



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

In the Matter of

FORTIS COLLEGE,

Docket No. 12-55-SP

Federal Student Aid
Proceeding

Respondent.

PRCN: 201040427285

Appearances: Sherry Mastrostefano Gray, Esq. and Nicolas Michiels, Esq., Powers Pyles Sutter & Verville PC, Washington, D.C., for Fortis College.

Russell B. Wolf, Esq., Office of the General Counsel, U. S. Department of Education, Washington, D.C., for the Office of Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Fortis College (Fortis) is a postsecondary institution located in Miami, FL and is eligible to participate in various federal student aid programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* The Office of Federal Student Aid (FSA) is the agency within the U.S. Department of Education (ED) that administers and oversees these programs.

It is axiomatic that institutions participating in any federal student financial assistance program authorized by Title IV must comply with the rules and guidelines established by federal regulations. 34 C.F.R. § 668.1. Pursuant to 34 C.F.R. § 668.32(e) (1), a student must have a high school diploma or its recognized equivalent to be eligible to receive Title IV funds. The term “recognized equivalent” of a high school diploma has been defined in 34 C.F.R. § 600.2 and it is not applicable to the students at issue.

During the period of July 19-23, 2010, FSA reviewers conducted a program review at Fortis to determine its compliance with applicable Title IV statutes and regulations for the 2008-2009 and 2009-2010 award years. The reviewers found 12 students out of a sample of 35 from the two relevant award years who possibly had invalid high school diplomas. After a file review of all Title IV recipients at Fortis during the relevant time period, FSA identified 378 students who were awarded Title IV aid based on their receipt of a high school diploma from Atlantic Southeastern Academy (ASA). FSA determined that these diplomas were not valid high school diplomas for Title IV purposes based on the following factors: the dates students entered on

Fortis questionnaires for when they received their ASA diploma were very soon after those same students reported that they were not a high school graduate; changes on student questionnaires suggested that Fortis knew students were receiving diplomas from ASA in a very short time period; some Fortis students had been referred to ASA by Fortis employees; ASA and Fortis are 0.10 miles away from each other; and information from students and ASA representatives showed that ASA students could take a take-home examination with no prior classroom instruction or attendance requirement and could receive their diploma for a fee of \$450. On July 2, 2012, FSA issued a Final Program Review Determination (FPRD) assessing liabilities of \$1,952,919 based on its finding that Fortis disbursed Title IV funds to 378 students with invalid high school diplomas from ASA. The FPRD asserted that Fortis was aware that ASA was not a valid high school but viewed its diplomas as sufficient for awarding Title IV funds.

Before me, Fortis argues that it is not liable to ED for awarding Title IV funds to ASA graduates because the regulations in effect during the award years in issue did not define a high school diploma or directly obligate eligible institutions to determine the validity of high school diplomas. Fortis points out that ED's published guidance at the time only provided that students could self-certify that they have a high school diploma or, if a school is concerned with the validity of a diploma, it should check with the state's department of education. A new rule, found at 34 C.F.R. § 668.16(p), effective on July 1, 2011, now requires that schools "develop[] and follow[] procedures to evaluate the validity of a student's high school completion if the student or the Secretary had reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education." As such, Fortis argues that this rule, for the first time, requires an institution to evaluate the validity of high school diplomas and therefore ED cannot assess a liability against Fortis since that regulation cannot be applied retroactively.

Further, Fortis argues that, even assuming it had an obligation to validate high school diplomas before awarding Title IV funds to students, the high school diplomas earned by ASA graduates were valid and that there was no evidence at the time that ASA was an invalid high school. Fortis claims it took the following steps to determine the validity of ASA high school diplomas even though it was under no obligation to do so. First, Fortis checked the Florida Department of Education's (FLDOE) Private High School Directory and confirmed that ASA appeared on the list during the relevant award years. Fortis admits, however, that the FLDOE does not license or approve private high schools in the state, but does update its directory annually. Second, Fortis checked ED's National Center for Education Statistics (NCES) and found that ASA was, and still is, a registered, listed school. Third, Fortis checked The College Board, a nonprofit membership organization of postsecondary schools that administers the SAT, among other exams, and found that ASA appeared, and continues to appear, in their directory. In addition, a review of ASA's website indicated two ways for a student to earn its high school diploma: (1) students can take an exam to test their abilities in subjects required by the FLDOE or (2) students can complete online courses ranging from five to twelve weeks. Students who take the exam in order to earn their high school diploma must pay a fee of \$450 and pass the exam with a cumulative score of 70% and a score of at least 60% in each subject. Fortis notes that ASA graduates perform almost as well as non-ASA graduates in terms of average GPA and graduation rate. Based on this information, Fortis argues that it reasonably concluded that ASA was a valid high school and it did not knowingly award Title IV funds to students with invalid credentials.

