



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

In the Matter of

Docket No. 04-20-SP

BRYANT & STRATTON COLLEGE,

Federal Student
Aid Proceeding

Respondent.

PRCN: 200140519064

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

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

Before: Judge Ernest C. Canellos

DECISION ON REMAND

This decision is the result of a remand issued by the Secretary on October 31, 2007. In the remand, the Secretary said she “agree [d] with FSA that Respondent did not receive accreditation to provide the course in question through on-line distance learning.” The Secretary, however, remanded this case to allow me to review the following question: “whether Federal statutory/regulatory provisions require, under the circumstances of a contractual and/or consortium arrangement, accrediting agency approval before Respondent can offer on-line courses.” As such, it is clear that the Secretary’s order limits the inquiry before me to a narrow question of law.

At issue is the fact that Bryant & Stratton College (B&S) contracted with its sister school B&S-Lackawanna to provide the on-line portion of its Business Management program. There is no dispute that B&S failed to receive approval from its accrediting agency, the Accrediting Council for Independent Colleges and Schools (ACICS), for it to provide on-line courses. The question before me is whether B&S was required to obtain accrediting agency approval before contracting out with another institution, which was accredited to provide on-line distance learning courses.

In my initial decision, dated April 14, 2005, after careful scrutiny of all of the evidence in the record and the applicable law, I determined that B&S was relieved of any liability to pay the U.S. Department of Education (ED) for its demand for \$48,473 relative to the issue of ineligible course delivery method. Indeed, I was persuaded, as I am now, that no Federal statutory/regulatory provisions required accrediting agency approval before B&S could offer on-line courses through a contractual and/or consortium arrangement with its sister school B&S-Lackawanna. Upon remand,

FSA persists in its position that Federal regulations require accrediting agency approval for contractual and/or consortium agreements, like those involved in the present case.

In order to analyze this issue, the first matter to consider is whether the Business Management on-line courses are essentially identical to the Business Management on-campus courses. B&S argues that both the on-line courses and the on-campus courses are part of the same Business Management program. B&S claims that under 34 C.F.R. § 600.9(a), B&S was not required to notify ACICS of its distance learning courses since there is no accrediting agency approval requirement for agreements between two eligible institutions. B&S further claims that it was eligible to offer the Business Management program, since the accredited on-campus courses mirrored the on-line courses. Contrariwise, FSA claims that B&S cannot rely upon its approval to offer the Business Management program on-campus to support offering it on-line since the courses offered through on-line distance learning are a separate program from those courses offered on campus. FSA finds significant and argues that B&S-Lackawanna was separately accredited and approved to offer these courses through the on-line delivery method, whereas B&S was only approved to offer the courses on-campus.

Federal regulations specify that an eligible institution may enter into a written agreement with an ineligible institution to provide up to 25% of an educational program without losing its eligibility. It is only if the agreement with the ineligible institution contemplates providing more than 25% of such program, that institution's accrediting agency first must give its approval.¹ When both institutions are eligible, however, the regulations do not require any such accrediting agency approval before the two enter into a consortium agreement.² Pursuant to 34 C.F.R. § 602.22(a), an institution must gain re-approval from its accrediting agency if the eligible program for which it was originally approved undergoes a substantive change. Since, there is no question that B&S was accredited in its Business Management program, the question is whether contracting certain courses through the on-line delivery method constituted such a substantive change that B&S would be required to gain re-accreditation. The relevant definition of substantive change is "the addition of courses or programs that represent a significant departure, in either content or method of delivery, from those that were offered when the agency last evaluated the institution."³ This definition requires the court to determine if the on-line course delivery constituted a "significant departure" in content or method of delivery. There is no evidence and no reason to believe that the content of the on-line courses differed from that of the on campus courses. Both operated under the same name and were equally creditable for degree purposes. Furthermore, FSA provided no evidence that the curriculum or course requirements differ for the on-line courses. Therefore, the only issue is whether the addition of these on-line courses represented a significant departure from the normal on-campus course delivery method.

According to the record, the on-line courses made up less than 50% of the entire Business Management Program.⁴ In a September 2002 "Dear Colleague" letter,⁵ ED makes it abundantly clear that only if an institution decides to offer more than 50% of any program through distance-

¹ 34 C.F.R. § 600.9(b) (2000).

² 34 C.F.R. § 600.9(a) (2000).

³ 34 C.F.R. § 302.22(a)(2)(iii).

⁴ Counsel for Bryant and Stratton stated in oral argument, "Bryant and Stratton always made sure that no institution offered more than 50 percent of its courses online...." This statement was un-rebutted by FSA at that argument or in any subsequent submission.

⁵ September 2002 "Dear Colleague" letter attached to Respondent's responsive brief.

learning is it required to submit proof of having appropriate accrediting agency approval. In other words, ED does not consider course offerings of less than 50% to be significant enough so as to require separate accreditation. Since the distance-learning courses in the instant case made up less than 50% of the program, I find that the distance-learning courses did not represent a significant departure from the normal on-campus delivery method and as such, does not require agency re-approval.

In conclusion, since the type of consortium agreement at issue in the present case was authorized by FSA's regulations, I find that the applicable law does not support FSA's contention that B&S must return the Title IV funds it disbursed to students who were taking the on-line courses. B&S was authorized to provide the subject coursework for the Business Management program because another eligible institution provided the courses under an authorized consortium arrangement. B&S and B&S-Lackawanna were both eligible institutions and the on-line courses and the on-campus courses were part of the same program. B&S was not required to gain re-approval for the on-line courses since such courses did not constitute a significant departure from the on-campus courses. On this basis, I find that Federal regulatory provisions do not require accrediting agency approval for the subject arrangement.⁶

ORDER

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

Ernest C. Canellos
Chief Judge

Dated: August 7, 2008

⁶ It is significant to note that ACICS reviewed and ultimately approved of the consortium arrangement between B&S and B&S-Lackawanna. As such, I cannot fathom how federal funds were placed in jeopardy by B&S' contracting out with Lackawanna, especially because no prior approval was necessary, but approval was ultimately given. It is also significant that FSA allowed other B&S schools to enter into identical consortium arrangements without requiring re-accreditation.