THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

FORTIS COLLEGE (FL),

Respondent.

Docket No. 12-55-SP
Federal Student Aid Proceeding

DECISION OF THE SECRETARY

This matter comes before me on appeal by Fortis College (Respondent or Fortis) of the Initial Decision by Chief Administrative Judge (AJ) Ernest C. Canellos. On July 30, 2013, Judge Canellos upheld Finding One of the Final Program Review Determination (FPRD) letter issued on July 2, 2012, by the office of Federal Student Aid (FSA) of the U.S. Department of Education (Department).[1] As a result, Respondent was ordered to pay $1,952,919 to the Department for the liability resulting from funds disbursed to ineligible students.[2] Fortis has appealed the AJ's ruling.

I. Background

FSA stated in Finding One of the initial program review that it identified 12 students out of a sample of 35 who FSA suspected of having ineligible high school diplomas for the purpose of receiving Title IV funds.[3] As a result, FSA required Fortis to conduct a file review of all Title IV recipients in the 2008/2009 and 2009/2010 award years, identify any students who Fortis admitted without high school diplomas, and engage an auditor to attest to the accuracy of the file review.[4]

In its audit, Fortis identified 42 students with invalid high school diplomas.[5] FSA reviewed Fortis' audit and subsequently issued the FPRD. In the FPRD, FSA stated that it found 378 additional students who received Title IV funds based on holding "invalid High School Diplomas," all of them from American Southeastern Academy (ASA).[6] FSA asserted that "the

[1] FPRD, p. 12; FSA issued a Program Review Report on Nov. 30, 2010, containing four findings. Department of Education Exhibit (ED Ex.) 1-4. FSA deemed Findings Two through Four closed in the FPRD, so Fortis appealed only Finding One. FPRD, p. 4.
[2] 34 C.F.R. § 682.609.
[3] Program Review Report, pp. 5–7. The suspicion arose because interview questionnaires in those 12 files either bore recent changes or otherwise called into question the student's diploma. ED Ex. 5-2.
[4] Program Review Report, pp. 7–8.
[5] FPRD, p. 7.
[6] *Id.*

Department does not believe that ASA is a valid high school."[7] FSA based this conclusion on student interviews, questionnaire forms, and other documentary evidence.[8]

FSA also noted that a Fortis campus in Alabama was involved in a lawsuit where Fortis allegedly promised to get ASA diplomas for three women *after* completing the Fortis program, only later discovering that Alabama did not recognize ASA credentials as high school diplomas.[9] Finally, FSA considered an investigation by an agent from the Department's Office of Inspector General, who was told by an ASA representative that ASA's students took no classes and would receive a diploma after taking an online test and paying $450.[10]

Based on all of this evidence, FSA concluded "the Department does not believe that ASA is a valid high school."[11] FSA ordered Fortis to return $1,952,919 it disbursed to the 378 ASA students based on an erroneous Title IV eligibility determination.[12]

On appeal, the AJ made two determinations: 1) ASA credentials did not render their recipients eligible for Title IV funds, and 2) Fortis breached its fiduciary duty to the Department because it disbursed funds to students who it knew or should have known held these invalid credentials.[13] Accordingly, the AJ upheld FSA's order in the FPRD.

Fortis bears the burden of demonstrating, with a preponderance of the evidence that the AJ erred in his findings.[14] Based on the following analysis, I affirm the AJ's ruling.

II. ASA Credentials Were Not High School Diplomas

The first issue in this case is whether ASA credentials were high school diplomas. A high school diploma is required to render a student eligible for Title IV funds. However, I affirm here that not all credentials purporting to be high school diplomas make a student eligible to receive Title IV funds. For example, a credential from a "diploma mill" does not render a student eligible to receive Title IV funds. The statutory definition of a diploma mill includes an entity that offers diplomas for a fee with little or no coursework and which has no accreditation from a recognized accrediting agency.[15]

The Federal Student Aid Handbook (FSA Handbook) warns institutions about diploma mills. The Handbook states that, where the validity of a diploma is in question, the institution could request verification from the state department of education as to whether the school's credential was recognized by the state.[16] ASA is located in Florida, and the Florida Department

