UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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In the Matter of **Docket No. 15-60-SP**

Elite Academy of Beauty Arts, Federal Student Aid Proceeding

Respondent. PRCN: 201140227650

Appearances: Aaron D. Lacey, Esq., Thompson Coburn LLP, Saint Louis, MO, for Elite Academy of Beauty Arts.

Denise Morelli, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Office of Federal Student Aid.

Before: Chief Administrative Law Judge Rod Dixon

DECISION

Elite Academy of Beauty Arts (Elite) is a small, private postsecondary institution in Brooklyn, New York that was accredited by the National Accrediting Commission of Cosmetology Arts and Sciences.[1] Elite offers students a 1,000-hour cosmetology program, 600-hour esthetics program, 250-hour nail specialty program, 75-hour waxing program, and 180-hour refresher course for previously-licensed cosmetologists. Once a student completes a program, they are eligible to take the state licensing examinations for the student's chosen field. Elite typically enrolls 50 to 100 students, many of whom are first generation immigrants from Russia, Bulgaria, Pakistan, Georgia, Mexico, and the Dominican Republic. Elite participated in the federal student aid programs that are authorized under Title IV of the Higher Education Act of 1965 (Title IV), as amended. 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 United States Department of Education (Department) that administers and oversees these programs. Elite's request for review was filed

[1] Elite lost its accreditation on January 6, 2015, and no longer participates in the Title IV programs as a result.

pursuant to 34 C.F.R. § 668.113(a). The appeal procedures are set forth in 34 C.F.R. Part 668, Subpart H.

This case results from a program review conducted by the Department at Elite from September 12, 2011 to September 16, 2011. The review looked into Elite's compliance with federal statutes and regulations pertinent to the administration of Title IV programs from award years (AYs) 2009-2013 (AY 2009-2010, 2010-2011, 2011-2012, and 2013-2014). On July 31, 2015, FSA issued a Final Program Review Determination (FPRD) calculating the total liabilities due from Elite to be $1,284,497.00. Elite appealed Findings 2, 3, 12, and 13 of the FPRD. FSA revised the liability for Finding No. 2 and withdrew liabilities for Finding No. 13. For Finding No. 2, Elite only challenged the cohort default rate (CDR) used for calculating the Department's estimated loss from the disbursement of ineligible loans. FSA agreed to apply the 2009-2010 CDR as requested by Elite. The revised estimated loss calculation for Finding No. 2 is $263.01 and the total liability for Finding No. 2, including Pell Grant liability, is $21,967.74. Consequentially, the projected liability for all findings of the FPRD is $1,108,414.77.[2]

In order to participate in the Title IV programs, an institution must enter into a program participation agreement with the Department, which binds the institution to use funds received under Title IV in strict alignment with the statutes and regulations. *See* 20 U.S.C. § 1094; 34 C.F.R. § 668.14; *In the Matter of Jagiellonian University*, Dkt. No. 14-05-SA, Dep't of Educ. (May 14, 2014). This agreement creates a fiduciary duty to the Department; the Respondent must not only meet the letter of the law, but also meet with the spirit of the law when administering Title IV program assistance. Given this duty, Elite has the burden of proof and is subject to the highest standard of care in ensuring that the funds received are properly spent in compliance with the regulations. *See* 34 C.F.R. §§ 668.82(a)-(b), 668.116(d).

The findings at issue here ultimately hinge on the Respondent's fiduciary duty to ensure that Title IV funds are faithfully disbursed to eligible students. Finding No. 3 focuses on eligibility through ability-to-benefit tests and Finding No. 12 looks into the validity of forms used to self-certify that students have a foreign high school diploma. Based on the following analysis, I affirm FSA's decision on Finding No. 3 and affirm FSA's decision on Finding No. 12.