To bolster its argument that it acted reasonably, Fortis describes its actions taken after the time period in issue. After receiving notice of the 2010 negotiated rulemakings regarding the validity of high school diplomas, referenced above, Fortis instituted its own internal policy in May 2010 to only accept high school diplomas from accredited and state-licensed high schools. Fortis argues that this goes beyond what the current law requires. In addition, as a test, Fortis had several individuals seek enrollment at local postsecondary institutions utilizing their ASA diploma as a credential. These students were accepted at Broward College and Indian River State College and were provisionally accepted at Miami Dade College and Palm Beach State College. Apparently, none of the students applied for financial aid upon acceptance to these institutions. Also, Fortis claims it had students consult with certain employers to determine whether their ASA diploma would be accepted in order to gain employment. The Palm Beach Fire Rescue Department and the Seminole County Sheriff's Office both indicated that an ASA diploma met their high school diploma requirement.

Fortis denies FSA's allegation that the student interview questionnaires show that Fortis knew that students were receiving their ASA diplomas within a short period of time. Fortis points out that these questionnaires were used to track certain pre-enrollment data and it was not uncommon for admissions representatives to update the forms after the student's initial interview. As such, Fortis argues, it is not truly possible to know when a student received his or her high school diploma in relation to initially filling out the questionnaire. Fortis insists that it admitted students solely on documentation of graduation from high school.¹

FSA asserts that Fortis knowingly admitted students with an invalid high school diploma in violation of its fiduciary duty to ED. FSA agrees that ED regulations never specifically defined what constitutes a high school diploma, but argues that the term is essentially defined in federal statute regarding student eligibility as a "certificate of graduation from a school providing secondary education[.]" 20 U.S.C. § 1091(d). FSA adds that the word "valid" is superfluous -- the purpose of requiring a valid high school diploma is to ensure that federal funds are not awarded to students who lack the basic educational capacities to benefit from postsecondary education.

In addition, FSA argues that it is not attempting to retroactively enforce a new standard through § 668.16(p) but is upholding a standard that has always existed. FSA cites two previous cases before this Tribunal to establish that it can legally enforce a requirement that students possess a valid high school diploma absent a definition of the term. *See In the Matter of Galiano Career Academy*, Dkt. No. 11-71-SP, U.S. Dep't of Educ. (Dec. 6, 2012); *see also In the Matter of Hope Career Institute*, Dkt. No. 06-45-SP, U.S. Dep't of Educ. (Jan. 15, 2008). FSA rejects

¹ Fortis argues that liabilities be reduced for students who achieved the six-credit hour towards a degree requirement of 34 C.F.R. § 668.32(e) (5). This would also include students who already completed their program at Fortis and, therefore, proved they had sufficient foundation for success at the postsecondary level. I find that there is no authority to support this argument. An institution must determine a student's Title IV eligibility prior to awarding funds, not retroactively. *See Hope Career Institute, infra.*

Fortis' argument that ASA offered valid high school diplomas. Specifically, FSA argues that the school essentially offers the opportunity to "purchase" a high school diploma after taking an exam without any coursework, instructors, independent or impartial proctors, or required attendance. Students can retake the exam as many times as necessary to reach the passing score at no extra charge. FSA cites to *Galiano Career Academy, supra*, where the Tribunal found under similar circumstances to those in this case that the school was clearly a diploma mill and urges this Tribunal to do the same.