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[7] *Id.*, p. 9.
[8] *Id.*, pp. 8–9.
[9] *Id.*
[10] *Id.*, p. 9.
[11] *Id.*
[12] *Id.*, p. 10.
[13] *In the Matter of Fortis College*, Dkt. No. 12-55-SP, U.S. Dep't of Educ. (July 30, 2013), at 5–6.
[14] *Central State University*, Dkt. No. 12-32-SA, U.S. Dep't of Educ. (Sept. 2, 2014) (Decision of the Secretary), at 1 (citing 34 C.F.R. § 668.116(d)).
[15] 20 U.S.C. § 1003(5) (2012).
[16] ED Exs. 4-1 and 4-3.

of Education does not accredit private schools. However, under Florida law, a private high school must provide "instructional services that meet the intent of s. 1003.01(13)."[17] The cited section, s. 1003.01(13), is a definition of "regular school attendance," which is "actual attendance of a student during the school day."

FSA conducted an investigation culminating in the FPRD. In the FPRD, FSA found that ASA: offered diplomas for $450; required no classroom instruction or attendance; and allowed students to obtain a credential by taking a single, repeatable take-home test.[18] These characteristics fit the description of a diploma mill.

Fortis argues that I should consider ASA's credentials to be high school diplomas because no definition of a high school diploma or a diploma mill existed during the award years in question.[19] Further indicia of validity asserted by Fortis are that local colleges and prospective employers were willing to accept them.[20] Finally, Fortis asserts that ASA was a legitimate private high school because it "required academic work on the part of the student by requiring the student to take and pass a comprehensive exam."[21]

The Department argues that no statutory or regulatory definition of a high school diploma was necessary for Fortis to recognize that "there have always been minimal requirements as to what constitutes an acceptable high school diploma."[22] In fact, the Department asserts that describing a high school diploma as "valid" is surplusage, because logically the regulatory requirement that a student has a diploma is meant to ensure that the student has completed an actual curriculum.[23] The Department also argues that other schools and employers tentatively treating ASA credentials as sufficient to meet their admissions or hiring criteria is not persuasive that ASA credentials make a student eligible for Title IV funds.[24]

First, I note that the statutory definition of a diploma mill was established by the Higher Education Opportunity Act (HEOA) in August 2008, well before the Department published the regulations cited by Fortis.[25] Additionally, FSA specifically warned institutions about diploma mills in the FSA Handbook.[26] I agree the requirement that a student hold a high school diploma presupposes that the diploma will be "valid." What the Department has, at times, referred to as an "invalid"[27] or "ineligible" high school diploma really is not a high school diploma at all, but merely a credential that does not qualify its holder for Title IV funds. Fortis admits that, even absent a regulatory definition, a high school diploma is "more than a piece of paper."[28] I conclude that Fortis had ample notice that diploma mills existed. I also conclude that Fortis

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[17] FLA. STAT. ANN. § 1002.01(2) (West 2014).
[18] FPRD, p. 9.
[19] Fortis Brief, pp. 5–6, 13.
[20] *Id.*, pp. 9–11.
[21] *Id.*, p. 14.
[22] ED Brief, p. 5.
[23] *Id.*, pp. 4–5.
[24] *Id.*, p. 11.
[25] 20 U.S.C. § 1003(5) (2012), as amended by the HEOA, § 109, Pub. L. No. 110-315, 122 Stat. 3078, 3094 (2008); Fortis Brief, p. 13.
[26] ED Exs. 4-1 and 4-3.
[27] *See, e.g., id.* 2-8.
[28] Transcript at 38.

knew credentials issued by diploma mills would not qualify as high school diplomas for Title IV purposes because such programs did not provide minimally sufficient levels of instruction.

