



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

In the Matter of

QUEENSBURGH COMMUNITY COLLEGE

Respondent

Docket No. 21-31-SP

Federal Student Aid Proceeding
PRCN: 2017-2-02-29584

Appearances: Bonnie Graham, Esq.
Andrew Ball, Esq.
Brustein & Manasevit, PLLC counsel for Respondent

Karen S. Karas, Esq.
Office of the General Counsel for Federal Student Aid

Before: Robert G. Layton, Administrative Law Judge

DECISION

This decision involves an appeal by City University of New York Queensburgh Community College (QCC), a public, four-year college in the City University of New York (CUNY) college system. QCC participates in numerous federal student assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1070 *et seq.* (Title IV, HEA programs). Within the U.S. Department of Education (Department) the office having jurisdiction and oversight of these Title IV programs is the Office of Federal Student Aid (FSA).

FACTS AND PROCEDURAL BACKGROUND

To ensure compliance with federal statutes and regulations, FSA routinely conducts a program review of an institution's administration of funds disbursed pursuant to the Title IV program.¹

The Department conducted a program review on QCC in March and April 2017. The period of review was Award Years (AY) 2015-2016 and 2016-2017. The Department reviewed QCC's policies and procedures regarding institutional and student eligibility, individual student financial aid and academic files, attendance records, student account ledgers, and fiscal records. Following the on-site review at QCC, the Department issued a Program Review Report (PRR) on July 26, 2017. FSA in the PRR made eleven findings. QCC submitted to FSA numerous additional information and documentation in response to the PRR.

After considering QCC's written responses, on May 7, 2021, FSA issued a Final Program Review Determination (FPRD). FSA, in the FPRD, determined that QCC had adequately resolved Findings 1, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the PRR. The FPRD determined that there remained deficiencies in the return of Title IV funds under Finding 2 of the PRR and assessed a liability against QCC for \$348,604.58.

QCC filed a Request for Review to Finding 2 of the FPRD pursuant to 20 U.S.C. § 1094 and 34 C.F.R. § 668.113. After the Office of Hearings and Appeals (OHA) received QCC's Request for Review, the undersigned Hearing Official issued an Order Governing Proceedings. QCC filed its initial brief with exhibits. Department then filed its responsive brief with exhibits, and QCC responded by filing a reply brief. This tribunal took administrative notice of the Memorandum from the Office of University Registrar to the Presidents of the Colleges, Deans of

¹ 20 U.S.C. § 1099(c-1)

Schools and Provosts of Colleges regarding Revised CUNY Uniform Grade Symbols: Glossary and Guidelines dated August 27, 2013.² The parties were provided an opportunity to supplement their arguments based upon this memorandum and both parties did so.

This appeal is governed by the procedures set out in 34 C.F.R. Part 668, Subpart H. A timely request for review was submitted, the parties were notified of the hearing process, briefs along with relevant evidence have been accepted and reviewed. This matter is ready for decision pursuant to 34 C.F.R. § 668.118.

ISSUES

During the program review, the Department identified thirty files from the AY 2015-2016 and 2016-2017 to review. The files were randomly selected from a statistical sample of the total population receiving Title IV, HEA program funds for each award year. In addition, fifteen student files were selected to test the Federal Supplemental Opportunity Grant (FSEOG) program, the Perkins Loan program, Federal Work Study Program. the Direct PLUS loan program and students with a zero GPA from no passing grades.³

In Finding 2, the Department identified eight students (Students 2, 13, 14, 18, 23, 38 44 and 45) for whom it believed QCC had return of Title IV (R2T4) deficiencies.⁴ For Student 14, FSA asserted that the refund issued after the student withdrew was issued late.⁵ For Student 18, FSA stated that QCC held Title IV funds after the student failed to begin class and issued refunds to the student instead of the appropriate program.⁶ For Student 38, FSA contends that QCC failed to produce proof of a proper refund.⁷ The Department additionally identified Students 2,

² OHA E-filing System (OES) Doc. No. 23.

³ PRR at 4.

⁴ *Id.* at 8-11.

⁵ *Id.* at 10.

⁶ *Id.* at 10.

⁷ *Id.* at 10.

13, 23, 44 and 45 as having received a combination of non-passing grades of WU, F, INC or FIN and requested that QCC submit documentation, separate from its grading policy, to confirm that Students 2, 13, 23, 44 and 45 completed the relevant payment period.⁸ The PRR stated to QCC that “If a school uses its grading policy to determine whether students with failing grades have unofficially withdrawn, during compliance audits and program reviews, student records might be examined to determine whether the grades assigned accurately represents the student's attendance.”⁹ QCC informed the Department that, consistent with Department policy, it uses its grading policy to confirm whether students complete a payment period and did so for these students. QCC provided statements from professors indicating their understanding of the grading.¹⁰ The Department determined that for all five students, the information provided did not adequately document participation in an academic related activity through the end of the payment period.¹¹ Based on the Department’s determination of inadequate documentation of the accuracy of the grading system for the cited students, QCC was required to complete a full file review of all students who received all non-passing grades, with the exception of students who received all "W" and "WU" grades, including summer semesters or payment periods beginning with AY 2014/2015 through 2016/2017. If the student started classes and stopped attending unofficially or did not receive at least one passing grade during the payment period, the school was directed to use either the midpoint of the payment period or period of enrollment or a documented last date of attendance at an academically related activity for the withdrawal date. QCC was then directed to calculate the return of Title IV funds using that date.¹² The Department and QCC engaged in a lengthy email exchange regarding what documentation would

⁸ *Id.* at 9-10.

⁹ PRR at 8.

¹⁰ *See* FPRD at 113.

¹¹ *See* PRR at 8-11.

¹² PRR at 11.

substantiate the grade given by the professor.¹³ The Department continued to assert that only the acceptable documentation would be “faculty attestations with additional substantiation such as copies of detailed grade rosters, exams, quizzes, participation in on-line courses is applicable, etc. which would show an academic related activity date.”¹⁴ QCC responded, stating that as non-attendance taking institution, “There is no Federal regulation that we are aware of that has been referred to us that would require that an institution maintain records of attendance at an academically-related activity in order to substantiate the grade a student earned in a class.”¹⁵ With no resolution on substantiating the professor’s grade, QCC was required to resubmit program review responses.¹⁶ The Department noted again that “The Department's position is that the attestations, without additional supporting source documents, do not suffice as adequate documentation for students' attendance at an academically related activity through the end of the applicable term.”¹⁷ Despite objecting, QCC did submit a full file review.¹⁸

The Department determined that for the five students (2,13, 23, 44 and 45) QCC provided blanket statements from professors but failed to provide supporting documentation from student records to establish the student completed the payment period or to determine whether the grades assigned accurately represent the students' attendance.¹⁹ According to the Department, in the absence of evidence demonstrating that the grading policy was understood and consistently applied, QCC was unable to demonstrate that the students in question had not withdrawn.²⁰ Instead of asserting, as it did in the PRR, that the documentation provided by QCC did not adequately document participation in an academic related activity through the end of the

¹³ See FPRD at 71-105.

¹⁴ *Id.* at 73.

¹⁵ *Id.* at 89.

¹⁶ FPRD App. B.

¹⁷ FPRD at 60.

¹⁸ *Id.* at 256.

¹⁹ See FPRD at 11-24.

²⁰ *Id.* at 22.

payment period,²¹ the FPRD asserted for each of the students cited “The information provided did not adequately demonstrate adherence to the grading policy.”²²

The FPRD acknowledges the Department’s guidance in the *Dear Colleague Letter*, GEN-04-03 (November 2004) (hereinafter DCL) and the *Federal Student Aid Handbook 2015-2016* (Sept. 2015) and the *Federal Student Aid Handbook 2016-2017* (June 2016) (hereinafter collectively *FSA Handbooks*). Collectively that guidance states that when a student at a school that is not required to take attendance who began attendance and has not officially withdrawn fails 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 period. A school may use a grading policy as documentation that student completed the period. To do so, the grading policy must provide the ability to differentiate between those students who complete the course but failed to achieve the course objectives and those students who did not complete the course.²³ The school's ability to rely on the grading process requires the institution to ensure that grades are being accurately assigned. Although a school may use an official grading policy to determine whether a student with failing grades has withdrawn or completed the period, the *FSA Handbooks* cautions that "during compliance audits and program reviews, student records might be examined to determine whether the grades assigned accurately represent the students' attendance." If an institution fails to demonstrate by way of official grading policy a student completed a course, then the institution must conclude that the student withdrew.

The FPRD contended that testing performed during this program review demonstrated that QCC's grading process cannot be consistently relied on to meet the exception criteria for

²¹ See PRR at 9-11.

²² *Id.* at 13-16.

