THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

NORTHWEST FLORIDA STATE COLLEGE,

Respondent.

Docket No. 12-18-SA
Federal Student Aid Proceeding

DECISION OF THE SECRETARY

This matter comes before me on appeal by the Northwest Florida State College (Respondent) of the Initial Decision by Administrative Judge Richard I. Slippen. In the case before Judge Slippen, Respondent appealed one finding of the Final Audit Determination (FAD) letter issued on January 18, 2012, by the Office of Federal Student Aid of the U.S. Department of Education (FSA or Department). The Finding involved Respondent's failure to demonstrate that it established, published, and applied reasonable standards for measuring whether an otherwise eligible student was maintaining satisfactory academic progress, consistent with its duty under 34 C.F.R. § 668.16(e). On July 31, 2012, Judge Slippen found that Respondent did not demonstrate that it complied with the applicable regulations, upheld the finding, and ordered Respondent to pay $340,845 to the Department. On appeal, Respondent urges me to overturn the Initial Decision and reverse the liability determination.

I.

At issue in this case is whether Respondent's Satisfactory Academic Progress (SAP) policy was in compliance with 34 C.F.R. § 668.16(e), which requires, in part, that an institution --

> For purposes of determining student eligibility for assistance under a title IV, HEA program, *establishes*, *publishes*, and *applies* reasonable standards for measuring whether an otherwise eligible student is maintaining satisfactory academic progress in his or her educational program. (emphasis added)

In the FAD, FSA determined that Respondent, for purposes of the audit review, provided the state auditors with its published SAP policy, as printed in the school catalog, but that the policy was not actually applied or in effect during the 2009-2010 academic year. For this reason, Respondent did not meet its responsibilities under 34 C.F.R. § 668.16(e).

Respondent timely appealed this finding. In the proceedings before Judge Slippen, Respondent indicated that it had two SAP policies, one printed in the school's catalog (Catalog SAP policy),[1] and an updated one that was published on its website (Revised SAP policy).[2] Despite having two policies in existence, Respondent argued that only one policy was in effect: the Revised SAP policy. The school emphasized that the Revised SAP policy was the only policy used to measure the satisfactory academic progress of students and had been since it was updated in 2001. Conversely, Respondent argued that the Catalog SAP policy, as written, had not been applied since 2001, and the school's failure to update the policy in the catalog was nothing more than a "clerical error" that had no bearing on the actual administration of the SAP policy in use, *i.e.*, the Revised SAP policy. Respondent further maintained that the Revised SAP policy was established, published on its website, and mailed to students along with information about student aid. For these reasons, Respondent believed it was in compliance with 34 C.F.R. § 668.16(e) and argued that it would be unjust to be penalized for a simple "clerical error."

In response, FSA asserted that Respondent's argument was without merit. Respondent could not have a published policy that it failed to apply (*i.e.*, the Catalog SAP policy) and still be in compliance with a regulation that requires the established, published policy to be applied. Administrative case law clearly states that institutions must enforce their own policies as published[3] and that a failure to do so constitutes a failure to act with the highest standard of care and diligence in administering Federal education funds. Further, FSA maintained that Respondent's publication of one policy while implementing another was not merely a clerical error but rather a serious breach of its duty as a fiduciary and a failure to serve its students: "Institutions, however, in their capacity as a fiduciary, must maintain practices that mirror their published policies, so that students and the Department have a measureable basis upon which to understand how Title IV funds will be earned and disbursed."[4] Given that Respondent had two incongruent policies, it would be impossible for the school to practice what they published. For this reason, FSA concluded that Respondent failed in its fiduciary duties.

Respondent replied that it did not have two policies being implemented simultaneously. To the contrary, the Revised SAP policy was the only one in effect, and it met the requirements of 34 C.F.R. § 668.16(e). For these reasons, Respondent argued that the finding in the FAD should be overturned.

In the Initial Decision, the hearing official determined that Respondent had two SAP policies. He found that the Catalog SAP policy was established and published; however, he found that it was not applied in accordance with section 668.16(e) because the school did not follow this policy when measuring a student's satisfactory academic progress. As for the Revised SAP policy, the hearing official found that the policy was not established, *published*, and applied as required by section 668.16(e). Specifically, Judge Slippen determined that Respondent did not

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[1] This policy was also printed in the school's Policy and Procedures Manual.

[2] The main difference between the two policies is that the Revised SAP policy incorporated a probationary period that was absent in the Catalog SAP policy.

[3] *See, e.g., In re Kelsey-Jenney College*, Dkt. No. 96-138-SP, U.S. Dept. of Educ. (May 1, 1998); *In re Academy of Hair Design*, Dkt. No. 95-98-SP, U.S. Dept. of Educ. (March 22, 1996); *In re Sinclair Community College*, Dkt. No. 89-2-S, U.S. Dept. of Educ. (Sept. 26, 1991) (Decision of the Secretary).

[4] *Brief of the U.S. Department of Education's Federal Student Aid* (May 17, 2012), p. 2.

demonstrate that it had published the Revised SAP policy.[5] The hearing official found no persuasive proof that the Revised SAP policy had been disseminated along with student aid letters or made available to all students, as argued by Respondent. Further, although Respondent averred that the Revised SAP policy was available on its website, the hearing official found that there was "no evidence demonstrating that its revised SAP policy appeared on its website during the 2009-2010 academic year."[6]

II.