Finding No. 3

Issue of Ability-to-Benefit Tests and Retroactive Eligibility

Pursuant to 20 U.S.C. § 1091(d), a student who does not have a high school diploma or its equivalent may be eligible to receive Title IV assistance if the student demonstrates that they have the ability to benefit from the education offered. Among other ways, a student without a high school diploma or GED can pass an independently administered ability to benefit (ATB) test prior to receiving Title IV funds. *See* 20 U.S.C. § 1091(d)(1)&(2) (2008); 34 C.F.R. § 668.32(e)(2) (2011).[3] The purpose of this requirement is to prevent a school from disbursing Title IV program assistance to ineligible students. *See In the Matter of Teddy Ulmo Institute*, Dkt. No. 03-42-SF, U.S. Dep't of Educ. (April 5, 2005); *In re Waukegan School of Hair Design*, Dkt. No. 96-66-SP, U.S. Dept' of Educ. (Decision of the Sec. Sept. 8, 1997).

[2] This total takes into account and has subtracted liabilities duplicated among the findings.
[3] Unless otherwise specified, all regulations cited are from 2011.

An ATB test is independently administered if the test administrator has no relationship with the institution, its affiliates, or its parent corporation. *See* 34 C.F.R. § 668.142. The Department found that the Respondent violated this regulation by working with a testing administrator who was an employee of a law firm where the owner/president of Elite is a partner. Four students—students 28, 31, 32, and 33—took their ATB test under this examiner. On May 31, 2011, Elite received noticed from the Department that the examiner did not meet the criteria of an independent test administrator. Elite subsequently ceased admitting students with an ATB test and restricted the test administrator in question from administering additional exams. As a result, the total liability assessed for this Finding is $31,104.85, excluding $72.60 of the total Pell liabilities that were found to be duplicated in Finding No. 2.

Analysis

Elite argues that Finding No. 3 should be reversed or the liability assessed should be reduced.

FSA argues that Elite violated its duty to the Department when it disbursed funds to ineligible students. In response, the Respondent argues that it should not be held liable for the independent test administrator violation because 1) there is no indication that ATB exams were improperly administered or that test results were compromised in any way due to this alleged violation, and 2) the test administrator did not know she was violating a regulation. Further, Elite asserts that it demonstrated a good faith effort in complying with the law since they stopped admitting ATB students once they were notified of the violation.

A school will be held liable for disbursement of Title IV funds if the school (1) used a test administrator who was not independent from the institution, (2) compromised the testing process in any way, or (3) is unable to document that the student received a passing score on an approved test. 34 C.F.R. § 668.154; *In the Matter of Teddy Ulmo Institute; see also Shimer College*, Dkt. No. 05-33-SA, U.S. Dep't of Educ. (Sept. 23, 2005) (concluding that the student was ineligible for Title IV funding when the testing process was compromised by not using an FSA approved test). An ATB test is independently administered if it is—

> (2) Given by a test administrator who—
>
> > (ii) Is not a current or former employee of or consultant to the institution, its affiliates, or its parent corporation, a person in control of another former member of the board of directors, a current or former employee of or a consultant to the institution, its affiliates, or its parent corporation, a person in control of another institution, or a member of the family of any of these individuals;

34 C.F.R. § 668.151(a)(2)(ii).

The Respondent failed to provide persuasive proof that the four students were tested by a neutral examiner. Since the testing administrator was a current employer of an affiliate of Elite at the time of administering the ATB tests, the four ATB tests were not independently administered and, therefore, the Respondent failed to meet the requirements set in § 668.151(a). Consequently, the ATB tests are not valid and the students had no basis to be eligible for Title IV program assistance. Thus, Elite additionally violated § 668.32(e) by not disbursing Title IV funds to eligible students.

Elite also argues that students without high school diplomas or equivalent are still eligible for Title IV funding if they complete six semester hours applicable toward a degree or certificate offered by the institution. Since the students demonstrated an ability to benefit from the curriculum through their high grade point averages, Elite says that they have satisfactorily completed 225 clock hours, which provides an alternate basis for Title IV admission requirements. In contrast, FSA argues that students must qualify for Title IV funding prior to its disbursement and that the institution cannot retroactively establish eligibility with this provision when the basis of admission turns out to be invalid.