²³ See DCL GEN-04-03 at 11-12; *Federal Student Aid Handbook 2015-2016* at 5-57 (Sept 2015).

documenting that student completed the payment period.²⁴ Specifically, FSA states that despite multiple opportunities given to QCC to demonstrate adherence to its grading policy, QCC was unable to substantiate the faculty attestations. The Department argues that GCC offered no records to demonstrate that its grading policy was consistently and accurately applied.²⁵ The FPRD also noted that QCC's own December 7, 2016 Memorandum²⁶ requires faculty to retain documentation of failing coursework. FSA contends that, therefore, even if QCC does not maintain evidence of "last date of attendance" at an academically related activity," faculty should have been maintaining, and QCC should have provided to the reviewers, documentation of failing coursework to demonstrate adherence to the grading policy.²⁷

Based on QCC's full file review, and the five identified students, FSA assessed a liability of \$348,474.38. Additionally, for Student 18, FSA contends that, although QCC claims that the student earned the funds during the fall 2015 semester, the school used \$372.95 in Title IV funds from AY 2015/2016 to cover the summer 2015 semester, and the student failed to show for class during the summer 2015 semester, which resulted in a tuition credit. The department asserts that, as a result, the \$372.95 in funds should have been returned to corresponding Title IV programs.²⁸

QCC responded to the FPRD with its Request for Review.²⁹ QCC appealed all of Finding 2's liabilities in the FPRD. QCC argues that, as a non-attendance taking institution, consistent with the Department's policy, QCC relied on its grading policy to differentiate between: (1) students who completed a course but failed to achieve course objectives (failed, or earned F); (2) those who did not complete the course (unofficial withdrawal, or WU; and (3) an

²⁴ FPRD at 22.

²⁵ *Id.* at 23.

²⁶ ED Exh. 3.

²⁷ FPRD at 27.

²⁸ FPRD at 19.

²⁹ Request for Review (June 22, 2021) (OES Doc. No. 1) (Herein after, Request for Review) at 1.

incomplete course or INC.³⁰ QCC contends the Department incorrectly required QCC to provide documentation of a student's attendance at an academically related activity to test QCC's adherence to its grading policy.³¹ QCC faculty adhered to a compliant grading policy that, consistent with Department policy, QCC used, as "documentation" to confirm if a student completed a payment period. QCC contends that the FPRD did not establish a *prima facie* case against QCC.

Issues to be Addressed

- 1. Has the Department established a prima facie case assessing liabilities under Finding 2?**
- 2. Does QCC have a grading policy, which conforms to Department policy and regulations, that can accurately differentiate between a student who completed a course but earned a failing final grade because the student did not meet course objectives and a student who has withdrawn from a course without providing any notice to QCC?**
- 3. Has QCC consistently and accurately assigned grades that adhered to QCC's grading policy?**

Summary of Decision

The record demonstrates that, during the AY 2015-2016 and 2016-2017, QCC used a Department-compliant differentiated grade policy which allowed QCC to determine if a student unofficially withdrew or completed the payment period. QCC's professors consistently adhered to the grading policy in issuing final grades. The liabilities assessed under Finding 2 as a result of the full file review and students 2, 23 and 44 are **UNSUBSTANTIATED**. The liability for Student 38 is **SUBSTANTIATED**.

³⁰ *Id.*

³¹ *Id.* at 3.

PRINCIPLES OF LAW

Before participating in Title IV programs, institutions are required to enter into a Program Participation Agreements (PPA) with the Department.³²

By agreeing to the conditions in the PPA, the institution must comply with the statutory and regulatory provisions applicable to the specified Title IV programs the institution will administer. The institution is required to establish and maintain procedures and records, administrative and fiscal, which may be necessary to ensure proper and efficient administration of funds received from the Department or from students under the Title IV programs. As a fiduciary, an institution is liable for all improperly administered Title IV funds.³³

The Department has a prima facie obligation to provide adequate notice in the FPRD of the demand from the institution. The Department's obligation to present a prima facie case in the FPRD is satisfied when the FPRD provides notice to the institution that the institution has a statutory or regulatory obligations and the specific reasons that the Department asserts that the institution did not meet its obligations.³⁴

When an institution appeals an FPRD finding in a Subpart H proceeding, the institution has the burden of proving by the preponderance of the evidence that the Title IV funds received were disbursed properly and that the institution complied with Title IV program requirements.³⁵

An institution is not precluded from resolving discrepancies in its records submission and submitting further documentary proof of resolution of the findings after the issuance of the FPRD and the filing of the institution's appeal.³⁶

³² 34 C.F.R. § 668.14 (2015, 2016).

³³ 34 C.F.R. §§ 668.14(b)(1), (4), and (25) (2015, 2016).

³⁴ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020) at 17.

³⁵ 34 C.F.R. § 668.116(d).

An institution may disburse Title IV 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.³⁷

When a student begins attendance at an institution, but then subsequently officially or unofficially withdraws from the institution during the same payment or period of enrollment, the institution is required to determine the amount of Title IV funds the student earned as of the student's withdrawal date. A student's earned and unearned Title IV funds are determined through a R2T4 formula calculation. For an institution that does not take attendance, any unearned Title IV funds are to be returned to the Department no later than 30 days after the end of the earlier of (1) the payment period or period of enrollment; (2) the academic year in which the student withdrew or (3) the educational program from which the student withdrew.³⁸

For institutions that elect not to take attendance, the institution may use its grading policy to determine if a student completed a payment period or period of enrollment. If based on the grading policy it is determined the student has withdrawn, the school must determine the date of withdrawal.³⁹

When calculating a student's withdrawal date for R2T4, except for withdrawals related to leave of absence or circumstances beyond the student's control, the date is determined by one of three options: (1) the date that the student began the withdrawal process prescribed by the institution; (2) the date that the student otherwise provided notification, in writing or orally, of an intent to withdraw; or (3) if the student withdraws without providing notice in either of those two

³⁶ 34 C.F.R. 668.117; *See In re Baytown Tech. Sch. Inc.* Dkt. No. 91-40-SP, U.S. Dept of Educ. (April 12, 1994) (Decision of the Secretary).

³⁷ 34 C.F.R § 668.164(b)(3) (2015, 2016).

³⁸ 34 C.F.R. §§ 668.22(a)(1), (g) and (j)(2) (2015, 2016).

³⁹ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020) at 35.

methods, then the withdrawal date is the midpoint of the payment period or period of enrollment.⁴⁰

When performing the R2T4 for a withdrawn student, an institution that does not take attendance may choose to use the last date of attendance (LDA) at an academically related activity instead of the midpoint of the payment period or period of enrollment if the institution documents that the activity is academically related and documents the student's attendance at the activity.⁴¹

A student's "academic attendance" or "attendance at an academically related activity" includes but is not limited to (1) the student physically attends a class where there is an opportunity for direct interaction between the instructor and students; (2) the student submits an academic assignment; (3) the student takes an exam, an interactive tutorial, or computer-assisted instruction; (4) the student attends a study group that is assigned by the institution; (5) the student participates in an online discussion about academic matters; and (6) the student initiates contact with a faculty member to ask a question about the academic subject studied in the course. A student's "Academic attendance" or "attendance at an academically related activity" does not include activities where a student may be present, but not academically engaged, such as (1) the student living in institutional housing; (2) the student participates in the institution's meal plan; (3) the student logs into an online class without actively participating; or (4) the student participates in academic counseling or advisement.⁴²

An institution must document a student's withdrawal date as determined in accordance with the regulations, and must maintain the documentation on the date of the institution's determination that the student withdrew. The regulations do not require an institution that has

⁴⁰ 34 C.F.R. § 668.22(c)(i)-(iii) (2015, 2016)

⁴¹ 34 C.F.R. § 668.22(3) (2015, 2016).

⁴² 34 C.F.R. § 668.22(l)(7)(i) (2015, 2016).

elected not to take attendance to have a policy of maintaining attendance records to determine whether a student has withdrawn.⁴³

If a student's attendance cannot be confirmed by attendance records, "an institution's grading system must provide an alternative method to confirm a student's attendance."⁴⁴

When adequately followed, a grading policy provides a sufficient basis for determining whether a student has unofficially withdrawn during the term.⁴⁵

The Department may test whether an institution accurately assigns failing grades to students if the institution uses its grading policy to determine whether a student with failing grades has unofficially withdrawn. If the institution fails to establish it applied its grading policy consistently and accurately, then the grading policy is insufficient to show that an institution has accurately determined which students have withdrawn during the term.⁴⁶

The Department cannot require a school to provide documentation of the last date of attendance in an academically related activity as the only required method of testing adherence to a grading policy.⁴⁷

FINDING OF FACTS

QCC has continuously asserted, during the program review and this appeal, that it is a non-attendance taking institution which relies on its grading policy to differentiate between students who completed a course and students who did not complete a course.⁴⁸ QCC uses this grading policy to identify students who unofficial withdraw and calculate a R2T4. QCC argues that 34 C.F.R. 668.22(c) and DCL GEN-04-03 allows institutions to rely on their grading policy

⁴³ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020) at 15.