Second, I reject Fortis' argument that the willingness of other institutions or employers to accept ASA credentials makes the credentials valid. The issue before me is limited to whether ASA credentials qualified students for Title IV funds. Whether a handful of schools or potential employers would use such a credential for admissions or hiring is not sufficient to overcome ASA's clear lack of actual instruction. Likewise, whether any other institution has erroneously disbursed Title IV funds to ASA students is not germane to the question of whether ASA is a diploma mill. In this case, I find that ASA had all the characteristics of a diploma mill as described by statute, and a credential from a diploma mill does not confer Title IV eligibility.[29]

Last, I disagree that the purported difficulty of ASA's exam qualifies ASA credentials as high school diplomas. There is evidence that a substantial number of Fortis students received ASA credentials within a month of revealing to Fortis that they did not have high school diplomas.[30] This figure contradicts Fortis' conclusion that ASA's exam was rigorous because one out of three students contacted by the Department took "'two or three months to pass the test.'"[31] However, regardless of the nature of the exam, Fortis does not assert that ASA provided classroom instruction or an attendance policy for most or all of its students. Providing an unproctored, infinitely repeatable exam for a fee and without educational instruction, and a diploma upon passage, is a classic example of a diploma mill.[32] Furthermore, ASA did not satisfy the Florida statutory definition of a private high school because it did not require classroom instruction and actual school attendance.[33]

Based on the evidence presented, I conclude that ASA both fit the Federal definition of a diploma mill and failed to meet Florida's statutory definition of a private school. As such, credentials issued by ASA did not render their holders eligible to receive Title IV funds.

III. Fortis Breached its Fiduciary Duty

Having determined that ASA credentials do not make their holders eligible for Title IV funds, I turn to the issue of whether Fortis breached its duty to the Department by disbursing funds to students holding ASA credentials. An institution "is subject to the highest standard of care and diligence" in administering Title IV programs and accounting for funds it receives.[34] The Department's regulations provide that an institution has a fiduciary duty to the Department to ensure that Title IV funds are only disbursed to eligible students.[35] A student generally demonstrates eligibility by holding a high school diploma or its recognized equivalent.[36] Therefore, the regulations required Fortis to act with diligence in verifying the validity of a

[29] 20 U.S.C. § 1003(5) (2012).
[30] ED Ex. 5-4.
[31] Fortis Brief, p. 14 (quoting ED Ex. 5-5).
[32] 20 U.S.C. § 1003(5) (2012).
[33] FLA. STAT. ANN. § 1002.01(2) (West 2014).
[34] 34 C.F.R. § 668.82(b)(1).
[35] *Id.* § 668.82(a); *In re Hope Career Institute*, Dkt. No. 06-45-SP, U.S. Dep't of Educ. (Jan. 15, 2008), at 3.
[36] 34 C.F.R. § 668.32(e).

secondary education entity where Fortis knew or should have known that its students held potentially ineligible credentials.

Fortis argues it had "no reason to question facially valid ASA high school diplomas," the Department is retroactively applying the regulation at 34 C.F.R. § 668.16(p), and in fact the Department is applying a standard even stricter than what is provided for in the regulation.[37] Fortis claims it acted with sufficient diligence by reviewing several online lists of schools that included ASA.[38] Fortis also "ensured the facial validity of all high school diplomas it received."[39] Fortis asserts that its fiduciary duty was limited to implementing processes established by statutes and regulations and, because no such rule laid out the steps it should follow, expecting Fortis to take additional action is tantamount to "an obligation to be omniscient."[40]

The Department argues that Fortis always knew it had a fiduciary duty to ensure that it only disbursed Title IV funds to eligible recipients.[41] In this case, due to Fortis' unique knowledge about ASA, the Department asserts that Fortis had a duty to take reasonable steps to ensure that ASA credentials actually made their holders eligible for Title IV funds before disbursing such funds to them.[42] I agree with the Department and find that Fortis' argument misses the mark. The issue in this case is not what every institution should have done with every student application, but what *Fortis* should have done regarding *ASA students' applications* based on the actual evidence before it. The evidence before ASA was as follows.

