



**UNITED STATES DEPARTMENT OF EDUCATION**  
**OFFICE OF HEARINGS AND APPEALS**  
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In the Matter of

**CITY UNIVERSITY OF NEW YORK**  
**LEHMAN COLLEGE**

**Docket No. 18-38-SP**

Federal Student Aid Proceeding

Respondent.

PRCN: 2016-2-02-29528

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Appearances: Leigh Manasevit, Esq. and Megan Passafaro Trachman, Esq. for City University of New York Lehman College

Karen Karas, Esq. for the Office of the General Counsel, U.S. Department of Education, Washington, DC for Federal Student Aid.

Before: Robert G. Layton, Administrative Law Judge

**DECISION**

This decision involves an appeal by City University of New York Lehman College (Lehman), a public, four-year college in the City University of New York school system. Lehman participates in numerous federal student assistance programs, including the Federal Pell Grant, Federal Perkins Loan and Direct Loan Programs authorized by Title IV of the Higher

Education Act of 1965 (Title IV).<sup>1</sup> Within the U.S. Department of Education (the Department) the office having jurisdiction over and oversight of these programs is the Office of Federal Student Aid (FSA).

## **BACKGROUND AND PROCEDURE**

On May 14, 2018, FSA issued a Final Program Review Determination (FPRD), assessing liabilities based upon three findings - Findings 1, 3, and 5, for “Inadequate Determination of Student Enrollment,” “Incorrect Return of Title IV Calculations,” and “Conflicting Information in Student[']s File” respectively. In this proceeding, Lehman only appealed the liabilities assessed in Finding 1 of FPRD.<sup>2</sup>

As part of the effort to have institutions comply with federal statutes and regulations, FSA conducted a program review of Lehman. The Department provides grants, loans, and work-study funds to eligible students attending institutions of higher education through Title IV. Lehman participated in Title IV programs through a Program Participation Agreement (“PPA”).

Subpart H proceedings allow institutions to appeal the results of a program review. The respondent has the burden of proving by the preponderance of the evidence that the Title IV funds it received were lawfully disbursed.<sup>3</sup> If the respondent does not establish that its expenditures of federal funds were correct, it has to return the funds to the Department. Once the respondent is given adequate notice of the demand by FSA in its FPRD, the respondent must meet its burden.

On June 26, 2018, Lehman filed a request for a review of the liabilities assessed in the

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<sup>1</sup> 20 U.S.C. § 1070 *et seq. q*

<sup>2</sup> See Request for Review (June 26, 2018) at 1; Initial Brief (Feb. 11, 2019) at 1-2.

<sup>3</sup> 34 C.F.R. § 668.116(d).

FPRD. Lehman only challenged Finding 1. Lehman contended the Department mis-interpreted regulations to require Lehman, a non-attendance taking institution, to follow the practices required of an attendance taking institution.<sup>4</sup> After the previously assigned judge became unavailable, the undersigned was named the hearing official on September 12, 2018.<sup>5</sup> After an Order Governing Proceedings was issued on August 6, 2018, Lehman filed its initial brief on February 11, 2019. The Department filed its brief in response on March 26, 2019. On April 2, 2019, Lehman filed a motion to file a reply brief, which counsel for the Department verbally agreed should be granted. Before Lehman could file a reply brief, however, the Department filed a motion to file a sur-reply brief on April 23, 2019. The undersigned issued an order the same day noting that it was unclear why a sur-reply brief was necessary in the case, but that because the motion represented that it was unopposed, the Department was given permission to file a sur-reply brief. The Order, however, stated that the Department's sur-reply brief was limited to 5 pages and could not include any new exhibits or evidence.

On April 25, 2019, Lehman filed its reply brief and on May 10, 2019, the Department filed its sur-reply brief. The sur-reply brief was filed by Department's former counsel, who has since left the Department. It was twelve pages long and contained four new exhibits, in direct violation of the two limitations placed on the Department when permission was granted to file a sur-reply brief. On May 22, 2019, Lehman then responded with what was akin to a sur-sur-reply brief, with its own new exhibits. At that point, the undersigned scheduled a telephone conference for June 7, 2019. The day before the conference, on June 6, 2019, former counsel for the Department filed additional improper and unauthorized exhibits, this time unattached to any brief or motion.

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<sup>4</sup> Letter from Jose Luis Cruz to Susa Crim (June 26, 2018).

<sup>5</sup> Letter from Kathleen Styles to Oluwaseun Ajayi and Abbey Jennis (Sept.12, 2018).

During the June 7, 2019 teleconference, counsel for the parties were offered the opportunity to address the issues voluntarily and avoid the need to have a written order entered addressing the violations of the prior orders. One week later, the parties filed a joint motion to withdraw the sur-reply brief with the attached exhibits, as well as the additional exhibits filed by both parties after the sur-reply brief as filed. On June 17, 2019, that motion was granted, and those filings were removed from the record. The same day, the Department filed another motion requesting permission to file a corrected sur-reply brief with attached exhibits, which Lehman did not agree to support. Noting the Department's former counsel's repeated and significant violations of orders and, most importantly, the need to preserve fundamental fairness and not allow the Department to have the last word when Lehman has the burden in this Subpart H hearing, the Department's final motion was denied. The proceedings described here all occurred before current counsel for the Department entered an appearance.