⁴⁴ *In re Housatonic Cmty. Coll.*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016) at 3.

⁴⁵ *Id.*

⁴⁶ *See, In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020); *In re Housatonic Cmty. Coll.*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016); *Cin. State Tech. & Cmty. Coll.*, Dkt. No. 97-65-SP, U.S. Dep't of Educ. (Sept. 4, 1998).

⁴⁷ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020) at 35.

⁴⁸ Request for Review at 1.

to confirm whether a student completed a payment period or withdrew.⁴⁹ The Department has argued that if a school uses its grading policy to determine whether students with failing grades have unofficially withdrawn, during compliance audits and program reviews, student records might be examined to determine whether the grades assigned accurately represents the student's attendance.⁵⁰ The documentation the Department sought to prove period completion was last date of attendance at academically related event.⁵¹ QCC provided professors' statements and affidavits that the professor confirmed that student was given the correct grade, but the Department rejected such statements as acceptable documentation of period completion.⁵² QCC responds that none of the regulations or the DCL or FSA Handbooks require that a non-attendance taking institution must maintain last date of attendance at an academically related event to test the institution's adherence to its grading policy.⁵³ In QCC's view, their option not to take attendance at an academically related event is an option provided by regulations. To now require them to provide documentation of a student's attendance at an academically related event negates that option.⁵⁴ If the Department still required a non-attendance institution to continue to maintain a student's attendance records at an academically related event to test the institution's adherence to its grading policy, then Department must explicitly state such.⁵⁵ To support this QCC relies on *Lehman*⁵⁶ for its holding "FSA exceeded its authority when it demanded that the last date of attendance be used as the sole means of testing a school's adherence to a grading policy."⁵⁷

⁴⁹ Resp't Br. at 9.

⁵⁰ PRR at 8.

⁵¹ FPRD at 73.

⁵² PRR at 8-11.

⁵³ FPRD at 90.

⁵⁴ *Id.*

⁵⁵ *Id.* at 88-94.

⁵⁶ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020)

⁵⁷ *Id.* at 6.

During AY 2015-2016 and 2016-2017, QCC argues it utilized a grading policy which provided instructors the ability to assign grades depending on the following: whether the student completed the course successfully, whether the student completed the course but failed to achieve course objects; whether the student initially participated in the course, but subsequently ceased participation before the course completion; and whether the student was granted additional time to complete coursework.⁵⁸

According to QCC, the grading policy is designed to assign an alphabetical letter grade for the student's earned work (A,B,C,D,F) with a corresponding numerical value to the letter grade which is used to calculate a student's grade point average (GPA). In addition, the grading policy is designed to assigns grades which may contribute to a student's GPA, as well as have a specialized meaning regarding the student's academic progress and record.⁵⁹ QCC states the relevant portion of the grading policy which is the subject of this proceeding are the letter grades "F" for Failing, with a numerical value of 0 to be used in calculating a student's GPA; "WU" Unofficial Withdrawal, with a numerical value of 0 to be used in calculating a student's GPA; and "INC" incomplete, with no numerical value assigned to be used in calculating a student's GPA.⁶⁰ .

According to QCC, the grading policy that all instructors followed defined a grade of "F" as an earned grade by a student who completed the course, but the student poorly performed in the course (failure to achieve course objectives). A WU grade was given to a student who attended a minimum of one class but did not complete the class or officially withdraw from the course. An INC grade was given only when there is a reasonable expectation that a student can successfully complete the requirements of the course no later than the last day of the following

⁵⁸ Resp't Br. at 10-11.

⁵⁹ See Resp't Exh. R-2.

⁶⁰ Resp't Br. at 10-11.

semester. If the student does not complete the coursework by the deadline, then the grade is converted from INC to FIN.⁶¹

QCC states that the 2016 Memorandum⁶² and its Addendum⁶³ were never implemented as stated by the FPRD.⁶⁴ QCC contends that the 2013 grading policy⁶⁵ enabled instructors to differentiate between students who completed the course without achieving its objectives, and those who attended but discontinued and did not complete the course.⁶⁶ QCC points out that the 2013 grading policy used the same definitions for an “F” grade for students who completed the course without achieving its objectives. QCC further points out that Section XIII of the policy specifies that the grades of ‘W’, ‘WA’, ‘WD’, ‘WF’, ‘WN’, and ‘WU’ shall signify that the course has not been completed. Except for the “AUD” grade, all other grades shall signify that the course has been completed.⁶⁷ QCC’s 2013 grading policy comports with 34 C.F.R. § 668.22(c), DCL GEN-04-03, the *FSA Handbooks*.⁶⁸

QCC assert faculty received training on the grading policy and faculty were routinely reminded about the QCC grading policy. Prior to submission of the grades each semester, the Registrar sent emails, with a link to the QCC grading policy, to all faculty and department heads regarding the differentiated grading policy at QCC.⁶⁹ In addition, the Registrar states that it periodically explained in meetings and emails that a "WU" grade is given when the student stops attending the course but did not officially withdraw; that an "F" grade is an earned grade based

⁶¹ Resp’t Reply Br. at 10.

⁶² ED Exh. 5.

⁶³ ED Exh. 6.

⁶⁴ Resp’t Br. at 11.

⁶⁵ Memorandum on Revised CUNY Uniform Grade Symbols: Glossary and Guidelines. From the Office of University Registrar to the Presidents of the Colleges, Deans of Schools and Provosts of colleges (August 27, 2013) (OES Doc. No 23) (Hereinafter 2013 Grade Policy Memorandum) (OES Doc. No 23).

⁶⁶ Resp’t Response Br. at 3.

⁶⁷ *Id.* at 3.

⁶⁸ *Id.* at 3.

⁶⁹ Request for Review at 2.

on poor performance and the student did not complete the coursework successfully; and an "INC" is a temporary grade given to students who request additional time to complete their coursework. Faculty were informed that an "INC" can only be granted if the student's coursework has been of passing quality, so there is a reasonable expectation that the student will be able to successfully complete the course requirements by the end of the following semester.⁷⁰

The Department argues that QCC has filed two different Registrar's affidavits in this matter and neither Registrar's affidavits are reliable.⁷¹ QCC argues that the initial affidavit from the Registrar⁷² had an error in the dates of employment caused by the Registrar's early retirement and the subsequent affidavit⁷³ corrected the date error. QCC asserts that the substance in the attestations were unchanged and, thus, the affidavit is reliable.⁷⁴

The Department does not dispute that QCC had a grading policy in place during questioned award years, but rather contends that QCC has failed to provide the relevant evidence of the pertinent grading policy in effect during the AY 2015-2016 and 2016-2017.⁷⁵ The Department asserts that QCC has proffered four different iterations of its grading policy.⁷⁶ The first policy is the 2021 Policy & Procedure Memorandum (May 22, 2021).⁷⁷ The second policy is the college catalogs (QCC 2015-2016 College Catalog and QCC 2016-2017 College, hereinafter College Catalogs).⁷⁸ The third is the 2016 Memorandum (December 7, 2016).⁷⁹ The fourth is the Addendum.⁸⁰ Consequently, the Department questions the extent to which faculty

⁷⁰ Resp't Ex. R-3 at 1.

⁷¹ ED Br. at 11.

⁷² Request for Review at 206.

⁷³ Resp't Ex. R-3 at 1.

⁷⁴ Resp't Reply Br. At 6.

⁷⁵ ED Br. at 11.

⁷⁶ ED Br. at 8.

⁷⁷ Resp't Exh. R-2.

⁷⁸ ED Exh. 5, 6.

⁷⁹ ED Exh. 3.

⁸⁰ ED Exh. 4.

truly understood and adhered to the grading policy. The Department asserts the operative policy is those listed in the College Catalogs.⁸¹ The published QCC's 2015-2016 and 2016-2017 College Catalog,⁸² states that upon completion of courses, students will receive final grades. Students are advised an instructor will assign a grade of "F" to a student whose coursework and other criteria demonstrates that the student did not meet course objects. The grade "F" has value of 0 for GPA calculations. An instructor will assign a grade of Unofficial Withdrawal (WU) for excessive absences, signifying that the course was not completed by the student. An instructor will assign a grade of "INC" to students who are doing work of passing quality in a course and who have been granted additional time by the instructor to complete coursework. The INC becomes a FIN grade if the missing coursework is not completed by the end of the semester immediately following the semester in which the INC grade was assigned. The FIN grade is computed into the GPA as an F.

