



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
OFFICE OF ADMINISTRATIVE LAW JUDGES
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In the Matter of

Docket No: 15-36-SP

Housatonic Community College,

Federal Student Aid
Proceeding

Respondent.

PRCN: 201410128473

Appearances: Bonnie J. Little, Esq. of Brustein & Manasevit PLLC, Washington, DC, for
Housatonic Community College

Denise Morelli, Esq. Office for the General Counsel, U.S. Department of
Education, Washington, DC, for Federal Student Aid

Before: Robert G. Layton, Administrative Judge

DECISION

Housatonic Community College (Housatonic) is a two-year public community college located in Bridgeport, Connecticut. By letter dated May 7, 2015, Dr. Paul Brodie II, President of Housatonic, filed a written Request for Review in the above-styled proceeding. Housatonic challenges the findings presented in the Final Program Review Determination (FPRD), dated March 27, 2015, issued by the U.S. Department of Education, Federal Student Aid (FSA) office. The determination imposes a liability on Housatonic to pay \$418,154.64 for violations of Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 *et seq.* (Title IV) and its implementing regulations for the 2012/2013 and 2013/2014 award years. Housatonic's review request was filed pursuant to 34 C.F.R. § 668.113(a). The appeal procedures are set forth in 34 C.F.R. Part 668, Subpart H.

The Department conducted a program review at Housatonic to evaluate the institution's

administration of Title IV funds. In Finding 1, the FPRD determined that Housatonic failed to confirm student enrollment statuses because the institution did not have any mechanism for determining if a student ever attended classes, which resulted in the institution keeping more Title IV funds than it was entitled to. According to 34 C.F.R. § 668.21(a), if a student does not begin attendance in a payment period or period of enrollment, the institution must return all Title IV, HEA program funds that were credited to the student's account at the institution or disbursed directly to the student for the payment period of enrollment. The FPRD also found inconsistent application of its grading policy, which Housatonic relied on for determining student withdrawal. The FPRD further noted that the institution's failure to confirm a student's actual enrollment status in a term may result in a student receiving funds for periods of non-enrollment, or receiving funds based on an incorrect enrollment status. Thus, the FPRD concluded that if a student failed to begin attendance in all of his or her classes in a term, those additional Title IV funds must be repaid to the Department.

In any Subpart H audit and program review proceeding, the Respondent has the burden of proving by the preponderance of the evidence that the Title IV funds received were lawfully disbursed and earned. If it fails to establish the correctness of the expenditure of federal education funds under the criteria of the statutes and regulations, the Respondent must return funds to the Department. 34 C.F.R. § 668.116(d). While Housatonic has the burden of proof in this proceeding, FSA also has the burden of providing adequate notice of its demand. Here, FSA, in the FPRD and supporting documentation adequately established a prima facie case showing that Housatonic improperly disbursed and retained Title IV for students who did not begin attendance in all classes for which Title IV funds were disbursed. Although the FPRD did not cite 34 C.F.R. § 690.80 specifically informing HCC that it must recalculate a student's Pell award if his or her enrollment status changes in a term, that recalculation is applicable to the 34 C.F.R. § 668.164 requirement that an institution may only disburse Title IV funds when a student is enrolled and eligible to receive those funds. Thus, FSA met its burden to establish a prima facie case and sufficiently identify Housatonic's noncompliance in the FPRD.

To participate in Title IV programs, an eligible school must enter into a Program Participation Agreement (PPA) with the Department that conditions a school's initial and continuing eligibility upon compliance with statutory requirements, regulatory requirements, and any additional requirements specified in the PPA. 20 U.S.C. § 1094 (2012); 34 C.F.R. §§ 668.14, 668.16(a) (2014). These requirements mandate that the institution use funds received under Title IV solely for the purposes specified in each individual student assistance program. *See* 20 U.S.C. § 1094(a)(1); 34 C.F.R. § 668.14. The refund determination is made pursuant to a calculation commonly referred to as the Return of Title IV funds (R2T4).