A former admissions counselor at Fortis, Mr. Romero, opened ASA in a strip mall located .10 miles from Fortis.[43] Fortis admissions counselors regularly referred prospective students to "online high schools," and after founding ASA, Mr. Romero obtained many students through Fortis' recommendation.[44] Some students indicated that Fortis staff referred them to ASA, from which they obtained credentials after paying a fee and completing a take-home test.[45] Mr. Romero even charged half price for diplomas to students recommended by Fortis.[46] Fortis admissions counselors would often send students' completed ASA exams to Mr. Romero for grading, and Mr. Romero would then fax ASA diplomas directly to Fortis admissions counselors.[47] Fortis asserts that it did not formalize these arrangements contractually, but does not otherwise dispute that they existed.[48]

Fortis student questionnaire forms were changed on a number of occasions to reflect their receipt of high school diplomas within a short time after completing the questionnaire.[49] In fact,

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[37] Fortis Brief, pp. 14–17.
[38] *Id.*, pp. 18–19.
[39] *Id.*, pp. 18, 20.
[40] *Id.*
[41] ED Brief, p. 21.
[42] *Id.*, pp. 22–23.
[43] ED Exs. 6-2, 5-2, 5-3, and 2-10.
[44] *Id.* 6-2.
[45] FPRD, p. 8.
[46] ED Ex. 6-2.
[47] *Id.*
[48] Fortis Brief, p. 15, n. 33.
[49] FPRD, pp. 8–9.

FSA noted that 85 percent of ASA students received their diplomas only *after* answering on a questionnaire "yes" to the question of whether they were high school graduates.[50] The students completed no actual instruction and had no attendance requirement.[51]

The record demonstrates that Fortis' interaction with ASA was regular and intimate. Fortis worked directly with ASA, first by recommending students to ASA and later by facilitating exam grading and prompt issuance of credentials. Fortis admits it did not rely on students' self-certification of holding high school diplomas, but actually required students to produce the diplomas.[52] Fortis cannot now claim that ASA was just one of a multitude of private high schools with which Fortis dealt at arm's length. Even if Fortis did not systematically record the high schools from which its students claimed to graduate, it could not plausibly fail to recognize that 378 students over two award years (out of 1,944 total) applied from a single school founded by a former employee located .10 miles away.[53]

In light of these facts, Fortis' review of the NCES Private School Universe Survey and school lists created by the Florida Department of Education and the College Board are irrelevant. These lists could only verify that ASA had filed registration materials. Reviewing such lists would be an obvious first step for an institution dealing with an unknown high school. However, that was not the case here. Fortis was admittedly well aware of the existence of ASA and its issuance of credentials to hundreds of students who were applying for Title IV funds to attend Fortis.[54] The lists provided no evidence of accreditation or any substantive curriculum.

The law specifically required Fortis to act with the highest standard of care and diligence in handling Title IV funds.[55] Whether an institution acted with sufficient diligence depends on the actual circumstances it faced in any given situation. Fortis needed no comprehensive regulatory rubric to recognize that ASA had indicia of a diploma mill, and the highest standard of care and diligence required further inquiry. The facial validity of an ASA credential should have been irrelevant to Fortis when its counselors were handling ASA exams and promptly receiving ASA credentials as soon as these exams were graded. Fortis has failed to show by a preponderance of the evidence that it ensured, or even made a substantial effort to ensure, the eligibility of ASA students to receive Title IV funds before disbursing them.

By disbursing funds to ASA students when Fortis knew or should have known that ASA was a diploma mill, it violated its fiduciary duty under 34 C.F.R. § 668.82(a). Disbursement to ineligible students is a ground for the Secretary to require an institution to repay those funds to the Department.[56]

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[50] *Id.*, p. 8.
[51] *Id.*
[52] Transcript, pp. 21–22; Respondent Exhibit (Resp. Ex.) R10-2, p. 2.
[53] ED Ex. 2-10.
[54] Transcript, pp. 28–30.
[55] 34 C.F.R. § 668.82(a).
[56] *Id.* § 668.95.