QCC argues that the evidence submitted during the program review and here supports the conclusion that the QCC grading policy was accurately and consistently adhered to by professors. For Student 2, QCC asserts that the professors' adhered to the QCC grading policy when they initially assigned a grade of INC for PSYC-220 and LF-111.⁸³ When the student did not complete the work, consistent with the QCC grading policy, the final grade of FIN was assigned. To support the both professors adhered to the grading policy, QCC submitted a professor's certified statement and records for PSYC-220.⁸⁴ Due to the unavailability of the professor for LF-111, QCC submitted the student's activity in the course.⁸⁵ The Department

⁸¹ ED Br. at 8.

⁸² See ED Ex. 5 and 6.

⁸³ Resp't Br. at 11-12; Resp't Reply Br. at 3-4.

⁸⁴ Resp't Exh. R-11.

⁸⁵ Resp't Exh. R-27.

responds with characterization that the evidence for this student as unreliable to show adherence to the QCC grading policy.⁸⁶

For student 13, QCC submitted evidence of the student's academic activity along with professors' attestations.⁸⁷ The Department removed the liability for this student. The Department determined that the student had attend a course past the 60% point and, therefore, earned 100% of their Title IV funds.⁸⁸

For Student 23, the only grade in question is from MA-121. To substantiate that the professor adhered to the QCC grading policy, QCC submitted evidence including a professor's attestation of the accuracy of the grade given and some of the professor's student records.⁸⁹ QCC states that the class met 75 minutes twice a week and the last class was on October 5th.⁹⁰

The Department responds with characterizing the evidence for this student as unreliable to show adherence to the QCC grading policy. The student attended until October 5, 2015, the Fall semester ends in December and the Student did not take the final exam.⁹¹

For Student 44, QCC submitted evidence including professors' attestations of the accuracy of the grade given and some of the professors' student records.⁹² For CRIM-101, QCC notes that the grade sheet demonstrates the student took all exams and earned an 80 and 82, respectively. Without additional completed assignments, the faculty assigned an F; and because the student took the final exam, the grade demonstrated the student completed the period.⁹³ For PSYCH-101, QCC argues that the professor's attestation, grade book, and attendance records confirm the student attended through the end of the period and the professor adhered to the QCC

⁸⁶ ED Exh. 9-001.

⁸⁷ Resp't Exh. R-12, R-13, R13.

⁸⁸ ED Br. at 15.

⁸⁹ Resp't Exh. R-15.

⁹⁰ Resp't Reply Br. at 4.

⁹¹ ED Exh. 9-002.

⁹² Resp't Exh. R-16, R-17, R-18.

⁹³ Resp't Reply Br. at 5.

grading policy.⁹⁴ For PH-112, QCC explains the professor had passed away, but the chair of the department reviewed the professor's records for the student and, based upon the review, assigned the correct in accordance to the QCC grading policy.

The Department responds that someone other than the professor reviewed the record for PH-112 and there is nothing in submitted records demonstrating that the chair of the department reviewed the records.⁹⁵ For CRIM-101, the Department characterize the records as conflicting to support the grade earned of F. For PSYCH-101, the Department questions the reliability of the evidence by noting the student's name was at the end of both rosters and does not have a student identification number.⁹⁶

For Student 45, QCC points out that there is no assessed liability because during the program review, QCC returned all Title IV because the student failed verification.⁹⁷ However, the issue of whether the instructor for PSYC-101 adhered to the QCC grading policy when they determined the grade for the student remains. To show the professor assigned a grade that adhered to the QCC grading policy, QCC submitted the professor's grade roster and attendance records⁹⁸. QCC states that the grade of F was an earned poor performance because the student failed the first quiz (65%) and only received an 84% on the midterm.⁹⁹

ANALYSIS

The facts in this matter and issues presented are nearly identical to those in the *Lehman* matter.¹⁰⁰ Just like Lehman College, QCC is a part of the CUNY system. Both of those institutions are non-attendance taking schools. Both institutions utilize a differentiated grading

⁹⁴ Resp't Reply Br. at 5.

⁹⁵ ED Exh. 9-002.

⁹⁶ ED Exh. 9-002.

⁹⁷ Resp't Br. at 13.

⁹⁸ Resp't Exh. R-18.

⁹⁹ Resp't Br. at 13.

¹⁰⁰ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020)

policy to ascertain whether a student unofficially withdrew, or if they completed a course but failed to meet the objectives. To perform unofficial withdrawal R2T4 calculations or overcome the presumption of unofficial withdrawal, a non-attendance taking institution may rely on its differentiated grading policy or utilize documentation of the student's last date of attendance at an academically related event. Both institutions chose to rely upon their respective differentiated grading policy to determine necessary R2T4 calculations. Just as in this case, in *Lehman* the Department sought attendance records to test the grading policy and instructors' adherence to their grading policy.¹⁰¹

In *Lehman*, the Department argued that the only acceptable documentation to prove a student's payment period completion and test instructor's adherence to the grade policy was through documentation of the student's attendance at an academically related event. Based upon *Lehman*'s lack of attendance documentation confirming a student's period completion, the Department required a full file review and issued a final program review establishing R2T4 liabilities. The Department makes a similar demand in this matter as it did in *Lehman*.

In *Lehman*, the tribunal determined that that *Lehman* sufficiently showed, through instructor attestations, that it adhered to its grading policy and the Department had exceeded its authority when it demanded that the last date of attendance be used as the sole means of testing a school's adherence to a grading policy.¹⁰²

Department's Prima Facie Case

The Department's obligation to present a prima facie case is satisfied when it informs the institution that: (1) the school has a regulatory obligation to only disburse Title IV funds to eligible students and to document the basis for the determination that the student is eligible for

¹⁰¹ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020) at 31.

¹⁰² *Id.* at 6.

the funds; and (2) the specific reason that the Department asserts that the school did not meet this obligation.¹⁰³ In this case, the Department gave QCC notice of the regulatory requirements to determine and document eligibility and the specific reason that the Department believed the obligation was not met.¹⁰⁴ Based on the records of the five students (Students 2, 13, 23, 44, 45) the Department determined that QCC could not rely on QCC's grading policy for students who received non-passing grades and "F" grades, and as such, QCC did not have a sufficient process in place to confirm if a student with all non-passing grades during a payment period actually completed the payment period.

For Finding 2 of the PRR, the Department informed QCC that it failed to perform a R2T4 calculations, failed to make a R2T4 return, and made late R2T4 returns. More specifically, Finding 2 informed QCC that, according to 34 C.F.R. § 668.22, a R2T4 calculation is mandatory whenever a student withdraws from QCC within the same payment or enrollment period. The calculation should cover all aspects of a refund calculation, including the correct identification of the payment period, calculation of the number of days the student has completed and the number of days in the payment period.¹⁰⁵ Any Title IV funds that are to be returned to the Department must be sent as soon as possible, but no later than 45 days after the date QCC's determination that the student has withdrawn.¹⁰⁶ For a student who ceases attendance without providing official notification at an institution that is not required to take attendance, like QCC, the withdrawal date is the midpoint of the payment period or the period enrollment.¹⁰⁷ QCC may use as the student's withdrawal date a student's last date of attendance at an academically related

¹⁰³ See *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016) at 2.

¹⁰⁴ PRR 7-11.

¹⁰⁵ *Id.* at 8

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

activity, if QCC shows that the activity is academically related, and documents the student's attendance at the activity.¹⁰⁸

The Department then referred QCC to review Volume 5 of the *FSA Handbook 2016-2017* and the DCL GEN-04-03 for additional guidance. QCC was informed that Volume 5 of the *2016-2017 FSA Handbook* indicates that “a student who begins attendance and has not officially withdrawn fails 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 period.”¹⁰⁹

The Department contends that QCC was non-compliant with its obligations because “QCC's process for monitoring whether or not students who failed to earn a passing grade during a payment period actually completed the payment period, with the exception for students who received all "W" (official withdrawal) and "WU" (unofficial withdrawal) grades, was not adequate.”¹¹⁰ QCC had a grading policy in place that it used to determine if a student completed a payment period or unofficially withdrew.

The Department identified, in the PRR, the five student files which it believed failed to provide adequate documentation of adherence to the grading system and the student's attendance at an academically related event.¹¹¹ As such, it cannot be determined if the student completed the entire payment period. The Department asserts that this indicated “systemic” noncompliance and ordered QCC to conduct a full file review for students who received all non-passing grades, except students with all “W” or “WU” grades. If the student started classes and stopped attending unofficially or did not receive at least one passing grade during the payment period, the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 8.

¹¹⁰ PRR at 8-9.