An institution may disburse Title IV, HEA program funds to a student or parents for a payment period only if the student is enrolled for classes for that payment period and is eligible to receive those funds. 34 C.F.R. § 668.164(b)(3). "Enrollment status" is defined as "full-time," "three-quarter-time," or "half-time." 34 C.F.R. § 690.2. If a student does not begin attendance in a payment period or period of enrollment, the institution must return all Title IV, HEA program funds that were credited to the student's account for the institution or disbursed directly to that student for that payment period or period of enrollment. 34 C.F.R. § 668.21(a).

The above regulatory requirement addresses when enrollment allows for HEA funds to be disbursed. In addition to addressing when HEA funds may be disbursed, the program also requires recalculation of a Federal Pell Grant award when there is a change in a student's enrollment status. That program requirement is found in 34 C.F.R. § 690.80(b), which states:

Change in enrollment status. (1) If the student's enrollment status changes from one academic term to another term within the same award year, the institution shall recalculate the Federal Pell Grant award for the new payment period taking into account any changes in the cost of attendance.

(2)(i) If the student's projected enrollment status changes during a payment period after the student has begun attendance in all of his or her classes for that payment period, the institution may (but is not required to) establish a policy under which the student's award for the payment period is recalculated. Any such recalculations must take into account any changes in the cost of attendance. If such a policy is established, it must apply to all students.

(ii) If a student's projected enrollment status changes during a payment period before the student begins attendance in all of his or her classes for that payment period, the institution shall recalculate the student's enrollment status to reflect only those classes for which the student actually began attendance.

The amount of Title IV funds earned is based on the amount of time the student spent in academic attendance. A student who attends on a basis that is less than full-time must have his or her Title IV funds reduced proportionately. 34 C.F.R. § 690.80. Although the regulations do not require that Housatonic maintains an attendance policy, a school must be able to confirm a student's enrollment status in order to correctly calculate a return. If a student's attendance cannot be confirmed, an institution's grading system provides an alternative method to confirming a student's attendance. *See Cincinnati State Technical and Community College*, Dkt. No. 97-65-SP, U.S. Dep't of Educ. (Sept. 4, 1998).

When a recipient of Title IV funds withdraws from an institution during a payment period or period of enrollment in which the recipient began attendance or the institution discovers that a student has stopped attending the institution, the institution must perform a Return of Title IV funds calculation. 34 C.F.R. §§ 668.22(a), (c). This must be performed within 30 days to determine the amount of Title IV grant or loan assistance the student earned as of the student's withdrawal date. If the student fails to begin any of the classes in a term, all Title IV funds disbursed must be returned. 34 C.F.R. § 668.21(c). An institution that is not required to take attendance must determine withdrawal dates no later than 30 days after the earliest of the payment period, academic year, or educational program from which the student withdrew. 34 C.F.R. §§ 668.22(c), (j).

The student's official withdrawal date can be either the date the student begins the withdrawal process prescribed by the institution or the date the student provides official notification to the institution. 34 C.F.R. §§ 668.22(c)(1)(i)-(ii). The student's unofficial withdrawal date can be either the mid-point of the payment period or the student's last date of

attendance at an academically-related activity provided that the activity is academically-related and documents the student's attendance. 34 C.F.R. § 668.22(c)(1)(iii).

Upon review of the entire record as discussed below, Housatonic failed to establish by a preponderance of evidence that the institution properly disbursed Pell awards consistent with federal requirements and the institution's policies. Housatonic correctly articulates the prohibition in the Federal Rules of Evidence against use of subsequent remedial measures such as those Housatonic implemented.¹ Although those remedial measures are not considered as evidence in this case, both the subsequently generated and the previously generated exhibits which Housatonic offered are properly before me.

Housatonic states that its recalculation procedures adjust awards for changes in projected and actual enrollment status at the beginning of the payment period. Under these procedures, Housatonic "freezes" the student's current enrollment status and does not make additional recalculations of Pell awards after the end of the add/drop period, or approximately fourteen days after the start of the payment period. ED Ex. R-2, Housatonic Catalog. As a result, Housatonic accepts responsibility for not properly identifying students as noted in 34 C.F.R. §668.21(c), and feels it is appropriate to return funds on behalf of students for which attendance could not be substantiated in any class that Title IV funds had disbursed on their behalf. Housatonic's Response Report to FPRD at 6. Based on this, Housatonic concedes \$109,366.36 in liability. However, Housatonic disagrees with the directive to recalculate enrollment status for students in cases where attendance was substantiated in at least one class for which Title IV funds were disbursed. Housatonic contends that \$308,787.28 of the expenditure questioned or disallowed were in fact proper and that Housatonic complied with program requirements. Housatonic therefore requests that the liability be reduced from \$418,154.54 to \$109,366.36.