### **ISSUES**

The FPRD at issue in this appeal was based on a program review of the 2014/2015 award year that was conducted by FSA on March 14 and 15, 2016. The review asserted that Lehman owed the Department \$365,549 for improperly disbursed Title IV funds.<sup>6</sup> Of that amount, FSA asserts \$350,211.53 is assessed under Finding 1 for "Inadequate Determination of Student Enrollment," which Lehman challenges in this proceeding.

During its program review of fifteen students who had received a non-passing grade in Finding 1, FSA decided that Lehman did not produce adequate documentation for five students to establish either the students' attendance, or their dates of withdrawal, or that the calculations

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<sup>6</sup> The FPRD also identified \$671.77 owed to Institutional accounts. FPRD at 20. This conclusion is not at issue in this appeal.

of the amount of money needing to be returned was correct. On May 27, 2016, FSA issued a program review report (PRR) articulating its findings. Because FSA characterized the initial findings as “systemic,” FSA ordered Lehman to complete a full file review of all students who received non-passing grades during any semester or payment period between the 2012/2013 and 2015/2016 award years. Lehman submitted nine responses to the PRR between November 2016 and November 2017. After a review of Lehman’s submissions, FSA issued the FPRD, in which it asserted that for two of the five students forming the basis for the conclusion of systemic problems no liability existed, for two other students, Lehman had liabilities that were duplicative of liabilities in Finding 3 which is not appealed, and for the final student the assessed liability was repaid before the FPRD was issued. FSA further concluded that based upon the full file review ordered in the PRR, Lehman owed \$350,211.53 for 318 instances where Lehman could not show the last date of attendance to prove that the students attended all registered courses and completed the payment period.

FSA must first give adequate notice of its demand before the burden is placed upon Lehman to justify the challenged disbursement of Title IV funds. Lehman contends that the Department failed to establish this prima facie case by failing to provide sufficient support for its conclusion in Finding 1. Lehman asserts that FSA’s demand that the college document the last day of attendance is inconsistent with the regulations. Lehman further asserts the FSA exceeded its authority by impeding an institution’s choice of whether or not to be a non-attendance taking institution. According to Lehman, its grading policy is consistent with the Department’s established policies. Lehman further argues that if this tribunal concludes that the Department has met its prima facie case, then the Department should have considered the school’s faculty attestations as evidence of the adequacy and consistent application of Lehman’s grading policies.

The Department asserts it met its prima facie case by providing notice in the PRR and FPRD of the errors in the student files and notice of the regulations showing Lehman's noncompliance. The Department contends this notice is sufficient for Lehman to be able to prepare an informed response, which meets the Department's prima facie burden.

The Department also asserts that Lehman has not met its burden of sufficiently showing that its disbursement of Title IV funds was proper. The Department contends that Lehman systemically is unable to show that it adhered to its grading policy for students within the sample, therefore, it cannot utilize the policy to confirm whether students withdrew from Lehman. The Department contends the only option Lehman has left is to submit documentation of the last date of attendance to determine whether a student completed the term or unofficially withdrew.

**The Issues to be Addressed Are:**

- 1. Has the Department established a prima facie case assessing liabilities under Finding 1?**
- 2. Has Lehman relied on its grading policy consistent with Department policy and regulations to establish whether a student unofficially withdrew?**
- 3. Can the Department require Lehman to submit evidence of last date of attendance in an academically related activity to determine whether a student unofficially withdrew or completed the term?**

**SUMMARY OF DECISION**

Lehman's grading policy provides an adequate method of determining whether a student has withdrawn during a payment period. Under FSA's policy, schools are permitted to use the last date of attendance to determine whether a student withdrew during the term. Alternatively, a school may use an adequate grading policy when the institution sufficiently adheres to the policy. 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. Finding 1 of the FPRD is reversed.

### **FINDINGS OF FACT**

Lehman elected to operate as a school that does not take attendance. Lehman's grading system provides three different grading options when a student does not pass a course. Specifically, students earn a WN grade if they never attend class, a WU grade when they attend at least one class but do not continue to attend class, and an "F" grade when students completes the class but academically fail the course.<sup>7</sup>

#### ***Program Review***

In March 2016, FSA conducted a review of Lehman to "determine Lehman's compliance with the statutes and federal regulations as they pertain to the institution's administration of Title IV programs."<sup>8</sup> The review examined Lehman's policies and procedures regarding student and institutional eligibility, and also examined a sample of 15 student files from the 2015/16 award year.