¹¹¹ *Id.* at 11.

school may use the midpoint of the payment period or period of enrollment, or the school may use a documented last date of attendance at an academically related activity for the withdrawal date.¹¹²

The PRR did notify QCC of the Department's policy in the *FSA Handbooks* for the school to document whether a student with all non-passing grades withdrew or completed the course but failed all of their courses. The PRR notified QCC that it was seeking documentation to test whether the grading policy was applied to those students who received non-passing grades and "F" grades. Therefore, based on the Department's understanding of what was required to document that grades were properly assigned under the policy, it concluded that QCC had not met its burden of producing required documentation. The conclusions in the PRR for students 2, 13, 23, 44, and 45 were mostly carried over to the FPRD. However, the original determination "The information provided does not adequately document participation in an academic-related activity through the end of the payment period"¹¹³ was replaced with the revised determination "The information provided did not adequately demonstrate that the grading policy was being adhered to."¹¹⁴

QCC is correct that the Department must provide sufficient legal support of its calculation of liability. Based on *Lehman*,¹¹⁵ the Department cannot demand evidence of the last date of attendance as the only acceptable proof that QCC sufficiently followed its grading policy.¹¹⁶ However, even if the Department has misinterpreted controlling regulations and/or policies, the Department has met its *prima facie* burden by providing identification of what files are at issue, giving notice of what it contends are the errors in those student files, and providing

¹¹² *Id.* at 11.

¹¹³ *Id.* at 9.

¹¹⁴ FPRD at 13.

¹¹⁵ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020).

¹¹⁶ Resp. Br. at 4

references to the regulations and/or statutes that support the determination of noncompliance in the FPRD.

QCC Grading Policy

The parties disagree on the operative QCC grading policy in effect during the AY 2015-2016 and 2016-2017. QCC clarifies that after the PPR, the 2016 Memorandum¹¹⁷ and its Addendum¹¹⁸ were never implemented and there is no evidence herein that indicates these memorandums were implemented. It should be noted that the Department's proffer of the Addendum is not another iteration of a grade policy memorandum but rather that it is attachment to the 2016 Memorandum. The 2016 Memorandum states "See attached addendum for more detailed information and examples," and the yellow border on the bottom of the page is the same yellow border on the bottom of the Addendum's page.

The Department's concerns about the faculty understanding of the grading policy in effect during the AYs is misplaced. A review of 2016 Memorandum and its Addendum reveal that, as written, the 2016 Memorandum and its Addendum were not intended to supersede the then current August 2013 Grading Policy Memorandum,¹¹⁹ but rather provide additional "clarification of the University's Uniform Grade Symbols: Glossary and Guidelines memo dated August 27, 2013."¹²⁰ Therefore, even if these grading memoranda had been implemented, they did not change the underlying 2013 Grade Policy Memorandum, but provided supplemental discussions on certain grade topics. The general definitions and when to use an "F," "WU," "INC," or "FIN" would not have changed with the 2016 Memorandum. Without the 2016 Memorandum and its Addendum, instructors still had sufficient information to determine when

¹¹⁷ ED Exh. 3.

¹¹⁸ ED Exh. 4.

¹¹⁹ 2013 Grade Policy Memorandum (OES Doc. No. 23).

¹²⁰ ED Exh. 3.

to assign an “F,” “WU,” “INC,” or “FIN.” The QCC faculty cannot be faulted for not adhering to any additional record retention requirements of the 2016 Memorandum and its Addendum.

The Department contends that the grading policy outlined in the QCC’s 2015-2016 and 2016-2017 College Catalogs illustrates the operative grading policy with attendance taking requirements specific to QCC.¹²¹ A review of the catalogs reveals that the target audience for the information contained therein is the student community. The provided examples, terminology, and clarifications in the catalogs are crafted to assist students in grasping the nuances of college life. They also offer a comprehensive summary of all policies and procedures at QCC, clarifying what is expected of students during their enrollment at QCC.

As such, the grading discussions in the catalogs are not designed to provide specific technical directives for instructors to follow when determining a student’s final grade. Those are found in the official technical grading policy memorandum from the University Registrar to college presidents, school deans, and college provost in the 2013 Grade Policy Memorandum. The technical 2013 Grade Policy Memorandum provides the information that instructors would be expected to understand, use, and reference when issuing a final grade. There may be similarities as well as subtle differences between the College Catalogs’ topic on grades and the technical grading policy memorandum. However, the inclusion of a general discussion of QCC’s grading policy in the catalogs for students does not introduce an additional grading policy that instructors were obligated to follow. QCC had a technical grading policy memorandum for which instructors received training on and were briefed on each grading term.

The Department next attempts to also use the catalogs to attach an attendance taking requirement to the QCC grading policy.¹²² The Department’s reliance on the catalogs

¹²¹ ED Br. at 8.

¹²² ED Br. at 8

advisement that “[A]bsences beyond 15 percent of course hours may result in a failure for a course” for establishing a mandatory requirement for an instructor to track a student’s attendance is misplaced. A review of the topic reveals that the catalog is providing an explanation regarding the overall influence of absences on a student's learning capacity and emphasizes the importance of students engaging in conversations with their instructors about any class absences. This is because, in the event that an instructor elects, at their discretion, to keep attendance records, they "may" take such data into account when evaluating a student's final grade. However, the catalogs’ discussion on attendance does not establish a definitive policy specific to QCC,¹²³ requiring instructors to consistently take attendance or modify the existing grading policy that instructors were expected to follow.

Because the 2016 Memorandum was never implemented and the QCC’s college catalog is not the technical guidance memorandum for instructors to follow, the 2013 Grade Policy Memorandum was the operative grading policy for QCC during the AY 2015-2016 and 2016-2017.

If the Department is attempting to assess QCC’s grading policy design to determine if it accurately distinguish between a student who completed a course without meeting the course objectives and a student who unofficially withdrew,¹²⁴ then all that is required is an objective analysis. This analysis would compare the Department's model of a differentiated grading policy, which can determine whether a student unofficially withdrew, with the actual grading policy in use at QCC. The FSA Handbooks¹²⁵ and DCL¹²⁶ provide two options for a grading policy that distinguish whether a student with no passing grades unofficially withdrew. The first option is a

¹²³ *Id.*

¹²⁴ PRR at 11.

¹²⁵ See *FSA Handbook* 2015-2016 (June 2015) at 5-57; *FSA Handbook* 2016-2017 (May 2016) at 5-56.

¹²⁶ See *Dear Colleague Letter*, GEN-04-03 (November 2004) at 11-12.

grading policy which requires instructors to capture, for all students awarded a non-passing grade, the student's last day of attendance. The institution may then use this date as the withdrawal date for a student who did not officially withdraw but received all "F" grades. The second option is a differentiated grading policy which requires instructors to assign an "F" (failing grade) only to students who completed the course but did not meet the course objectives. The grading policy would also have to require that instructors award an alternative grade to students who failed to complete the course. Under the second option, there is no requirement for an institution to document that last date of attendance. QCC asserts that they have elected to have a differentiated grading policy that is consistent with the second option of the DCL¹²⁷.

The FSA Handbooks model differentiated grading policy¹²⁸ used a letter grade, "F," for the instructor to denote a student who completed the course but failed to achieve the course objectives. The model used a different grade, "I/U" for the instructor to denote a student who did not officially withdraw from the course but failed to participate in course activities through the end of the term and in the opinion of the instructor, completed assignments or course activities or both were insufficient to make normal evaluation of academic performance possible. The Department's model did not provide an example of how to differentiate a student who is doing work of passing quality in the course and has been granted additional time by the instructor to complete coursework.

Comparing QCC's operative grading policy, which was the 2013 Grade Policy Memorandum, with the Department's model in the FSA Handbooks, it reveals that QCC's grading policy is similar. A QCC instructor was able to denote a letter grade of "F" for a student who completed the course but failed the course objectives. An instructor was able to denote a

¹²⁷ Resp't Br. at 10.

¹²⁸ See *FSA Handbook* 2015-2016 (June 2015) at 5-57; *FSA Handbook* 2016-2017 (May 2016) at 5-56.

letter grade of ‘WU’ for a student who attended a minimum of one class, stopped attending, but did not officially withdraw from the class. The 2013 grading policy also informed instructors that a “WU” shall signify that the course has not been completed and all other grades, except for the “AUD” grade, shall signify that the course has been completed.¹²⁹

QCC’s grading policy also provided a temporary grade for an instructor, who was granting a student with passing coursework additional time to complete coursework, to denote a grade of “INC.” If the student did not complete the coursework by the instructor’s due date in the next semester, the grade would be converted to “FIN.”¹³⁰

The comparison establishes that the 2013 Grade Policy Memorandum provided QCC’s instructors the ability to differentiate, by grade, a student who completed the course but failed course objectives from a student who did not complete the course. As such, the 2013 Grading Policy is a valid option for determining a student completion status and is consistent with Title IV program requirements.

Testing Adherence to the QCC’s Grading Policy

The real crux of this dispute is how to test adherence to an institution’s grading policy at non-attendance taking institution. There is no dispute that an institution must have a procedure for determining whether a Title IV recipient who began attendance during a period completed the period or should be treated as a withdrawal. The FSA Handbooks¹³¹ explicitly states that the Department does not require that a single specific procedure be used. As noted earlier, one option is to rely on a policy of using final grades, which QCC has elected, and the other is having grading policy which captures the last date of attendance for all students receiving non-passing

¹²⁹ 2013 Grade Policy Memorandum (OES Doc. No. 23) at 7.

