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

In the Matter of

CLEVELAND INSTITUTE OF ELECTRONICS,

Respondent.

Docket No. 14-02-SP

Federal Student Aid Proceeding

PRCN: 2010 205 27126

Appearances: Thomas Hylden, Esq. and Daniel M. Brozovic, Esq., Powers Pyles Sutter & Verville, P.C., Washington, D.C., for Cleveland Institute of Electronics.

Sarah L. Wanner, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Office of Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Cleveland Institute of Electronics (CIE) is a proprietary institution of higher education located in Cleveland, Ohio. In 2007, it was accredited by the Distance Education and Training Council (DETC) and, on November 30, 2007, entered into a program participation agreement with the U.S. Department of Education's (ED) office of Federal Student Aid (FSA) pursuant to 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*.

From March 8-11, 2010, reviewers from FSA's Chicago/Denver School Participation Team conducted a program review at CIE to determine the institution's compliance with federal statutes and regulations pertaining to its administration of Title IV programs. The reviewers examined randomly selected student files from the 2008-2009 and 2009-2010 award years, and issued a program review report on May 1, 2010. Based upon the information discovered in this review, i.e., that CIE only offered correspondence courses that were ineligible to receive Title IV funding during the award years in question, FSA denied CIE's application for recertification by

letter dated April 19, 2010. On July 26, 2010, FSA denied CIE's request for reconsideration, noting that potential liabilities remained pending until the issuance of a Final Program Review Determination (FPRD). On November 21, 2013, FSA issued the FPRD, demanding the return of $433,663.29 to ED. By letter dated January 10, 2014, CIE filed a written request for review of this liability assessment pursuant to 34 C.F.R. Part 668, Subpart H.

In the sole finding at issue in the FPRD, reviewers determined that CIE's programs constituted "correspondence education," thereby making the institution ineligible to participate in Title IV funding because it exceeded the 50% limitation on "correspondence" programs. *See* 34 C.F.R. § 600.7(a) (1) (i). In its brief, CIE argues that, under the applicable definitions and regulations,[1] its courses constituted authorized "telecommunications courses," therefore, it should not be liable for the return of Title IV funding to ED. In response, FSA asserts that CIE's programs do not meet the definition of telecommunications courses, but are rather clearly correspondence courses, therefore CIE was ineligible to receive Title IV funding for the entire period of its participation. In order to determine which category CIE's courses fell into, it is critical that the regulatory language be examined.

34 C.F.R. § 600.2 Definitions

Telecommunications Course:

> A course offered principally through the use of one or a combination of technologies . . . to deliver instruction to students who are separated from the instructor and to support **regular and substantive interaction between these students and the instructor**, either synchronously or asynchronously . . . If the course does not qualify as a telecommunications course, it is considered to be a correspondence course. (Emphasis added)

Correspondence Course:

> (1) A 'home study" course provided by an institution under which the institution provides instructional materials, including examinations on the materials, to students who are not physically attending classes at the institution. When students complete a portion of the institutional materials, the students take examinations that relate to that portion of the materials and **return the examinations to the institution for grading** . . .
>
> (3) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course. (Emphasis added)

The applicable law governing the issue in this case is quite clear. According to the provisions of 34 C.F.R. § 600.7(a) (1) (i), an institution does not qualify as eligible to receive Title IV funding if more than 50% of its courses are offered via correspondence. Therefore,

[1] Hereinafter, all citations to the Code of Federal Regulations pertain to those in effect from July 1, 2007, through June 30, 2010, as these governed the period covered by the program review.

pursuant to 34 C.F.R. § 668.116(d), CIE bears the burden of proving by a preponderance of the evidence that its courses did not exceed the 50% limitation, and that the institution complied with all Title IV program requirements and regulations in its disbursement of federal funds. While the respective parties do not appear to dispute the essential fact-findings regarding CIE's programs, they differ in their interpretation and application of federal regulations that define such programs.