Next, FSA argues that Fortis knew that ASA was a diploma mill. First, FSA points out that Florida is unable to determine a school's legitimacy because the state does not regulate private high schools. Consequently, the FLDOE Private High School Directory neither provides information as to the accuracy of the data submitted by the school nor implies approval or accreditation by the FLDOE. Second, FSA argues that Fortis knew about ASA's operations because a former Fortis employee founded ASA and Fortis employees referred students to ASA in order to quickly obtain a high school diploma. Third, FSA claims that in many instances, ASA's owner faxed a student's diploma directly to the Fortis admissions representative who referred the student. Fourth, FSA offers evidence that ASA's owner denied that ASA offered any course curriculum for its students. Fifth, FSA rejects the significance of Fortis' argument that ASA graduates performed as well as non-ASA graduates -- arguing that this may be due to Fortis' lack of an academically-challenging program. Lastly, FSA argues that the claim that a number of other institutions and employers accept a Fortis high school diploma is meaningless because it is unknown what other information these schools and employers had, and their determination cannot serve as the basis for establishing the validity of high school diplomas for the purposes of awarding Title IV funds.

In response to Fortis' claim that it was not aware that ASA's diplomas were invalid, FSA addresses the inconsistencies and statistics found in the student questionnaires. FSA agrees that the information from the questionnaires is not determinative but highly suggestive that Fortis knew that a number of students were receiving their high school diploma in a short time frame. FSA notes that 16% of ASA students received their diploma from ASA within one to five days of informing Fortis that they were not high school graduates and that 43% of ASA students did so within 30 days. In addition, FSA points out that 20% of students at Fortis were awarded Title IV funds based on their purported graduation from ASA. As a result, FSA argues that Fortis, as ED's fiduciary, needed to have sufficient familiarity with its student body when such a high percentage receive Title IV funds based on their possession of a high school diploma from a single entity. Finally, in terms of the close proximity between the two schools, FSA argues that the location of the two schools demonstrates how readily available information was to Fortis.

It is important to note that in reaching my decision in this proceeding, I am bound by the well-established rule that in all Subpart H – audit and program review – proceedings, the Respondent institution has the burden of proving by a preponderance of the evidence that the Title IV funds it received were lawfully disbursed. 34 C.F.R. § 668.116(d). Therefore, for the single finding in this appeal, Fortis has the burden of proving that the recipients of Title IV funds in issue were eligible to receive their respective Title IV aid because they possessed either a high school diploma or its recognized equivalent. 34 C.F.R. § 668.32(e) (1). If Fortis fails to establish its compliance with the Title IV, HEA regulations regarding the disbursement of Title IV funds, it must return all such funds to ED.

In this instance, Fortis relied upon diplomas issued by ASA to make Title IV eligibility determinations for 378 of its students who had no other educational credentials. After reviewing the record before me, and the arguments presented by counsel, I find that it is unassailable that for the period of time in issue, ASA's "diplomas" were not valid high school diplomas based on any reasonable interpretation of the meaning of "high school diploma." Specifically, students could receive a diploma from ASA if they paid a fee and passed an exam without any instruction or classroom attendance requirements. The exam could be taken, without supervision, as many times as necessary to pass at no extra cost. Although ASA stated that the test covers every area necessary for graduation as specified by FLDOE, there is no evidence that this test was rigorous or an appropriate measure of students' ability to succeed at the postsecondary level. Fortis does agree that there has to be some standard a student must meet in order to receive a high school diploma and I find that taking a non-proctored test as many times as necessary to pass is below that minimum threshold. I find Fortis' argument to be unpersuasive that it could still today accept ASA diplomas as valid high school diplomas knowing what it knows now about the school. I acknowledge the fact that ASA claims to have a traditional classroom program in addition to its fast-track program. However, I am not convinced, based on the evidence presented to me, that Fortis established that any of the 378 students from ASA received their diploma through the traditional program.