¹³⁰ *Id.*

¹³¹ *See See FSA Handbook 2015-2016* (June 2015) at 5-57; *FSA Handbook 2016-2017* (May 2016) at 5-56.

grades. The Department has a clear presumption for a student who began attendance and has not officially withdrawn and fails to earn a passing grade in at least one course offered over an entire period. In that instance, then the institution must assume, for Title IV purposes, that the student has unofficially withdrawn, unless the institution can document that the student completed the period. The parties agree that the regulations explicitly allow a non-attendance taking institution to implement a grading policy to distinguish when a student stopped attending class, i.e. unofficially withdrew, and when a student completed the course but was not successful, i.e. failed the course. The parties acknowledge that a grading policy can be considered as “documentation” of the student's completion of the period.

The Department points out that in the FSA Handbooks and DCL, institutions are advised that, although a school may use an official grading policy to determine whether a student with failing grades has withdrawn or completed the period, that “during compliance audits and program reviews, student records might be examined to determine whether the grades assigned accurately represent the students' attendance.”¹³² The FSA Handbook and DCL provide no further discussion on the topic of testing an institution’s adherence to a grading policy. As mentioned in *Lehman*, and reiterated here, there is no regulation or official guidance from the Department regarding a standardized methodology to assess an institution's compliance with its grading policy and what documents would be required.¹³³ In this case, QCC did not satisfy the Department that “F” grades were issued in compliance with QCC’s grading policy.¹³⁴ To test adherence to the grading policy, the Department requested “documentation for students' attendance at academically related activities through the end of the applicable terms” to support

¹³² See *FSA Handbook* 2015-2016 (June 2015) at 5-57; *FSA Handbook* 2016-2017 (May 2016) at 5-56; *Dear Colleague Letter*, GEN-04-03 (November 2004) at 11-12.

¹³³ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep’t of Educ. (Apr. 22, 2020) at 32.

¹³⁴ ED Exh. 1 (Gonzalez Decl.) at ¶21

the grade given in the student files.¹³⁵ In response, QCC supplied attestations from instructors, and when the instructor was unavailable, the Department Chair, confirming the grade given was accurate according to the QCC grading policy. The Department rejected these documents as being inadequate for its testing purposes.¹³⁶

As in *Lehman*, QCC relied on the DCL and the FSA Handbooks providing schools the option of using a grading policy or documenting the last date of attendance, and, therefore, did not maintain evidence of the last date of attendance at academically related events.¹³⁷ QCC, just like its fellow CUNY institution in *Lehman*, believed that attestations from professors that they understood the policy and accurately gave the student a correct grade “more closely accords with the intent of the Dear Colleague letter, its governing regulation, and the FSA Handbook.”¹³⁸

The Department’s test to establish the need for a full review is nonsensical. QCC has chosen an option described in the FSA Handbooks¹³⁹ and DCL¹⁴⁰ for a differentiated grading policy that can determine a student with non-passing grades has unofficially withdrawn. But, then to test QCC adherence to that policy, the Department asserts that QCC must provide documentation only required to be maintained for the other option, which QCC elected not to select as its method of determining whether a student with non-passing grades has unofficially withdrawn. Because, under the Department’s view, QCC does not maintain records of the last date of attendance at an academically related event, then QCC has not adhered to its grading policy.¹⁴¹ In other words, the Department’s test procedure is to -- test one option by using data only required by the other option. Here, as in *Lehman*, requiring an institution who has elected one

¹³⁵ FPRD at 89.

¹³⁶ *Id.*

¹³⁷ Request for Review at 1.

¹³⁸ FPRD at 92.

¹³⁹ See *FSA Handbook* 2015-2016 (June 2015) at 5-57; *FSA Handbook* 2016-2017 (May 2016) at 5-56.

¹⁴⁰ See *Dear Colleague Letter*, GEN-04-03 (November 2004) at 11-12.

¹⁴¹ See FPRD at 13.

option to maintain the records required for the other option obliterates giving the school an option at all and the nullifies Department's published policies.¹⁴² As in *Lehman*, the Department's test here for "determining whether the grades assigned accurately represent the students' attendance" requires an institution to document the last date of attendance, to identify the date of withdrawal, and also to prove whether a student did or did not attend classes throughout the term as the sole method of documenting whether a student unofficially withdrew.¹⁴³ An institution must demonstrate that a student began attending a class, but there is no requirement that schools maintain attendance records.¹⁴⁴ This is not mandated in this instance, since QCC relies on its grading policy to determine an unofficial withdraw.

QCC stood on its instructors' and Department Chairs' attestations as well as subsequent more detailed statements and attestations that the students in the file review received the correct grade in accordance with QCC grading policy. QCC did not provide any documentation of a student's attendance at academically related event in its PRR response. Before the issuance of QCC's FPRD, this tribunal issued a decision in *Lehman*.¹⁴⁵ In that matter, it was determined that the Department cannot require a school to provide documentation of the last date of attendance in an academically related activity as the required method of testing adherence to a grading policy and instructors attestations may serve as an acceptable form of evidence to test a grading policy.¹⁴⁶

In issuing the FPRD, the Department says it did not ignore the decision in *Lehman* and the determination of liabilities was in conformity with the decision in *Lehman*.¹⁴⁷ The FPRD

¹⁴² See *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020) at 33.

¹⁴³ *Id.* at 31.

¹⁴⁴ See *In re Housatonic Cmty. Coll.*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016); *Cin. State Tech. & Cmty. Coll.*, 97-65-SP, U.S. Dep't of Educ. (Sept. 4, 1998),

¹⁴⁵ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020).

¹⁴⁶ *Id.* at 26, 35.

¹⁴⁷ ED Br. at 4.

determined that QCC had failed to provide supporting documentation from student records to establish the student completed the payment period or to determine whether the grades assigned accurately represent the students' attendance.¹⁴⁸ To the Department, this lack of student records prevented the Department from testing that the QCC grading policy was understood and consistently applied. "The information provided did not adequately demonstrate adherence to the grading policy."¹⁴⁹ As a result, QCC was unable to rely on its grading policy to determine if a student had not unofficially withdrawn.¹⁵⁰ Even after *Lehman*, the Department faulted QCC for not providing student records of attendance at an academically related activity to test QCC's adherence to its grading policy.

The Department contends that QCC is unable to rely on its grading policy to confirm that five students (Students 2, 13, 23, 44 and 45) completed the payment period. If QCC can demonstrate it applied its grading policy consistently, then the grading policy is sufficient to show that QCC has accurately determined which students have withdrawn during the payment period. In addition to the documentation QCC submitted in its response to the PRR, QCC has submitted additional documentation during the pendency of this appeal to meet their burden of proof. Reviewing the evidence of the five students, it appears that overall, the instructors adhered to the QCC's 2013 Grade Policy Memorandum. Where, an "F" grade is an earned grade based on academic poor performance and the student did not complete the coursework successfully. A "WU" grade is given when the student attends a minimum of one class and then stops attending the course but did not officially withdraw.

¹⁴⁸ FPRD at 13.

¹⁴⁹ *Id.* at 13-16.

¹⁵⁰ *Id.*

QCC Registrar

To meet its burden of proof and demonstrate QCC's reliance and application of its grading policy, QCC submitted an affidavit from the QCC Registrar during the AY 2015-2016 and 2016-2017. QCC submitted an affidavit from the Registrar in its request for review of the FPRD¹⁵¹ and filed a corrected affidavit with its initial brief.¹⁵² The Department argues that the both affidavits are unreliable as they contain conflicting information.¹⁵³ QCC explains that it subsequently recognized the date errors in its initial affidavit submission and then subsequently corrected the dates errors with the second affidavit.¹⁵⁴ Examining both affidavits, the date errors appear to be the result of a clerical error between the years 2016 and 2018. The Registrar does state in the subsequent affidavit that she commenced early retirement leave. The examination revealed that what remained unchanged was the relevant substance of the affidavit. QCC's admission of the date errors in its initial filing and subsequent corrective submission does not diminish the value or reliability of the subsequent affidavit.

The QCC Registrar says the grading policy pertaining to an "F," "WU," and "INC" is as follows: An "F" grade is to be assigned when a student earns a grade based on poor performance and the student did not complete the coursework successfully. The "WU" grade is to be given when the student stops attending the course but did not officially withdraw. An "INC" is a temporary grade given to students who request additional time to complete their coursework. The "INC" can only be granted if the student's coursework has been of passing quality, so there is a reasonable expectation that the student will be able to successfully complete the course requirements by the end of the following semester. At the beginning of the term and prior to the

¹⁵¹ Request for Review (OES Doc. No. 1) at 206.