Based upon the evidence presented during this proceeding describing CIE's program design, I find that CIE's program was consistent with the definition of a correspondence course as it is enumerated in the provisions of 34 C.F.R. § 600.2. Specifically, CIE distributed its instructional materials including examinations on such materials, to students who were not physically attending classes at the institution. Per program instructions, students completed individual lessons, i.e., a portion of the instructional materials, took examinations after completing such materials, and then returned the examinations to CIE for electronic grading, or, in the case of narrative answers, review by one of CIE's instruction staff. This program clearly matches up with the definition of a correspondence course, and falls well short of the required interaction between students and instructors that characterizes "telecommunications courses."

CIE asserts that it would be unreasonable to require the return of all Title IV funds to ED because the institution relied upon DETC's accreditation and, in good faith, interpreted the pertinent regulations to designate their programs as telecommunications courses. While CIE claims that it attempted to comply with the federal regulations, this cannot override the clear language of the law. Significantly, the role of a recognized accrediting agency, such as DETC, does not include the responsibility for making Title IV eligibility determinations; rather this role belongs to ED. *See* HEA § 498, 20 U.S.C. § 1099(c). While accreditors may be recognized by the Secretary for their reliability in assessing the quality of postsecondary education programs, they are not charged with specific knowledge or understanding of Title IV requirements. *See* HEA § 496, 20 U.S.C. § 1099(b). Thus, although DETC's accredited CIE's course offerings and this lends credence to the substance of the programs, such courses clearly constituted correspondence courses and, therefore, were ineligible to receive Title IV aid.

Moreover, CIE was put on notice of the potential Title IV limitation at the time of its accreditation. The DETC site team made "*no opinion as to the institution's current or future compliance with federal regulation and criteria* regarding the administration of federal financial aid programs" and that DETC's report was issued "for the express use of DETC and [was] intended to verify institutional compliance *with DETC policy and standards* concerning federal student aid." (Emphasis added). As such, I find that FSA is correct in asserting that "[the] recognized accreditor's role … starts and stops with its decision as to whether to grant accreditation," and that DETC's comments concerning CIE's compliance with the definition of telecommunications courses bear no evidentiary weight in this proceeding.

Under the plain statutory language, CIE is unable to meet its burden of proving that its courses constituted telecommunications courses. The distinctive statutory element relative to a telecommunications course is whether or not there existed "regular and substantive" interaction between the "students and *the* instructor." 34 C.F.R. § 600.2 (emphasis added). Thus, clearly the regulations define a telecommunications course as one that involves a single instructor, assigned to a specific class, who communicates with the class via a combination of technologies. Conversely, for correspondence courses, "[w]hen students complete a portion of the institutional materials, they take examinations that relate to that portion of the materials and return the examinations *to the institution* for grading." 34 C.F.R. § 600.2 (Emphasis added). As such, a correspondence course is one that involves the distribution and grading of course materials by the institution itself, rather than by a specific instructor. This core distinction between the two definitions highlights the clear purpose of the regulatory language, which is meant to distinguish between distance learning courses that offer "regular and substantive" interaction between a designated instructor and his/her class and distance learning courses that instead offer only periodic interaction between students and the institution.[2]

While CIE argues that its programs did, in fact, support regular and substantive interaction between students and instructors, under the common definitions of "regular" and "substantive," it appears that CIE's programs do not support such communication.[3] Primarily, CIE offers no proof that students were ever assigned a specific instructor to guide them through the course materials. Rather, CIE's programs involved the mass distribution of primarily paper-based, standardized instructional materials to students, of which the students were expected to utilize in answering standardized questions that were then returned to the institution for grading. CIE claims that its staff will see that every question [students] have will receive a careful consideration by *one or more members of the staff.* (Emphasis added). In this regard, it appears that a group of instruction staff are assigned to grade students' responses, rather than a designated professor assigned to a group of students. Moreover, while CIE argues that its requirement that students make "weekly" contact with such staff supports the existence of