Housatonic insists that Pell awards are only disbursed after actual enrollment status is confirmed, and that an institution must only recalculate Pell awards if the students' projected enrollment status changes. Housatonic further argues that enrollment statuses confirmed at the end of the add/drop period were not projected since there was no possibility that the enrollment statuses would change during the remainder of the payment period. Thus, Housatonic contends an institution only needs to document student attendance in at least one class in the payment period in order to confirm student attendance in the institution and that Title IV disbursements were properly made. But by its very language, the regulations specify in 34 C.F.R. § 690.80(b)(2)(ii) that if a student's projected enrollment status changes during a payment period before the student begins attendance in all of his or her classes for the payment period, the institution shall recalculate the student's enrollment status to reflect only those classes for which the student actually began attendance.

FSA contends that Housatonic failed to determine a student's actual enrollment status prior to disbursing Title IV aid, which resulted in the institution disbursing over-awards to students who did not begin attendance in all or some of the classes. ED. Exs. 1 at 12, 2, at 7-8. FSA further argues that Housatonic incurs liability by failing to ensure students began attendance

¹ The measures taken were those requested by FSA. The argument concerning the Federal Rules of Evidence is addressed in response to Housatonic's contention on remedial measures, even though the admissibility standard of the Federal Rules of Evidence are not applicable in this proceeding.

in all classes, which resulted in inaccurate return calculations for students who began attending some classes but ultimately withdrew from the institution prior to completing the payment period. Although Housatonic had an add/drop period, the institution did not monitor students who did not begin attendance in all, or some of the classes in which they initially enrolled. School officials acknowledged that Housatonic did not make a determination regarding enrollment status until the end of each term, and then the student was treated as a withdrawal. *See* ED. Ex. 3 at 2.

Based upon the evidence presented in this proceeding, Housatonic failed to check changes in enrollment status for recalculation purposes. No action was taken until the end of the term, such as contacting instructors about students' attendance. Students who did not complete the term were considered withdrawals and no action was taken for students who began some, but not all of their classes. This is inconsistent with Title IV requirements.

Further, in the *Brown Affidavit*, Acting Dean of Academic Affairs for Housatonic swears that approximately 75% of the students at issue attended one or more of their classes, even though the students later withdrew from or failed the courses. Ex. R-3, *Brown Affidavit*. But the affidavit does not articulate how Housatonic calculated that 75% of students attended at least one class. The affidavit fails to provide adequate proof that the majority of students at issue began attendance in all of their classes and their Title IV disbursements were properly made. Additionally, only one attendance roster was submitted in addition to instructors' emails to Academic Affairs. Since Housatonic instructors only confirmed attendance in email at the end of the semester, the accuracy of these emails is in question. Professors are only relying on memory to recall students' attendance. *See* ED. Ex. 10-11. Even if Housatonic's legal interpretation of the regulations was acceptable, the evidence it offers fails to meet its burden of proof that attendance was appropriately confirmed and Title IV funds were properly disbursed and recalculated. Housatonic's single affidavit, single roster and select emails from instructors after the semester commenced are of limited evidentiary value.

Housatonic's argument that it would be burdensome for an institution to continue monitoring students' attendance throughout the semester is not persuasive. As a fiduciary, an institution is subject to the highest standard of care and diligence in administering those programs and ensuring that the funds received are properly spent. 34 C.F.R. §§ 668.82(a)-(b). An eligible school owes the Department the highest standard of care and diligence to ensure the funds are efficiently administered and properly spent. Housatonic did not maintain the highest standard of care and diligence in disbursing Title IV funds or calculating returns. An institution must establish that a student began attendance in all classes for which Title IV funds were awarded and disbursed. To do otherwise, would permit students, and the institution, to retain Title IV funds to which they were not entitled. To comply with 34 C.F.R. § 690.80(b)(2), an institution must demonstrate that a student began attending classes in the payment period even if attendance was not required.