¹⁵² Resp't Ex. R-3.

¹⁵³ ED Br. at 11.

¹⁵⁴ Resp't Reply Br. 6.

start of the exam/grading period., the QCC Registrar routinely sent an email to all faculty and adjuncts, as well as department heads, with information on the differentiated grading policy, including a link to the grading policy, which explained the distinctions between “F,” “WU,” and “INC.” The Registrar regularly attended meetings and trainings which discussed the grading policy to instructors. The Registrar also sent emails addressed to all faculty wherein she answered individual questions from faculty and staff regarding the grading policy. The Department does not provide any evidence to contradict the Registrar’s sworn statement on the above actions.

The Registrar had a crucial role in ensuring the accuracy of academic policies, like the grading policy. That makes her affidavit relevant in demonstrating that QCC adhered to its grading policy by demonstrating that QCC consistently and constantly informed professors of the application of the QCC grading policy. With over fourteen years as the Registrar, the detailed information provided in the affidavit is credible and reliable.

Student # 2

Reviewing Student 2’s transcript¹⁵⁵ for Spring 2016, it indicates that the student received a grade of “FIN” (failed incomplete) in PSYC-220; “FIN” in LF-111; a “WU” in MA-10 and a “W” in HI-111. The grade for HI-111 and MA-10 are not questioned for this review. During the program review, QCC provided statements from professors that they had reviewed the grades given to Student 2 and that the grades were in accordance with QCC grading policy.¹⁵⁶ These statements did not satisfy the Department that the professors had adhered to the QCC grading

¹⁵⁵ Resp’t Exh. R-9 at 2.

¹⁵⁶ ED Exh. 7-001, 002.

policy.¹⁵⁷ During the pendency of this appeal QCC submitted additional evidence to support that the professors adhered to the QCC grading policy.¹⁵⁸

For PSYCH-220, QCC submitted professor's records and a detailed certified statement from the professor.¹⁵⁹ The professor's signed and detailed certification specifically identified Student 2 and stated that they were the professor for that student. The professor stated that prior to the end of each semester, including the one at issue, the faculty received an email from Office of Registrar which contained information about CUNY's grading policies and procedures. It also stated that the professor understood that a "WU" grade is given when the student stops attending the course but did not officially withdraw, an "F" grade is an earned grade based on poor performance and the student did not complete the coursework successfully, and an "INC" grade is given if a student is doing work of passing quality in a course and has been granted additional time by the instructor to complete coursework. It also stated that the professor had reviewed their records and confirmed that the student attended throughout the term and the student's course average was of passing quality (76%) by end of the term. At the end of term, the student had two outstanding items, and to allow the student additional time to make up the missed work, the student was assigned a grade of "INC," which was consistent with the QCC grading policy. The temporary grade of "INC" was converted to final grade of "FIN" because the student did not complete the outstanding coursework items.

QCC has stated that the professor for LF-111 is no longer employed at the institution,¹⁶⁰ but the school did submit additional records to substantiate the professor's initial issuance of a

¹⁵⁷ FPRD at 13.

¹⁵⁸ Resp't Exh. R-11, R-27.

¹⁵⁹ Resp't Exh. R-11.

¹⁶⁰ Resp't Br. at 12.

grade of “INC” at the end of the term.¹⁶¹ A review of the evidence indicates that at the end of the term, the student was earning a passing grade up until the final exam, which the student did not take. The student had a 91% test average, 90% in participation and attendance, 86% on their oral exam. At the end of the term, the average user’s time spent in the course was 1 hour and 39 minutes. This student’s time was 59 minutes. That information supports the conclusion that since the student’s work was of passing quality at the end of the term, the instructor granted additional time for the student to complete the remaining outstanding assignments. The student’s performance shows that the student did not unofficially withdrawal under QCC’s grading policy and the instructor’s assignment of “INC” at the end of the term was not inconsistent with the QCC grading policy. Further, the evidence shows that, again consistent with the QCC grading policy, the temporary grade of “INC” was converted to final grade of “FIN” because the student did not complete the outstanding coursework. For this student both professors adhered to the QCC grading policy as the assignment of “INC” was not inconsistent with QCC’s grading policy.

Student 13

The liabilities for this student have been resolved during this pendency of this appeal. QCC submitted additional evidence with documentation of the student’s attendance at an academically related activity despite not being attendance taking institution. The Department concluded that student attended at least one course past the 60% point and, therefore, earned all their Title IV.¹⁶²

¹⁶¹ Resp’t Exh. R-27.

¹⁶² ED Br. at 15.

Student 23

Reviewing Student 23's transcript¹⁶³ for Fall 2015, it indicates that the student received a grade of "WU" in four classes and an "F" in MA-121. During the program review, QCC provided a statement from MAD-121 professor that they had reviewed the grade given to Student 44 and the grade was in accordance with QCC grading policy.¹⁶⁴ This statement did not satisfy the Department that the professor had adhered to the QCC grading policy.¹⁶⁵ During the pendency of this appeal QCC submitted additional evidence to support that the professor adhered to the QCC grading policy when it assigned the grade of "F."¹⁶⁶ The Department argues that this student should have received a "WU" because the only attended until October 5, 2015, arguing that the Fall semester ends in December and the grade roster submitted does not show a grade for the final exam.¹⁶⁷

In reviewing QCC's additional evidence including, the professor's records and a detailed attestation from the professor, the Department is incorrect that the course was to have met until December. As explained by QCC, the class met 75 minutes twice a week and the last class was on October 5th.¹⁶⁸ The professor's detailed attestation states that (1) the professor taught student 23 in MAD-121; (2) the professor understood that a "WU" grade is given when the student stops attending the course but did not officially withdraw, and an "F" grade is an earned grade based on poor performance when the student did not complete the coursework successfully; (3) the professor reviewed their records and confirmed that the student attended throughout the term and missed the last two classes; (4) the professor confirmed the student's

¹⁶³ Resp't Exh. R-9 at 9.

¹⁶⁴ ED Exh. 7-012.

¹⁶⁵ FPRD at 14.

¹⁶⁶ Resp't Exh. R-23.

¹⁶⁷ ED Exh. 9-001.

¹⁶⁸ Resp't Reply Br. at 4.

academic performance and noting that the student earned a “F” because the student’s average of 86% for the first test and 0% for final, because student did not take final exam, resulted in an earned grade of 43%; (5) that during the same Fall 2015 MAD 121 course, the professor assigned another student a “WU” based on that student’s lack of attendance.

The professor’s firsthand knowledge describing the student’s performance in the attestation is relevant and reliable. The evidence shows the student was poorly performing in the course. The instructor’s determination that the student did not complete the coursework successfully and “earned” a grade of “F” is consistent with QCC grading policy and shows adherence to the grading policy.

Student 44

Student 44’s transcript¹⁶⁹ for Fall 2016 indicates that there are three grades in question. The student received an F in CRIM-102, PH-112, and PSYC-101. During the program review, QCC did not provide any documentation that the instructors had adhered to the QCC grading policy when they assigned their grade. During the pendency of this appeal QCC submitted evidence to support that the professors adhered to the QCC grading policy.¹⁷⁰

The professor for CRIM-102 has been employed by QCC since 2012 and the professor for PSYC-101 has been with QCC since 2008. Both professors provided detailed and personalized attestations¹⁷¹ regarding their assignment of a grade of F for the student. The professors’ attestations state that both professors taught the student in their designated course, and, that prior to the end of each semester, including the Fall 2016 term, both professors received information about QCC’s grading policies and procedures from the Office of the Registrar. During the Fall 2016 semester and prior to issuing their grades, they reviewed and understood

¹⁶⁹ Resp’t Exh. R-9 at 6.

¹⁷⁰ *Id.* R-16, R-17, R-18.

¹⁷¹ *Id.* R-16, R-17.

the grade definitions as specified in the grading policy. The professors individually acknowledged and understood that a “WU” grade is given when the student stops attending the course but did not officially withdraw; an “F” grade is an earned grade based on poor performance and the student did not complete the coursework successfully. With that understanding, the professors reviewed their records and confirmed that the “F” grade was the correct grade and consistent with the grading policy.

The professor for CRIM-102 explained in their attestation why they determined the student earned an “F” grade instead of a grade of “WU.” The professor noted that the student took both the first exam and final exam in the course but did not complete other assignments. Because the student completed the course with the final exam (with minimal attendance), the student was not appropriate to be assigned a grade of “WU” under the grading policy. The instructor’s determination that student “earned” a grade of “F” because of poor coursework and was ineligible for a grade of “WU,” is consistent with QCC’s grading policy.

