UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of	**Docket No. 04-20-SP**
BRYANT AND STRATTON COLLEGE,	Federal Student Aid Proceeding
Respondent.	PRCN: 200140519064

Appearances: Yolanda R. Gallegos, Esq., of Albuquerque, New Mexico, for Bryant and Stratton College.

Steven Z. Finley, Esq., of the Office of the General Counsel, United States Department of Education, Washington, D.C., for Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Bryant and Stratton College (B&S) is a proprietary institution of higher education that provides varied educational programs of study at two campuses: Parma and Willoughby, Ohio. It is accredited by the Accrediting Council for Independent Colleges and Schools (ACICS), and is eligible to participate in the various Federal Student Aid Programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* Within the U.S. Department of Education (ED), the office of Federal Student Aid (FSA) is the organization that has cognizance over and administers these programs.

Institutional Review Specialists from FSA's Chicago Case Management Team conducted an on-site program review of B&S' administration of the Title IV programs for the 1999-2000 and 2000-2001 award years. As a result, on August 4, 2003, FSA issued a Final Program Review Determination (FPRD) finding that B&S wrongfully disbursed Title IV aid to students who were enrolled in an ineligible program. B&S appealed that determination and, subsequently, on October 30, 2003, FSA withdrew that finding. Later, on December 19, 2003, FSA issued another FPRD recasting its former determination as "Ineligible course delivery method" but, otherwise, adopting its former FPRD in its entirety. B&S' appeal of that FPRD, dated, February 16, 2004, is the subject of the current proceeding.

After an exchange of briefs and evidentiary matter, on March 18, 2004, I presided at an oral argument in Washington, D.C. The hearing was transcribed and a transcript was provided to both parties. After that, I took the case under advisement.

At first blush, this case appears quite simple and straightforward. It is unquestioned that, under Title IV, an institution must be accredited by an accrediting agency approved by the Secretary of Education to be an eligible institution. It is equally clear that the institution's programs must meet the standards of the accrediting agency to be eligible for Title IV funding. As a corollary, if an institution provides an unaccredited course to its students, federal funds may not be disbursed to pay for it. Throughout the course of this proceeding, FSA's position has remained constant -- B&S disbursed Title IV funds to students who were taking unaccredited courses and, as a consequence, it must return Title IV funds disbursed for those courses. On the contrary, B&S defends that it did not offer unaccredited courses; it disbursed Title IV funds only for accredited course work, and, therefore, owes nothing for this finding.

Since I view the timing and the sequence of the facts as a critical part of my analysis, I will review the events that occurred during B&S' reaccreditation process step-by-step. As pertinent to the matter before me, ACICS and FSA, respectively, had previously accredited and approved B&S' Business Management Program as a program to be delivered in the traditional classroom format. Coincidentally, two sister schools, B&S-Wisconsin and B&S-Virginia, were in the process of reaccreditation by ACICS about the same time as the B&S campuses at issue here. Not unexpectedly, the three schools kept in contact with one another during this process. All three schools desired to avail themselves of the benefits and efficiencies of distance learning and, as a consequence, negotiated with a fourth sister school, B&S-Lackawanna to join in a consortium and provide the on-line courses for them. Previously, B&S-Lackawanna had been authorized to provide these distance-learning courses by its accrediting agency, New York State. During the course of ACICS' reaccreditation process, ACICS had advised both the Wisconsin and Virginia schools to notify it of the proposed contractual relationship with Lackawanna, which they did. Thereafter, in August 2000, ACICS completed the reaccreditation process for those two schools; they each implemented the distance learning courses with Lackawanna, and they have continued to this date without any objection from either ACICS or FSA.

Anticipating that it would be subject to the same requirement, but prior to any request from ACICS, B&S notified ACICS that they, also, were going to contract with Lackawanna to provide distance learning. Because of some continuing concerns, apparently unconnected with the distance learning issue, B&S was placed in a deferral status. It is interesting to note that B&S-Wisconsin was also in a deferral status when it implemented its on-line learning program with Lackawanna and ACICS accepted such arrangement. During the ensuing delay in finalizing B&S' reaccreditation, for some unexplained reason, ACICS responded to the notice relative to distance learning, "the institution has not received approval from the Council to offer courses via the on-line delivery method."[1] Since B&S was not offering the courses itself and its sister institutions were doing likewise without objection, B&S assumed that its distance learning would be approved when ACICS acted finally on the reaccreditation. In due course, B&S was reaccredited in the same manner as the Wisconsin and Virginia schools; it implemented a similar