Having found that ASA diplomas are not valid high school diplomas for Title IV purposes, the next issue I must decide is whether Fortis was on notice that ASA's diplomas were invalid. Specifically did Fortis know or should have known that credentials from ASA were not valid high school diplomas. In making that determination, it is most important to recognize that Fortis entered into a program participation agreement whereby it accepted that it has a fiduciary responsibility to ED by virtue of being entrusted to disburse federal financial assistance to eligible students on behalf of the Federal government. One part of that obligation is that Fortis must ensure that the expenditure of Title IV funds is proper and that it complied with program requirements. *See* 34 C.F.R. § 668.116(d). As a fiduciary, such an institution is held to the highest standard of care in administering the programs and in accounting to ED for any funds disbursed under the programs. 34 C.F.R. § 668.82(b). Fortis argues before me that without a definition of "high school diploma" and explicit regulations obligating an institution to validate high school diplomas, it cannot be held responsible to ED for not determining the validity of high school diplomas. I reject this argument as being without merit. Fortis at least acknowledges that there is some minimum, common sense requirement for validating high school diplomas when it offered that it would not accept a diploma from a student who simply purchased the credential. Alternatively, Fortis argues that even assuming that it has an obligation to determine the validity of high school diplomas, it had a good faith belief that these diplomas were valid and, therefore, should not be held in violation.

After reviewing the information and testimony in this case, I find that Fortis has failed to live up to its fiduciary duty to ensure that only eligible students receive Title IV funds. Fortis' argument that it believed that ASA diplomas were valid because the school appeared on the FLDOE's list of private high schools, NCES, and The College Board, that it reviewed ASA's website, and that other institutions in the area were accepting ASA's diplomas falls short of the highest standard of care and diligence owed by a fiduciary to ED. The close proximity of the two schools reveals how easily Fortis employees could have visited ASA to see firsthand how

the school ran its programs and discuss graduation requirements and examinations with ASA representatives. Checking ASA's website was clearly not enough to determine the validity of its diplomas. The fact that there were times when faxes were sent back and forth between ASA and Fortis that ultimately resulted in the student receiving Title IV aid is not evidence of any agreement between the two schools; however, this is persuasive evidence that Fortis did have knowledge of ASA's operations and the short time period in which students were receiving their diplomas. In addition, Fortis describes the steps it took after the FPRD to prove that they had a good faith belief that the ASA diplomas were valid, such as contacting local employers and asking contractors to apply to local institutions with an ASA diploma. I find that this after-the-fact action is unpersuasive to establish that Fortis was reasonable in its belief.

Fortis argues that it was unaware of the total number of ASA students who were awarded Title IV funds because they did not track which high school students attended in their database. However, Fortis admits that they were aware of ASA and its close proximity, and the fact that a former employee founded the school. This is not a case a post-secondary institution received a few stray high school diplomas and, therefore, had no reason to believe that further investigation was necessary, which may be the case with the schools that Fortis contacted. Fortis awarded federal funds to 378 students, 20% of the Fortis student population, from a high school down the street with very little due diligence inquiry. Fortis distinguishes this case from *Hope Career Institute* and *Galiano Career Academy*, where this Tribunal held both schools liable for awarding Title IV funds to students with invalid high school diplomas. Although the facts before me may not be as egregious as the violations in those cases, I find that differences are not consequential.

In conclusion, I find Fortis had sufficient ways, requiring little effort, of evaluating the validity of ASA's high school diplomas but did not take those actions prior to awarding Title IV funds. Most importantly, it failed in its capacity as a fiduciary to ED to ensure only eligible students receive Title IV funds. Despite the lack of a direct regulation obligating institutions to evaluate high school diplomas, Fortis had a fiduciary duty to ED during the relevant time period to use the highest standard of care in evaluating ASA's credentials. Fortis' apparent arm's length treatment of ASA, given the high number of Fortis students with these ASA "diplomas" and the fact that a former employee founded ASA, does not come close to satisfying its fiduciary duty standard. It is clear that the antithesis of acting as a fiduciary is "putting your head in the sand" and ignoring clear reasons for concern. This, I believe, best describes Fortis' lack of action in this instance. Consequently, based upon the reasons set forth above, I affirm the FPRD finding.

ORDER

On the basis of the foregoing, it is hereby **ORDERED** that Fortis College pay to the U.S. Department of Education the sum of \$1,952,919.

Ernest C. Canellos
Chief Judge

Dated: July 30, 2013

SERVICE

A copy of the attached initial decision was sent by Certified U. S, Mail, return receipt requested, to the following:

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