IV. ASA Credential Holders Did Not Become Retroactively Eligible for Title IV Funds

Fortis makes an alternative argument that even if it is liable for improperly disbursed Title IV funds, that liability is offset in large part by students becoming retroactively eligible for funds under 34 C.F.R. § 668.32(e)(5). Fortis' theory is that even students with ASA credentials who completed the equivalent of six credit hours of instruction at Fortis became retroactively eligible for Title IV funds.[57]

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.*, was amended effective August 14, 2008, to provide Title IV loan eligibility to students who successfully completed the equivalent of six credit hours applicable toward a degree.[58] This amendment did not provide retroactive eligibility for students erroneously determined to be eligible by the institution. As discussed in the comments to the rulemaking, 34 C.F.R. § 668.32(e)(5) constituted an additional method to demonstrate an ability to benefit during an *initial* determination of eligibility.[59] However, this new method "would require students to pay for these six credits without the benefit of title IV, [Higher Education Act] program assistance."[60] In other words, subsection (5) provided an opportunity for a student to obtain an initial determination of eligibility after completing six credits which would facilitate the rest of the course of study.[61]

The Department has long held that a student must qualify for Title IV assistance prior to disbursement of Title IV funds.[62] Even where ineligible students graduated from programs, the Department has held the institution that made the ineligible disbursement liable to the Department.[63] As evidenced by the comments and responses in the *Federal Register*, promulgation of 34 C.F.R. § 668.32(e)(5) did not change these well-established rules.[64]

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[57] Fortis Notice of Supplemental Authority, pp. 2–3.

[58] HEOA, § 485, Pub. L. No. 110-315, 122 Stat. 3078, 3287–88 (2008). This category of eligibility ceased to be available to students enrolling in programs on or after July 1, 2012. Consolidated Appropriations Act of 2012, Division F, Title III, Pub. L. No. 112-74, 125 Stat. 786, 1100–1101 (2011).

[59] 75 Fed. Reg. 66,832, 66,921 (Oct. 29, 2010).

[60] *Id.*

[61] The Department published a 219-page guidance letter summarizing the HEOA, which, among other things, created the six credit hour rule. Dear Colleague Letter GEN-08-12, December 2008. In that guidance, the Department stated that students could "become eligible to receive Title IV funding upon satisfactory completion of six credit hours." *Id.*, p. 93. The Department further clarified, "Students are ineligible to receive Title IV aid while earning the six credit hours." *Id.*

[62] *In re Hamilton Professional Schools*, Dkt. No. 02-49-SP, U.S. Dep't of Educ. (June 11, 2003).

[63] *In re Hope Career Institute*, Dkt. No. 06-45-SP, U.S. Dep't of Educ. (Jan. 15, 2008); *In re Avalon Beauty College*, 04-24-SP, U.S. Dep't of Educ. (Dec. 20, 2005).

[64] Fortis cites a letter dated April 12, 2012, in support of its argument. Resp. Ex. R4-1. In this letter, a departmental employee expressed his opinion to a Member of Congress that a particular student (whose name is redacted) was eligible for Title IV funds under the regulation. The letter does not provide additional details, but indicates only that the student was eligible for Title IV funds based on "the information that [the student] and Liberty University have provided . . . ." The determination made in the case of that student, based on those specific circumstances, does not provide a basis for an alternative analysis of the 378 students at issue in the present case. The opinion expressed in the letter does not have the effect of a rulemaking and does not provide a basis for overruling the AJ. *Amoco Production Co.* v. *Watson*, 410 F.3d 722, 732 (D.C. Cir. 2005) (holding that a letter issued by an Associate Director in a Federal department lacked the authority to bind the department and, therefore, a letter issued by him purporting to lay out guidelines for calculating royalty payments was neither authoritative nor binding on the department in future matters).

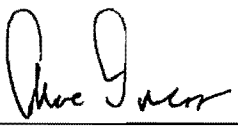
There is no evidence that Fortis made a new determination of eligibility for the students in this case to provide them student aid based on the completion of six credit hours. I am not persuaded that the six credit hour rule provides an avenue for Fortis to reduce its liability for funds disbursed based on erroneous eligibility determinations. Therefore, I find that Fortis is liable for all of the funds disbursed to ineligible students. I affirm the AJ's holding in Finding One that Fortis is liable to the Department for $1,952,919.

To the extent Fortis made further arguments not discussed herein, they have been considered and rejected.

ORDER

ACCORDINGLY, the Initial Decision by Chief Administrative Judge Ernest C. Canellos is HEREBY AFFIRMED as the Final Decision of the Department. Respondent is ordered to pay $1,952,919 to the Department.

So ordered this 17th day of March 2015.



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