Housatonic cites *Lorian County Community College*, Dkt. No. 97-6-SP, U.S. Dep't of Educ. (July 22, 1998) as supporting its argument. Review of *Lorian* shows the decision does not support Housatonic's position. The tribunal concluded in *Lorian* that the regulations clearly state that when a student fails to begin attendance in all of his or her classes, the institution is required

to recalculate the student's award to reflect only those classes for which he or she began attendance. There is no ambiguity. The regulations require that an institution demonstrate that the student began attending at least one class in each of the courses for which he or she was registered. It is also worth noting that the argument that it would be burdensome to demonstrate that students began attendance in at least one class in each course does not logically equate to “monitoring attendance indefinitely.” Following its plain meaning, the regulation as written, and as previously applied in *Lorian* requires that for Title IV recalculation purposes, evidence must be provided that would demonstrate that a student began attending at least one class in each course for the academic term. Thus, when a student fails to begin attendance in all of his or her classes, the institution is required to recalculate the student's award to reflect only those classes for which he or she began attendance.

Housatonic also argues that it would be unduly burdensome to require proof of attendance in each of the classes for which the student was registered during the payment period. This contention is undercut by Housatonic also quoting the Secretary’s stated purpose of 690.80(b)(2)(ii) as “. . . allowing [an] institution the discretion to recalculate the Pell awards after a student has begun attendance in **all** classes, which was intended to alleviate the administrative burden of tracking student attendance throughout the academic term.”

One cannot simultaneously argue for and against something. Housatonic correctly argues that advice and guidance provided by the Department in its FSA Handbook and Letters does not constitute law or official agency policy. But Housatonic also urges the use of such guidance, citing the *Dear Colleague Letter* in support of its argument. A *Dear Colleague Letter* is an agency interpretation of existing law and regulations, which is a useful tool of regulatory construction only if an ambiguity is present. Even if an ambiguity exists and the agency’s prior interpretation of the language in 34 C.F.R. § 690.80 was based on error, then the agency would be permitted to change its interpretation of that language, no matter how longstanding. *Chisholm v. FCC*, 538 F.2d 349, 364 (D.C. Cir. 1976) (citing *Automobile Club v. Commissioner of Internal Revenue*, 353 U.S. 180, 182 (1957)). In this case, the language of the regulation is unambiguous. It is therefore inappropriate to use any long-standing interpretation of the regulation as a tool of construction in this case. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

Housatonic is correct in asserting that the regulations do not require an institution to document actual attendance in each class. The regulations do not require institutions to adopt and monitor an attendance policy, nor does 34 C.F.R. § 690.90(b)(2) articulate a method by which an institution must document that a student began attending classes. Although there is no specific attendance policy or requirements placed upon schools, schools can document the student’s attendance in a variety of different ways, such as through test scores or class work submitted. In addition, an institution’s grading system serves as a satisfactory substitute for class attendance records. While this is a simple determination if those students received passing grades, it is another matter for those who did not. See *Cincinnati State Technical and Community College*, Dkt. No. 97-65-SA, U.S. Dep’t of Educ. (Sept. 4, 1998).

In *Cincinnati State Technical and Community College*, the College did not require its teachers to take class attendance. However, the College explained that its grading system served

as a satisfactory substitute for class attendance records, even for those students who did not receive a passing grade. The students' grades in those courses served as the only way to document that students attended at least one class in each course that made up their projected enrollment status. But the tribunal determined that the College was unable to document that the students who received "F," "W," and "V" grades ever attended any classes in those courses.² Therefore, the tribunal held that the College could not prove that the Pell Grant payments to those students were authorized. Thus, the College was required to refund the Department \$373,035.