The professor for PSYC-101 also noted in their attestation that the student attended classes sporadically but was present through the last classes and took all of the tests administered in the course. A review of the grades assigned by the instructor shows the student performed poorly on the tests and assignments. The professor’s firsthand knowledge describing the student’s performance in the attestation is relevant and reliable. The instructor’s determination that the student did not complete the coursework successfully and “earned” a grade of “F” under the grade policy demonstrates adherence by the instructor to the grading policy. The Department has not provided evidence Department that this professor’s record keeping is unreliable.¹⁷²

The professor for PH-112 died during the term. As result, the Chair of the Physics

¹⁷² ED Exh. 9-002.

Department (Physics Chair) performed his own independent review of the instructor's records. QCC submitted his attestation regarding the instructor's assignment of a grade of "F."¹⁷³ Physics Chair has been with QCC since 1987. His affidavit includes information consistent with the grading policy, and states that the Office of the Registrar regularly sends information about CUNY's grading policies and procedures via email using an email list which includes all full-time and adjunct faculty. A "WU" grade is given when the student stops attending the course but did not officially withdraw. An "F" grade is an earned grade based on poor performance and the student did not complete the coursework successfully. Physics Chair reviewed the academic records of the student for PH-112, and concluded that the "F" grade was the grade to be given, consistent with grading policy. The student attended ten laboratory sessions but did not attend the final three sessions. The student handed in one lab assignment, for which she received a grade. She did not hand in other lab assignments.

Student 45

There is no assessed liability for this student because, during the program review, QCC returned all Title IV because the student could not be verified. However, the Department believes the issue of whether the instructor for PSYC-101 adhered to the QCC grading policy when they determined the grade for the student remains unresolved.¹⁷⁴

The student's transcript¹⁷⁵ shows three grades of "WU" and the one grade of "F" in PSYC-101. The Department argues the student did not academically earn an "F" because the student did not take the final exam.¹⁷⁶ The Department is again requiring mandatory

¹⁷³ Resp't Exh. R-18.

¹⁷⁴ FPRD at 16.

¹⁷⁵ Resp't Exh. R-9 at 8.

¹⁷⁶ ED Exh. 9-002-03.

documentation of the last date of attendance at an academically related activity to prove that the instructor adhered to the QCC grading policy.

The records provided by QCC show the student took the first quiz, the midterm examination, and attended through most of the period, missing the final five classes.¹⁷⁷ To the Department, QCC's evidence shows the instructor's lack of adherence to the QCC grading policy, because without the instructor's documentation of attendance at an academically related event, even though it is a non-attendance taking institution, the instructor is foreclosed from determining under the QCC's grading policy that the student "earned" an "F" for poor performance and did not complete the coursework successfully.¹⁷⁸ The lack of records indicating a student's attendance at academically related event is not dispositive that the instructor did not adhere to QCC's grading policy. The evidence shows the student poorly performed in PSYC-101 and supports the instructor's determination that the student did not complete the coursework successfully and "earned" a grade of "F." The instructor's assignment of an "F" is consistent with QCC grading policy and does not show the instructor did not adhere to the QCC grade policy.

For Finding 2, the PRR indemnified the five students above, who received combination of all non-passing grades such as an "F," "FIN," and "WU" in a semester. The Department believed the professors did not adhere to the QCC grading policy and required QCC to demonstrate by documentation of the student's last date of attendance at an academically related event to prove the professor adhered to the QCC grading policy. When the Department determined that QCC did not demonstrate, through documentation of last date of attendance at an academically related event, that the professors of the five students adhered to the QCC grading

¹⁷⁷ Resp't Exh. R-19.

¹⁷⁸ ED Exh. 9-002-03.

policy, it concluded that the QCC grading policy could not be relied upon to show whether the student unofficially withdrew or completed the period by earning a grade of “F.”¹⁷⁹ The Department then required a full file review of AY 2015-2016 and 2016-2017 for students who received a combination of “WU” and “F” grades. QCC was to assume that student had unofficially, unless it could prove document period completion without reliance on the grading policy, withdrawn and calculate a R2T4. The date of unofficial withdraw was either the mid-point or last date of attendance at an academically related event.¹⁸⁰ The FPRD established liability based on its determination that the professors did not consistently adhere to the QCC grading policy and as result the grading policy cannot be relied upon to show period completion. As in *Lehman*,¹⁸¹ QCC is correct that requiring it to use documentation of the last date of attendance to test the grading policy effectively eliminates the grading policy option allowed by the Department’s published policies.¹⁸²

Moreover, the evidence overall provided by QCC in this proceeding, including the instructors’ statements and attestations for the three students, are of similar quality, relevancy, and sufficiency as in *Lehman* to demonstrate that professors adhered to the QCC grading.¹⁸³ The statements and attestations are not a “rubber stamp” from one person on a summary statement disjunct from the individual student facts. The statements and attestations not only state what they understood the QCC grading policy to be, but also include the review of their records to show that the grade of “F” or “FIN” was correct under the QCC grading policy. Of the seven grades in question from the four student files (2,23,44,45), the evidence convincingly shows that for six of the grades, the professor’s assignment of an “F” or “FIN” is consistent with QCC’s

¹⁷⁹ PRR at 9-11.

¹⁸⁰ *Id.* at 11.

¹⁸¹ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep’t of Educ. (Apr. 22, 2020) at 31.

¹⁸² Resp’t Br. at 8.

¹⁸³ *In re City Univ. of N.Y. Lehman Coll.*, Dkt. No. 18-38-SP, U.S. Dep’t of Educ. (Apr. 22, 2020) at 26.

grading policy and demonstrates that the professor adhered to the QCC grading policy. Only the one grade for Student 44 in PSYC-101 is inconclusive as to demonstrate that the instructor adhered to the QCC grading policy.

The evidence shows that professors adhered to the grading policy, and one inconclusive grade does not indicate a “systemic” problem to determine that the QCC grading policy was not adhered to. As a result, QCC has convincingly met its burden of proof by the preponderance of evidence it has adequately adhered to its grading policy and through that grading policy has sufficiently documented whether a student has unofficially withdrawn or completed the period.

Student 18

This student’s liabilities under Finding 2 are unrelated to the issue of period completion and the professor’s adherence to the QCC grading policy. QCC used \$372.95 in Title IV funds from AY 2015/2016 to cover the summer 2015 semester, and the student failed to show for class during the summer 2015 semester, which resulted in a tuition credit. QCC claims that the student earned the funds during the fall 2015 semester. The FPRD determined that the funds must be refunded to the corresponding Title IV programs.¹⁸⁴ During the pendency of this appeal, QCC has not advanced any evidence or argument against the FPRD that QCC is entitled to retain the Title IV tuition credit. As a result, QCC has not met its burden of proof for this student.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. The Department established a prima facie case assessing liabilities under Finding 2.
2. QCC has a grading policy that is consistent with the Department’s policy and regulations which can accurately differentiate between a student who completed a course but earned a failing final grade because the student did not meet course

¹⁸⁴ FRPRD at 24.

- objectives, and a student who has withdrawn from a course without providing any notice to QCC.
3. QCC has demonstrated that it relied on its grading policy, consistent with the Department's policy and regulations, to establish period completion or unofficial withdrawal.
 4. QCC has demonstrated that its faculty consistently and accurately assigned grades that adhered to QCC's grading policy.
 5. For Student 38, QCC has not met the burden of proof that it is entitled to retain this student's Title IV aid.

ORDER

The liabilities assessed in Findings 2 for Student 38 are SUBSTANTIATED. The liabilities in Finding 2 based on the file review for period completion are UNSUBSTANTIATED. QCC is not liable for the return of \$348,474.38 in Title IV funds assessed in Finding 2 of the FPRD. QCC is liable for and is ORDERED to repay to the United States Department of Education \$372.95 in liabilities with any appropriate interest for Student 38.

**DATE OF ORDER:
JANUARY 3, 2024**

Robert G. Layton
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 and 668.121(b).

An appeal to the Secretary, shall be in writing and explain why this decision should be overturned or modified. 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 appealing party shall provide a copy of the appeal to the opposing party. The appeal shall clearly indicate the case name and docket number.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system. Otherwise, appeals must be timely filed in 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 12 th Street, S.W., 10 th Floor Washington, DC 20024	Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 400 Maryland Avenue, S.W. Washington DC 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.

* Due to the consequences from the COVID-19 Pandemic and consistent with the current operating directives of the Department, OHA's on-site support staffing does not provide coverage during all OHA's general office hours (Monday thru Friday, 8:00 am to 4:30 pm, Eastern Time). Hand delivery or courier-delivered mail or parcels at the OHA's physical location may be accepted by Education's mail delivery personnel. Alternatively, a party filing by hand delivery or courier-delivered mail or parcels, may contact the OHA main phone at 202-245-8300 to verify OHA staff is available to accept a filing. Hand delivery and delivery by U.S. Mail to OHA will likely be delayed. Extensions to the time to file will not be granted by OHA.