It is true that students can demonstrate their ability to benefit from instruction based on satisfactory completion of 6 semester hours, 6 trimester hours, 6 quarter hours, or 225 clock hours that are applicable toward a degree or certificate offered by the institution. 34 C.F.R. § 668.32(e)(5) (2011). However, this regulation was enacted in July 2011, rendering it inapplicable to the students at issue who entered Elite during AY 2010.[4] More importantly, is also a long-standing rule that a student's eligibility for Title IV funds cannot be demonstrated retroactively. *See Hamilton Professional Schools*, Dkt. No. 02-49-SP, U.S. Dep't of Educ. (June 11, 2003); *In re Pan American School*, Dkt. No. 91-94-SA, U.S. Dep't of Educ. (Dec. of the Secretary Jan. 12, 1995) (stating that ineligibility to receive assistance is not mitigated by the student's completion of the program). The credit hours must be earned without the benefit of Title IV program assistance. Comments in the rulemaking indicate that a student must demonstrate the ability to benefit from instruction during the *initial* determination of eligibility. HEOA, § 485, Pub. L. No. 110-315, 122 Stat. 3078, 3287-88 (2008); 75 Fed. Reg. 66,832, 66,921 (Oct. 29, 2010); Consolidated Appropriations Act of 2012, Division F, Title III, Pubc. L. No. 112-74, 125 Stat. 786, 1100-1101 (2011). In *Galiano Career Academy*, Dkt. No. 11-71-SP, U.S. Dep't of Educ. (Dec. of the Secretary July 10, 2015), the Academy presented the same argument as Elite: students who completed six credit hours should become retroactively eligible for Title IV funds under § 668.32(e)(5). The tribunal determined that students must pay for these credit hours and then receive an initial determination of eligibility before they can be considered for Title IV funds. Here, the students are benefiting from the program assistance during the hours that are providing them with the eligibility. Because of this, the funding is ineligible and Elite is held liable for violating 34 C.F.R. § 668.32(e).

Elite also argues that liability should be recalculated using the estimated loss formula because, according to Elite, the general rule is to calculate the estimated loss to the Department rather than having the school repurchase the entire amount of loans. Elite states that only the following are exceptions to this rule:

(1) "The estimated loss formula should never be used in cases where the reviewer knows that all of the loans in question are currently in default."
(2) "The estimated loss formula should not be used in situations where the students in question may be eligible for loan relief" or "discharge under 34 C.F.R. § 682.402(e)."
(3) "The estimated loss formula is inapplicable to refund situations …."
(4) "Estimated loss may be inappropriate in cases where it appears that the institution is certifying loans that it *knows* are ineligible."

[4] Three students took the ATB test in 2010 and one took the test in 2011. This indicates that three students may have been seeking eligibility for award year 2010/2011, which was before the regulation took effect.

July 17, 1996 Memo at 3-4 (emphasis in original); *see Christian Brothers University*, Dkt. No. 96-4-SP, U.S. Dep't of Educ. (Jan. 9, 1997). Elite indicates that the issue of ability to benefit examinations is not an exception to this rule, the formula should be applied. Elite states that the issue at hand is an ATB exam issue, which falls out of scope of the exceptions in the 1996 memo. In contrast, FSA argues that the students are eligible for false certification discharge, which makes Elite liable for full repayment of Title IV funds.

A student's eligibility to borrow is considered "falsely certified" by the school if the school—

> (i) certified the student's eligibility for a Direct Loan on the basis of ability to benefit from its training and the student did not meet the eligibility requirements described in 34 C.F.R. § 668 and § 484(d) of the Act, as applicable;

34 C.F.R. § 685.215(a)(1)(i) (2006). If a school falsely certifies a student's eligibility, then the borrower is relieved of any past or present obligation to repay the loan and any accrued charges with respect to the loan. 34 C.F.R. § 685.215(b)(1). If the government does not seek full recovery from the institution, then the burden to pay the remaining portion of the borrower's Title IV funds is unjustly placed on tax payers. This sentiment is echoed in the 1996 memorandum, which states that ELF should not be applied when borrowers may be eligible for loan relief through false certification discharge. *See Christian Brothers University*. According to FSA, these students are eligible for false certification discharge. Consequently, the institution must provide full recovery of funds under Finding No. 3 minus the liability duplicated with Finding No. 2.