Housatonic similarly relied on the students' enrollment status when calculating Pell Grant awards. Like Cincinnati State Technical and Community College, Housatonic did not require its faculty to take attendance. Thus, the only way to document that students attended at least one class in each course that made up their projected enrollment status is to rely on the students' grades in those courses. But the FPRD stated that Housatonic's procedures are not adequate to monitor student enrollment statuses for purposes of determining Title IV eligibility for students who unofficially stop attending an academic term. The reviewers were unable to determine the enrollment status for those who received a grade point average of 0 for the term for the Fall 2012, Spring 2013, Summer 2013, and Fall 2013. Based on the FPRD, it could not be determined whether students enrolled for Fall 2012, Spring 2013, Summer 2013, and Fall 2013 terms began classes for which they were enrolled. While Housatonic is correct in its assertion that an institution can have flexibility in determining whether the student began attending classes, Housatonic did not have a sufficient mechanism for determining if a student failed to begin classes in which they were enrolled because they did not perform an evaluation until the end of each term when final grades were reviewed.

FSA further argues that students who began attendance and have not officially withdrawn fail to earn a passing grade in at least one course offered over an entire period, the institution must assume, for Title IV purposes, that the student has unofficially withdrawn, unless the institution can document that the student completed the payment period. *See* FSA's Dear Colleague Letter, *Advisory on Recalculation of a Federal Pell Grant Award*, March 20, 1997, available at https://ifap.ed.gov/eannouncements/doc0263_bodyoftext.htm. However, as noted above, *Dear Colleague Letters* are not a useful tool for construction in a case such as this where the applicable regulations are clear.

It is clear that if a student doesn't begin attendance in all of his or her classes, resulting in a change in the student's enrollment status, then an institution must recalculate the student's award based on the lower enrollment status. *See* 34 C.F.R. § 690.80(b)(2)(ii). So when a recipient of Title IV funds withdraws from Housatonic during a payment period or period of enrollment in which the recipient began attendance or Housatonic discovers that a student has stopped attending the institution, Housatonic should perform a Return of Title IV Funds calculation within 30 days to determine the amount of Title IV grant or loan assistance the

²*See Cincinnati State Technical and Community College*, Dkt. No. 97-65-SA, U.S. Dep't of Educ. (Sept. 4, 1998) (describing the college's policy of issuing an "F" when a student maintains a low quality of work and minimally masters the subject matter in a course or because the student did not complete the course requirements; issuing an "V" to a student who enrolled in a course, did not withdraw from the course, but stopped attending and meeting the course requirements; and issuing a "W" to students who changed their enrollment status by officially withdrawing from a class).

student earned as of the student's withdrawal date. *See* 34 C.F.R. §§ 668.22(a), (j). Since Housatonic's procedures for monitoring student enrollment are inadequate, there remains no definitive method to determine if a student attended all or some of the classes during the payment period. Thus, Housatonic did not properly recalculate the student's award based on their enrollment status or within the required 30-day timeframe after the earliest of the payment period, academic year, or educational program from which the student withdrew. *See* 34 C.F.R. §§ 668.22(c), (j).

Although Housatonic does have an add/drop period and does not disburse funds until after that period is over, the College does not require professors to provide census data information that could help determine those students who were no shows. ED Ex. 2 at 7. The add/drop census data only includes those students that officially withdrew or dropped some of the classes. *Id.* While Housatonic is an institution that is not required to take attendance, it must have a process in place to determine whether any student who failed to receive any passing grades during a term established eligibility for the Title IV funds disbursed to the student during the period. *See* 34 C.F.R. § 668.22. Housatonic failed to have any adequate policy in place.

Furthermore, a review of Housatonic emails and student transcripts and emails after the semester commenced establishes that it is clear that the institution did not administer "N" grades and "F" grades consistently.³ Thus, it is not clear whether students who received "N" or "F" grades attended class. Some students received "N" grades if they attended class and completed some work, while other students received "N" grades if they did not attend class or complete any work. Housatonic stated that an "N" grade should only be issued when there are no grades and it was assumed that the student was not in attendance; and an "F" grade should only be issued if the student completed some work for the class and it was assumed that the students was in attendance at some point in the term. ED. Ex. 3 at 2. Therefore, it cannot be determined by looking at a student's grades whether a student ever began attending classes in specific courses. Thus, Housatonic did not provide the highest standard of care and diligence in administering Title IV funds since they did not maintain an attendance policy or administer grades correctly.