Respondent now appeals this finding. In this appeal, the burden is on Respondent to demonstrate by a preponderance of the evidence that it complied with 34 C.F.R. § 668.16(e), that its SAP policy was established, published, and applied. On appeal, Respondent presents the same arguments that were raised and rejected during the proceeding below but asserts that the hearing official failed to properly consider evidence in the record that the Revised SAP policy was published.[7] I find that the hearing official properly heard and reviewed Respondent's arguments and evidence and articulated a sound rationale for rejecting them.[8] Thus, Respondent has failed to meet its burden in this matter. Accordingly, I find no basis on which to alter the Initial Decision or the liability determination.

Respondent dismisses the Catalog SAP policy's existence as an oversight and asserts that it was in compliance with 34 C.F.R. § 668.16(e) because its current SAP policy—the Revised SAP policy—was established, published, and applied, per the regulations. Respondent's argument is unconvincing. Respondent's evidence on appeal is not sufficiently persuasive to overcome the determination in the FAD or by the hearing official that the Revised SAP policy was not made available to the public. Moreover, the existence of a Revised SAP policy, even assuming *arguendo* that it had been properly published,[9] would only be relevant to the extent that Respondent retracted the Catalog SAP policy and made clear that the Revised SAP policy was the version in effect. Respondent did not do this. To the contrary, Respondent represented to the auditors that the Catalog SAP policy was its SAP policy. It was not until after the discrepancy between the Catalog SAP policy and Respondent's practice was brought to Respondent's attention that any mention of an updated or revised policy can be found in the record. For these reasons, Respondent's arguments on appeal are unavailing.

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[5] Administrative case law has well established that "to publish" generally means to make known to the public. *See, e.g., In re Santa Clara Beauty College*, Dkt. No. 94-24-SP, U.S. Dept. of Educ. (Nov. 14, 1994), affirmed by the Secretary (July 18, 1995) and *In re Chicago State University*, Dkt. No. 94-172-SA, Dep't of Educ. (April 26, 1996).

[6] Initial Decision at 3.

[7] Specifically, Respondent argues that the hearing official neglected to consider two affidavits attesting to the publication and sole usage of the Revised SAP policy since 2001 or that, if the hearing official did consider this evidence, then his decision was in error.

[8] Although the hearing official did not specifically mention the affidavits in his Initial Decision, it is not incumbent upon him to list every piece of evidence that he considered. It is clear from the Initial Decision that the hearing official did not find the affidavits to be sufficiently persuasive in light of other evidence – and the lack thereof – in the record.

[9] I believe that, had the Revised SAP policy been made available to the public on the website at the start of and continuing throughout the 2009-2010 academic year, then the requirement under section 668.16(e) that the policy be published would have been satisfied.

It is troubling that throughout its appeal, Respondent ignores the fact that it was providing misinformation to students and the public. As the hearing official properly observed in the Initial Decision, it is incumbent upon an institution, as fiduciary of Federal funds, to act with the highest standard of care and diligence in administering its programs, which would include taking "the necessary steps to ensure that all financial documentation established, published, and applied was consistent in all print and electronic forms of communication."[10] Having two policies with conflicting standards is inconsistent with this fiduciary responsibility, serves to obfuscate rather than clarify, and undermines the primary reason why policies are required to be published—to provide clear, comprehensible guidance. Even if Respondent were applying only one standard, as Respondent asserts here, the students and the public could not easily discern which policy or standard was in effect. A school cannot live up to its regulatory or fiduciary responsibilities when conflicting versions of the same policy exist without clear indication of which is current and being implemented.

Further, I simply cannot agree with Respondent's characterization of the eight years that it failed to update the SAP policy in its printed catalog as being mere "clerical error." As I have stated previously, an educational institution has an important responsibility to the Department, to its students, and to the public to provide accurate information in its publications, especially when related to school policies. These policies mold expectations and behavior, and the school community relies on them for information and guidance. When an institution publishes incorrect information year after year, it must take responsibility for what is clearly a lack of proper oversight.

Finally, Respondent's arguments that neither the Federal interest was harmed, nor did any students receive unearned funds, are without merit. Whenever an institution breaches the fiduciary duty that it owes to the Department, the Department and Federal interests are harmed. Here, Respondent clearly failed to adhere to the requirements of 34 C.F.R. § 668.16(e) to establish, publish, and apply a satisfactory academic progress policy, and as a result of its failure, Respondent awarded financial aid to students who were not eligible. Consistent with established policy and administrative case law, Respondent has the legal obligation to refund to the Department the improperly administered student aid funds.

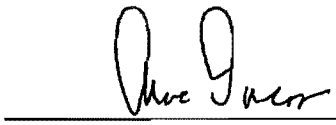
ORDER

ACCORDINGLY, the Initial Decision by Administrative Judge Richard I. Slippen is HEREBY AFFIRMED as the Final Decision of the Department.

It is FURTHER ORDERED that the Northwest Florida State College shall pay the sum of $340,845 to the U.S. Department of Education.

[10] Initial Decision at 3.

So ordered this 24th day of July 2014.



Arne Duncan

Washington, D.C.

Service List

Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-4616

Mr. Hayward Dykes, Jr., Esq.
Mr. Levin F. Bracken, Esq.
Conerly, Bowman & Dykes, LLP
4481 Legendary Drive, Suite 200
Destin, FL 32541

Mr. Russell B. Wolff, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-2110