[2] Although CIE apparently claims that the distinction between telecommunications and correspondence courses is more so based upon the technological mediums utilized by the institution in administering its programs than upon the level of interaction between students and instructors, this argument is inconsistent with the clear guidance offered by ED for distinguishing between the two categories of distance learning courses. *See* 71 Fed. Reg. 45666, 45667 (Aug. 9, 2006) ("A definition of telecommunications course that focused exclusively on technologies could be erroneously interpreted to allow an institution to qualify for full participation in Title IV, HEA programs upon introduction of *minor e-mail contact between students and a grader or instructional assistant* … Quality standards for electronically-delivered education emphasize the importance of interaction between the instructor and student.") (Emphasis added).

[3] According to the Merriam-Webster Online Dictionary, "regular" is defined as "happening or done very often" while "substantive" is defined as "considerable in amount or numbers." *See also* 71 Fed. Reg. 64378 (Nov. 1, 2006) The phrase 'regular and substantive' means that the interaction provided for should take place at regular intervals and not be trivial.

"regular and substantive" interaction, it offers no proof to show that this was anything more than the posting of answers to standardized questions by students via the institution's web portal, to which the students received electronically-generated feedback through CIE's computer grading system.[4] CIE asserts that instructors were available to answer students' questions during scheduled office hours, but only offers proof of a few instances in which students actually called in with course-related questions. Thus, the only regular contacts that CIE appears to have had with students consisted of the students posting completed lessons to the "e-grade" portal for electronic grading, with the mere *option* to call CIE staff with questions during office hours. Such contacts are plainly insufficient, of themselves, to constitute "regular and substantive" interaction between students and professors.

Finally, CIE asserts that an agency must give "full notice of its interpretation" prior to sanctioning a regulated party, *see Satellite Broad. Co., Inc. v. F.C.C.*, 824 F.2d 1 (D.C. Cir. 1987). I find that, based upon the plain reading of the language of the regulations, as well as the clear guidance offered by ED distinguishing between the two types of "distance learning" courses, CIE did have notice of the proper regulatory interpretation prior to its program review. I note, that if CIE wished more clarification on the definitions found in 34 C.F.R. § 600.2, it could have contacted ED, the proper governing authority on regulatory interpretation, with such an inquiry at any time prior to the review. However, CIE did not do so, and instead, apparently chose to rely solely on the DETC accreditation. While it does appear that CIE made an attempt to comply with the governing regulations in structuring its programs, in the end, such programs clearly constituted correspondence courses and, therefore, never qualified for Title IV financial assistance. It is important to note that by this finding, I do not mean to imply that the courses taught by CIE were not educationally beneficial -- DETC has found that they are such. Unfortunately, that is not the question that is before me.

Consistently and most important, pursuant to 34 C.F.R. § 668.117(d), I may not waive or rule invalid applicable statutes and regulations, but rather am bound by and must enforce them.[5] Accordingly, I find that CIE is liable for the full return of Title IV funds for the 2008-2009 and 2009-2010 award years.

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[4] While CIE argues that it's CD-ROM "training lab" also fostered "regular and substantive" interaction between students and instructors, this lab appears merely to have supplemented two of CIE's sixteen programs, and, by itself, is insufficient to move the courses' classification from "correspondence" to "telecommunications."

[5] *See Prairie View Agricultural and Mech. Univ.*, Docket No. 10-32-SP, U.S. Dep't of Educ. (Decision) (Aug. 3, 2011) ("In spite of the sympathy I might have for the situation that [the institution] finds itself… I do not have any discretion in this matter… I am required to follow properly promulgated regulations and cannot waive them or rule them to be invalid."); *see also Wrightco Technologies Technical Training Ins.*, Docket No. 05-01-SP, U.S. Dep't of Educ. (Decision) (Aug. 16, 2005) (noting that the institution's defense "that it was informed by FSA employees that the system they were establishing was in compliance with the regulations" constituted "informal advice" and "could not effectively overrule the regulatory provisions.")

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested, to the following:

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