Examination of individual student records provides specific explanation of how Housatonic's system in existence for the relevant time periods was inadequate to document if the students began attendance.

Student 5:

In Finding 1, Student 5 officially withdrew from one class and received "N" grades in her other two classes. ED Ex. 2 at 7. In her first class, SOC 101 class, the professor stated that she attended six classes and completed two of six assignments. In her second class, BIO 101, the professor stated that the student did come to class for a good part of the semester, but never completed her last assignments that were required. But according to Housatonic's Handbook and website, an "N" grade should result from a student who never attended class. *See* ED. Ex. 3 at 2.

³ED. Ex. 2 at 7 (articulating Housatonic's policy that an "N" grade should be issued when there is no grade reported at the end of the semester or no basis for a grade; a "W" grade is issued for students who formally withdraw from a course; and an "F" grade would indicate a student's performance in terms of the quantity and the quality of the performance).

Thus, Student 5 should have received an “F” in one of her classes since she attended six classes and completed two assignments.

Student 7:

Additionally, Student 7 received two “N” grades and two “F” grades. ED. Ex. 2 at 7. In her first class, MAT 075, the professor stated that she only attended class on the first day and never did any work. She received an “F” in this course as a result. In her second class, THR 101, the professor gave the student an “N” grade but stated she attended four of the five classes, missed the next seven classes, and then came to the next five classes. Additionally, in her third class, DS 099, the professor stated he gave her an “N” because she did not attend any classes. Furthermore, in EN 043, the student showed up for the first eight classes, which was documented in an assignment book. Since the student did not receive any grades, she received an “F.” Consequently, it is evident that Student 7 received an “F” and “N” grades when she attended class. This is inconsistent with Housatonic’s policy that a student should receive an “N” grade only when a student was not in attendance for a course.

Student 8:

Student 8 received an “I,” “N,” and an “F” for her three classes. ED Ex. 2 at 8. The registrar did not provide confirmation of attendance in any of these classes. Although Housatonic requires professors to turn in notification of incompletes, the registrar did not have any on file for this student. Thus, the registrar’s office failed to provide the bare minimum of documentation on behalf of Student 8. Therefore, it cannot be determined whether she ever attended class.

Student 15:

Student 15 received two “N” grades and two “F” grades. ED Ex. 2 at 8. In her first class, ECE 101, she answered 3 out of 15 discussion questions, and submitted 5 out of 13 journal entries. She did not complete any other assignments which accounted for 80% of her grade. The student only completed 2% of the required work and was given an “N.” In her second class, ECE 207, she earned 33 out of 1000 points for the semester and earned an “F” grade. In her third class, ECE 190, she never logged onto Blackboard or submitted any work. Thus, she earned an “N” grade. In her fourth class, ECE 190, no documentation was provided to explain why she received an “F” grade. Once again, Housatonic distributed an “N” grade and “F” grade for a student who completed some work. As a result of this, it cannot be determined whether Student 15 unofficially stopped attending these courses. Furthermore, the registrar’s office failed to submit any documentation on why Student 15 received an “F” for ECE 190.

The record offered by Housatonic shows that it cannot be clearly determined by looking at a student’s grade whether he or she ever began attending classes in that course. Housatonic is unable to adequately document that the students who received those grades attended any classes in those courses, or that the Pell Grant payments to those students were authorized. Accordingly, Housatonic has not met its burden regarding students who received “F” and “N” grades.

Because Housatonic was unable to provide sufficient evidence to support its assertion

that it confirmed students' enrollment status in terms of disbursing Title IV funds, Housatonic has failed to meet its burden of proving that it properly disbursed Pell awards based on actual enrollment.

ORDER

On the basis of the above findings, I order that Housatonic Community College, Bridgeport, Ct, pay to the U.S. Department of Education the sum of \$418,164.26, as demanded in the Federal Program Review Determination.

Robert G. Layton
Administrative Judge

Dated: July 26, 2016

SERVICE

A copy of the attached document was sent by U.S. Mail, certified, return receipt to:

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