Finding No. 12

Issue of Self-Certifying High School Diploma Status for Title IV Eligibility

The regulations have consistently stated that a student is eligible for Title IV program assistance if they—

> (1) Have a high school diploma or its recognized equivalent;
> (2) Have obtained a passing score specified by the Secretary on an independently administered test;
> (3) Are enrolled in an eligible institution that participates in a State "process" approved by the Secretary; or
> (4) Were home-schooled.

34 C.F.R. § 668.32(e) (2009).[5] Effective July 1, 2011, the regulation also includes a provision that enables students to be eligible for Title IV funding if they satisfactorily complete 6 semester hours, 6 trimester hours, 6 quester hours, or 225 clock hours that are applicable toward the certificate or degree offered by the institution. 34 C.F.R. § 668.32(e)(5) (2011). A "recognized equivalent" of a high school diploma includes:

> (1) A GED;

[5] Though the regulations omit discussions of foreign high school diplomas, the FSA Handbook interprets the regulation to include foreign high school diplomas as a document that enables Title IV eligibility. 2010-2011 FSA Handbook, at 1-6.

(2) A certificate demonstrating that the student has passed a state-authorized examination that the state recognizes as the equivalent of a high school diploma;
(3) An academic transcript of a student who has successfully completed at least a two-year program that is acceptable for full credit toward a bachelor's degree; or
(4) For a student who enrolls before completing high school, a high school transcript indicating the student has excelled in high school.

34 C.F.R. § 600.2. Upon review, FSA found that Elite students who self-certified that they had graduated from a foreign high school were ineligible to receive Title IV funding and that the disbursement of funds violated 34 C.F.R. § 668.32(e).

For proprietary schools under New York State Education Department (NSYED), Bureau of Proprietary School Supervision (BPSS), a self-certification in the form of a sworn statement (form BPSS-115) is one of several acceptable documents for program entrance. Form BPSS-115 is a self-certification form for students who completed high school in a foreign country but are unable to produce a copy of their diploma. At the Federal level, the FSA Handbook permits self-certification on a student's Free Application for Federal Student Aid (FAFSA) form, assuring that they have received a high school diploma or equivalent.

On January 15, 2013, a student filed a complaint with the Department's Office of Inspector General (OIG) alleging that Elite admitted ineligible students who did not have a high school diploma, GED, or pass an ATB exam. OIG discovered that Elite's secretary may have directed at least two students to falsely complete, notarize, and file a sworn statement, confirming a student's graduation from a foreign high school. Consequentially, OIG looked back into ten files requested on December 10, 2012 and discovered that nine files contained sworn statements of students' graduations from a foreign high school. Since FSA already had an open program review, this matter was then referred to FSA for further action.

FSA requested to review an additional thirty-six student files on July 16, 2013 for AY 2010 and AY 2012. Of these files, twenty-five contained a sworn statement instead of a high school diploma. Based on its review of these student files, FSA required Elite to conduct a full file review to identify all Title IV recipients admitted by form BPSS-115 beginning with award year AY 09. Elite's full file review revealed that the school failed to provide the proper documentation for 125 out of 131 students with sworn statements.

Some statements averred that the students had a high school diploma, but the English translation of their transcripts or high school credentials fell short of having a high school diploma as recognized in the United States. Other sworn statements falsely indicated that students graduated high school at nine years of age, ninth grade, or even before a student was born. Another set of students' Individual Student Information Reports (ISIRs) indicated that they had a high school diploma, but, in reality, the students were admitted into Elite using the sworn statement. As a result, FSA determined that 125 students were ineligible to receive Title IV, HEA program assistance and Elite was directed to repay $1,019,080.50 in liabilities assessed in the FPRD.