[1] ACICS letter, dated May 4, 2001

distance-learning program through Lackawanna yet only B&S has been made subject to any recovery action. In fact, in a June 7, 2002 letter to B&S' corporate headquarters, ACICS acknowledges that B&S was providing distance learning courses through Lackawanna, that such arrangement was subject to its contracting out provisions in Section 2-2-505, that certain reporting would be required and, that the on-line activities would be reviewed on the next scheduled on-site evaluation visit.

The facts in this case seem clear enough, however, the dispute arises because the parties view the significance of the facts quite differently and, therefore, interpret them to reach opposite conclusions. First, FSA claims that ACICS specifically determined that B&S was not accredited to provide the courses in question through distance learning and it has no discretion other than to declare the programs as ineligible. In response, B&S asserts that, even though it might be true that it was not authorized to provide courses by distance learning, it did not provide the subject coursework -- the courses were provided by another eligible institution under a consortium agreement and such agreements are authorized both under ACICS and ED regulations.[2]

I begin my consideration of these issues by noting that this proceeding is governed by regulations promulgated under Subpart H of the general provisions. 34 C.F.R. Part 668. It is well established that in a Subpart H -- audit and program review proceeding, the institution carries the burden of proving by a preponderance of the evidence that the Title IV funds in issue were lawfully disbursed. In accordance with 34 C.F.R. § 668.116(d), to sustain its burden, an institution must establish, that (1) the questioned expenditures were proper and (2) the institution complied with program requirements. In that vein, it has been consistently held that the remedy available to FSA under Subpart H is contractual in nature and allows only for the recovery of provable losses.

In the present case, no matter how hard I try, I cannot fathom how federal funds were placed in jeopardy by B&S' contracting out with Lackawanna. This is especially so since this type of consortium agreement is authorized in both FSA and ACICS regulations. ACICS' May 4, 2001 letter, the single indication that such arrangement might not be authorized in the current situation, appears to be too general to be interpreted into a requirement that federal funds be returned because they were misspent. FSA's claim that it is unable to exercise any discretion in this matter and is driven to find liability in this case is not only difficult to understand, but on the facts, quite troublesome. As opposed to interpreting ACICS' language, "The institution has not received approval from the Council to offer courses via the on-line delivery method…" as only temporarily restricting B&S from providing distance learning itself, FSA chooses to interpret it to basically negate the entire concept of contracting out. I am at a loss to figure out how contracting out to another eligible institution in a like manner as other similar institutions, so concerns FSA that it takes the extreme position of declaring a program to be ineligible, especially since there appears to be no other possible problem with the arrangement. My concern is further heightened when I look at the tenor of ACICS' language in its June 7, 2002 letter referenced above. No amount of interpretation could lead one to conclude therefrom that ACICS considered the on-line courses at B&S to be unaccredited. Based upon my review of the

[2] 34 C.F.R. § 600.9 and ACICS Accreditation Criteria § 2-2-505.

entire record, I am forced to conclude that FSA focused on an extremely myopic view of ACICS' May 4, 2001 letter and, thereafter, apparently with blinders on, ignored all other indicators that the subject arrangement did not result in a loss of accreditation status.[3]

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is ORDERED that Bryant and Stratton College is relieved of any liability to pay the U. S. Department of Education for its demand relative to the issue of ineligible course delivery method.

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Ernest C. Canellos
Chief Judge

Dated: April 14, 2005

[3] More important, I am not unmindful of the possibility that if Title IV aid is returned, the respective students could be liable to pay for the tuition and fees that B&S had earned by educating them. In a nutshell, B&S provided educational services to the students under an enrollment agreement that usually provides that the student whose financial aid does not cover the total cost of the course is responsible for paying the school the difference. If a student received appropriate education, B&S would apparently have the legal right to initiate a state law action in contract to recover from the student. In cases like this one, the irony is that an otherwise eligible student who obtained the benefit of postsecondary training may be subject to liability because FSA pursued a remedy against the institution. As we have observed in the past, this is an unexpected result of FSA's use of declaring a program to be ineligible under Subpart G.

SERVICE

A copy of the attached document was sent to the following:

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