December 31, 2014, and December 31, 2015; consistency in Title IV numbers relative to prior years and numbers of students; graduation of more than half of the student body in 2016; no Borrower Defense to Repayment claims or complaints by students having been filed; CCI's prompt notification to the Department of its

closure; and, the Department's failure to notify others or email Mr. Kube about the requirement of a close-out audit.

In opposition, FSA contends that the assessed liability is not a fine, but a debt that CCI owes the Department for failing to account for Title IV funds it received prior to its closure.

Section 1099 is titled "Program review and data." Section 1099c-1(b), The "Special administrative rules," in § 1099c-1(b)(4) specifically pertain to program reviews of institutions and, with respect to program reviews or audits, require the Secretary to "base any civil penalty against an institution of higher education resulting from a program review or audit on the gravity of the violation, failure, or misrepresentation." 20 U.S.C. § 1099c-1(b)(4).

To determine whether the liabilities assessed in the FAD are a "civil penalty" within the meaning of 20 U.S.C. § 1099c-1(b)(4), the basis for and context of their assessment must be considered. Upon entering a program participation agreement for participation in Title IV programs, an institution agrees to comply with the HEA, the Department's regulations, and the terms of its program participation agreement. 34. C.F.R. § 668.14(a). If an institution's participation in a Title IV, HEA program ends, the institution must, among other things, submit an auditor's report within 90 days concerning all funds that the institution received. 34 C.F.R. § 668.26(b)(ii).

Liabilities resulting from an audit determination are the funds for which an institution cannot demonstrate it met all requirements for participation in the Title IV program, for which liabilities are assessed in a Final Audit Determination under 34 C.F.R. Part 668, Subpart H. In contrast, actions with respect to fines, limitations, terminations and suspensions concerning Title IV programs are addressed in 34 C.F.R. 668, Subpart G. The Department is authorized to impose civil penalties for violations or substantial misrepresentations. 20 U.S.C. § 1094(B).

Payment of liabilities by an institution to the Department for failing to properly disburse and account for Title IV funds does not constitute a penalty. *In re The Hair California Beauty Academy*, Dkt. No. 18-13-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 5, 2021) at 7. Rather, the Department is merely trying to recover funds to which it holds a legal right. *Id*. at 8. Payment of liabilities serves to compensate, not to punish or deter, because the liabilities assessed are measured only by the amount of funds not properly accounted for by the institution. *Id*.

Further indication that 20 U.S.C. § 1099c-1(b)(4)'s provision on uniform practice is directed at program reviews is found in 20 U.S.C. § 1099c-1(a), which sets out the general authority of the Secretary to provide for the conduct of program reviews on a systematic basis for the purpose of strengthening the administrative capability and financial responsibility of institutions participating in Title IV, HEA programs.

CCI appears to recognize that the liabilities FSA has assessed it for failing to submit a close-out audit are not a penalty, as evidenced by its reference to this liability not as a penalty, but as having been assessed "in the manner of a penalty." CCI's characterization by way of "manner of a penalty," however, does not elevate the liabilities to a civil penalty. The liabilities assessed in this case are based on a Final Audit Determination pursuant to 34 C.F.R. 668, Subpart H, not a

fine action for a violation or substantial misrepresentation under Subpart G, and as authorized by 20 U.S.C. § 1094(B). What FSA seeks in the liabilities assessed in the FAD is merely to recover funds that were not properly accounted for by CCI.

Because the liabilities sought by FSA are compensatory in nature and only recovery of those unaccounted funds to which the Department holds a legal right, payment of the liabilities does not constitute a penalty. Accordingly, the Secretary is not required to base the assessment in this case "on the gravity of the violation" as provided in 20 U.S.C. § 1099c-1(b)(4), and a downward adjustment in liabilities based on application of this provision is neither required nor appropriate.

Liability for closed school loan discharge in the FAD

This decision does not address CCI's challenges to the liability in the amount of $4,772.00 assessed in the FAD for the closed school loan discharge for one student because the Department withdrew its claim for the closed school loan discharge liability during the course of this appeal. Brief of Federal Student Aid at 2. The Department's representation that it has withdrawn its claim for closed school loan discharge liability assessed in the FAD is noted and the claim is deemed withdrawn.

VIII. Conclusion and Order

CCI has not satisfied its burden of proving that it complied with program requirements by accounting for Title IV funds issued to it between January 1, 2016 and December 10, 2016. 34 C.F.R. § 668.116(d). The finding of liability in the total amount of $416,091.27, for repayment of Title IV funds CCI received during the unaudited period and related cost of funds is supported and, therefore, affirmed. 34 C.F.R. § 668.118(b).

Accordingly, it is hereby **ORDERED** that Cosmetology Career Institute shall pay to the United States Department of Education, in a manner as required by law, Title IV, HEA program funds disbursed between January 1, 2016 and December 10, 2016, in the total amount of $416, 091.17, as established in the Final Audit Determination dated December 5, 2022.

Dated: June 26, 2023

_____
Elizabeth Figueroa
Chief Administrative Law Judge

NOTICE OF DECISION AND APPEAL RIGHTS-SUBPART H

This is the initial decision of the hearing official pursuant to 34 C.F.R. § 668.118. The regulation does not authorize motions for reconsideration. The following language summarizes a party's right to appeal this decision as set forth in 34 C.F.R. § 668.119.

An appeal to the Secretary shall be in writing and explain why this decision should be overturned or modified. A party appealing the decision may submit proposed findings of fact or conclusions of law to the Secretary. If a party submits proposed findings of fact, then the findings must be supported by admissible evidence that is already in the record, matters that may be given official notice, or stipulations of the parties. Neither party may introduce new evidence on appeal. An appeal must be filed within 30 days from receipt of this notice and decision. If an appeal is not timely filed, by operation of regulation, the decision will automatically become the final decision of the Department.

An appeal to the Secretary shall be filed in the Office of Hearings and Appeals (OHA). The appeal shall clearly indicate the case name and docket number. The appealing party shall provide a copy of the appeal to the opposing party, simultaneously with its filing of the appeal. The opposing party will then have 30 days to file its response to the appeal to the Secretary and shall provide a copy of its response to the party who appealed the decision, simultaneously with its filing of the response.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system. Otherwise, appeals must be timely filed with OHA by U.S. Mail, hand delivery, or other delivery service. Appeals filed by mail, hand delivery, or other delivery service shall be in writing and include the original submission and one unbound copy addressed to:

Hand Delivery or Overnight Mail*	U.S. Postal Service*
Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 550 12th Street, S.W., 10th Floor Washington, D.C. 20024	Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 400 Maryland Avenue, S.W. Washington D.C. 20202

These instructions are not intended to alter or interpret the applicable regulations or provide legal advice. The parties shall follow the regulatory requirements for appealing to the Secretary at 34 C.F.R. § 668.119. Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.