Analysis

Elite argues that Finding No. 12 should be reversed or the liability assessed should be reduced.

FSA argues that Elite is liable because it admitted students who did meet the initial eligibility requirements. According to 34 C.F.R. § 668.32(e), a student is eligible to receive Title IV, HEA program assistance if the student has a high school diploma, its recognized equivalent, was home-schooled, is enrolled in an institution with a pre-approved State "process," or passed an independently administered test. FSA states that the students at issue never obtained these documents. In contrast, Elite asserts that form BPSS-115 enabled students to be eligible for Title IV program assistance per the 2009-2010 FSA Handbook:

> A student may self-certify on the FAFSA that he has received a high school diploma or GED or that he has completed secondary school through homeschooling as defined by state law. If a student indicates that he has a diploma or GED, your school isn't required to ask for a copy, but if your school requires one for admission, then you must rely on that copy of the diploma or GED and not on the student's certification alone.

2009-2010 FSA Handbook, at 1-6. Elite states that, since all students at issue in Finding No. 12 certified that they had received a high school diploma on their FAFSAs, Elite was entitled to rely on this certification as an equivalent of receiving a high school diploma.

A self-certification of having a high school diploma does not equate to a high school diploma, its equivalent, or other permissible alternatives. *See* 34 C.F.R. §§ 668.32, 600.2; *In the Matter of American Center for Technical Arts & Sciences*, Dkt. No. 06-44-SA, U.S. Dep't of Educ. (July 12, 2007) (determining that self-certification is insufficient to meet the 34 C.F.R. § 668.32(e)(1)&(2) requirement of Title IV eligibility). Neither the Handbooks nor the regulations state otherwise. For the purposes of completing FAFSA, the Handbook allows for a student to self-certify on the form that they have received a high school diploma or equivalent, but self-certification cannot be used to vouch for one's Title IV eligibility. Though form BPSS-115 may be an acceptable document for satisfying the BPSS entrance requirement, this form does not satisfy the requirements of 34 C.F.R. § 668.32.

Elite further asserts that FSA did not check the validity of all 125 BPSS-115 forms and, therefore, FSA should not hold the institution liable for all forms. As mentioned earlier, when schools receive Title IV, HEA program assistance they operate as fiduciaries. The Department has neither the time nor resources to investigate each student file beyond the audit. Instead, the institution has the burden of proof to demonstrate that they used the funds lawfully. Here, the Respondent has not met its burden. Even if a sworn statement was an alternative recognized by this tribunal, many of these sworn statements bore erroneous information that automatically undermined their validity. Elite may argue that all sworn statements contained errors, but the audit pointed to enough internal consistencies that made the veracity of the forms suspect.

FSA also argues that the Respondent failed to reconcile all inconsistent student information on record. In arguing this, it points to questionable information and falsities within the forms. Elite rebuts and states that the sworn statements were consistent with the FAFSA forms and, therefore, it should not be held liable for Finding No. 12.

It is the institution's responsibility for reconciling all information received relating to a student's application for Federal student aid. 34 C.F.R. § 668.16(a), (f). Elite ignores the fact that

internal errors or contradictions within a document can still constitute an "inconsistency." Although the sworn statements and FAFSA forms may have remained consistent with one another, many sworn statements hosted inconsistencies within it. For instance, student 41's sworn statement falsely indicates that she graduated from high school at nine years old. Student 46's 2011/2012 ISIR indicates that he has a high school diploma, but, instead, a sworn statement of the student's graduation from a foreign high school diploma was filed. Student 52's 2011/2012 ISIR also indicates that she had a high school diploma instead of a sworn statement that was actually on record. Further, student 52's dates of high school attendance were recorded to be before the student was ever born. Instances like these indicate that internal inconsistencies within a form can still constitute a violation of Title IV regulations. *See* § 668.16(a), (f). Elite has a fiduciary duty to comply with all statutes and regulations that define its relationship with the Department and even a handful of individual violations can extend to all students at issue.

Lastly, Elite argues that it should not be held liable because a violation of a Handbook's guidance to verify foreign high school diplomas is not a violation of law and, therefore, is not a basis for punishing the institution. Although Elite correctly states that a violation of Department guidance alone is not a basis for imposing penalties, the Department anchors this Finding in a regulation, which carries the force of law, rather than the FSA Handbooks. Here, Elite points to the AY 13 FSA Handbook section that instructs institutions to verify foreign high school diplomas. If FSA were holding Elite liable for violating this provision of the Handbook, FSA would be impermissibly applying a policy statement.[6] Policy statements can assist tribunals in interpreting the law, but they cannot impose sanctions and penalties as though they had they were promulgated into law. *See In re Baytown Tech. School, Inc.*, Dkt. No. 91-40-SP, U.S. Dep't of Educ. (Init. Dec. Jan. 13, 1993), *aff'd by the Secretary*, Nov. 14, 1994; *In the Matter of Lincoln Technical Institute*, Dkt. No. 95-42-SP, U.S. Dep't of Educ. (May 17, 1996). However, FSA was not enforcing a policy statement, but, rather, it was enforcing the basic eligibility regulation set out in § 668.32. Therefore, Elite's argument holds no weight.

Elite also argues that the Department must apply the estimated loss formula when determining a school's liability for ineligible loans. Since Finding No. 12 falls outside of the four exceptions listed in the 1996 memorandum, Elite says that ELF must be applied by default. On the other hand, FSA argues that ELF should not be used because Finding No. 12 is another

[6] Elite states that FSA is retroactively applying its AY 2013-2014 policy to the audit period 2009-2013. Prior to the new policy, Elite asserts that students were allowed to self-certify their high school diploma status on their FAFSAs and form BPSS-115, and, therefore, Elite was entitled to rely on this certification. The Respondent's argument is incorrect for a few reasons. First, Elite overlooks the AY 11 FSA Handbook that also provides guidance on foreign high school diploma checks:

> Beginning with 2011–2012, if a college or the Department has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education, the college must evaluate the validity of the student's high school completion. . . . Acceptable documentation for checking the validity of a student's high school completion can include the diploma and a final transcript that shows all the courses she took. For students who completed their *secondary schooling outside the United States*, comparable documents can help, as can the services of companies that determine the validity of foreign secondary school credentials.

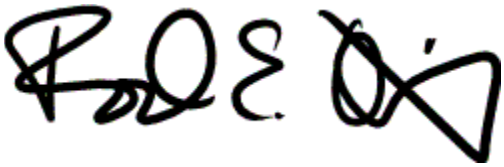
2011-2012 FSA Handbook, pg. 1-6 (emphasis added). The excerpt on foreign secondary schooling indicates that this new 2011 requirement applies to foreign high school diplomas. Therefore, FSA would actually be retroactively applying the AY 11 FSA Handbook's regulation to AY 09 and AY 10. Second, regardless of any retroactive application, any application of a policy statement without the support of a regulation carries no force of law and cannot be applied. Lastly, this argument holds no weight because FSA's argument is focused on Elite's violation of 34 C.F.R § 668.32, not a policy statement.

instance in which students are eligible for loan relief under the false certification discharge regulation.

As stated in Finding No. 3, when the borrower's Title IV eligibility is falsely certified, the borrower is relieved of repaying loans and it is up to the institution to repay the ineligible funds. 34 C.F.R. § 685.215. Since FSA has determined that the borrowers' eligibility was falsely certified by Elite, the same analysis for Finding No. 3 applies. Consequently, the estimated loss formula will not be applied and Elite is liable for paying the full liability assessed for Finding No. 12 minus the amount duplicated in Finding No. 2 and Finding No. 4.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that Elite Academy of Beauty Arts pay $1,108,414.77 to the U.S. Department of Education.



Rod Dixon
Chief Administrative Law Judge

Dated: November 27, 2017

SERVICE

A copy of this decision was sent by certified U.S. mail to the following:

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