#### ***The PRR***

On May 27, 2016, the Department issued a program review report (PRR) articulating its findings. In the PRR, the Department asserted nine findings. At issue here is Finding 1, for "Inadequate Determination of Student Enrollment."<sup>9</sup> Under provisions in 34 C.F.R., Part 668, the PRR correctly notes that (1) a student is eligible to receive Title IV funds if the student is a "regular student enrolled in an eligible program at an eligible institution;" (2) institutions are required to comply with the regulatory and statutory provisions governing Title IV programs and

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<sup>7</sup> PRR at 5; See also Lehman College Undergraduate Bulletin 2013-2015 at 58 (Exhibit A to CUNY Lehman College Brief).

<sup>8</sup> PRR at 4; FPRD at 4.

<sup>9</sup> PRR at 5.

these provisions include not disbursing funds until the school determines that the student is eligible; and (3) institutions have an obligation to maintain accurate and complete records because the Department relies on these records for its oversight of the Title IV programs. The PRR goes on to cite 34 C.F.R. § 668.21 to state that schools must return all funds disbursed in a payment period if a student “does not begin attendance” in that payment period or period of enrollment. Finally, the PRR directs Lehman to a Dear Colleague letter and the Federal Student Aid Handbook for guidance and notes that the Handbook “indicates” that if a student who begins attendance and has not officially withdrawn fails to earn a passing grade in at least one course offered over a period, Lehman has to assume that the student unofficially withdrew unless Lehman can document that the student completed the period.

The PRR asserted that Lehman was non-compliant with the regulations because it “did not have a process in place to confirm whether or not students who failed to earn a passing grade during a pay period actually completed the payment period.” To test whether Lehman was adhering to its established grading policy that differentiated between a WN, a WU, and an F, FSA required Lehman to perform additional review. The PRR identified 5 students it contends Lehman failed to properly document enrollment status during the payment period.

#### Student 1

Student 1’s transcript indicated that she earned “F” grades during the fall 2015 semester, but the PRR asserts that during the program review Lehman failed to provide documentation to establish whether she completed the semester. After the program review, but before the PRR was issued, however, Lehman provided confirmation of her attendance from both of her professors confirming that she did attend class but failed both the midterm and final exams.

#### Student 2

Student 2's transcript indicated that he failed to pass any of his three courses, earning two WU grades and one F grade. Lehman provided documentation that showed he attended each of the classes but did not provide "any documentation indicating the last date of attendance at an academic related activity to confirm whether or not the student completed the entire period for any course."<sup>10</sup>

### Student 3

Student 3's transcript indicated that he failed to pass any of his four courses during the fall 2015 term, earning two WU grades and two F grades. Lehman provided documentation that showed he attended each of the four classes but did not provide "any documentation indicating the last date of attendance at an academic related activity to confirm whether or not the student completed the entire period for any course."<sup>11</sup>

### Student 4

Student 4's transcript indicated that she failed to pass either of her two courses, earning WU grades for both classes. Lehman provided documentation that showed she attended each class on at least one occasion but did not provide "documentation to confirm that the student completed the period."<sup>12</sup> After the program visit, Lehman provided emails from the professors for the two classes. The professor for one class indicated that the student attended the lecture class but did not continue to attend and that there were no grades for the student for the 5 quizzes and the final exam given during the term.<sup>13</sup> The professor for the other class stated that the student attended the lecture classes but did not return and that there were no grades for the two

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<sup>10</sup> PRR at 6.

<sup>11</sup> PRR at 6.

<sup>12</sup> PRR at 6.

<sup>13</sup> PRR at 6.

midterm exams given during the term for the class.<sup>14</sup> The Department determined that this information was incomplete because “Lehman is required to provide the student’s last date of attendance in an academic related activity” and if Lehman cannot provide this information, than the student is only eligible for Title IV moneys up to the midpoint in the payment period.<sup>15</sup>

#### Student 5

Student 5 was enrolled in two classes during the fall 2015 term, and received an F in one course, BIO 166 and a WU in the other course. During the site visit, Lehman provided documentation that the student began both courses. The Department states in the PRR that “Lehman was not able to provide documentation to confirm that the student completed the payment period, as required.”<sup>16</sup> After the program review, Lehman submitted documentation from the professor for BIO 166, who noted that the student only attended one class and did not complete any of the three exams or any assignments during the term. The professor acknowledged that it was an error to give the student an F when the grade should have been a WU.<sup>17</sup>

The Department concluded that these findings demonstrated that Lehman’s noncompliance in this area was of a “systemic nature.”<sup>18</sup> As a result, the Department determined that it needed additional information to “determine the exact amount of liability associated with this finding.”<sup>19</sup> Although the original review was based upon a sample of 15 students from one award year, the Department ordered Lehman to complete a full file review of all students who received all non-passing grades during a semester or payment period between 2012/13 and

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<sup>14</sup> PRR at 6.

<sup>15</sup> PRR at 6.

<sup>16</sup> PRR at 6.

<sup>17</sup> PRR at 6-7.

<sup>18</sup> PRR at 7.

<sup>19</sup> PRR at 7.

2015/16. The Department ordered Lehman to do a calculation of how much money should be returned for any student for whom Lehman is unable to provide documentation that they completed the payment period, or an R2T4 calculation. Finally, the Department, in the PRR, directed Lehman to implement a new procedure for reviewing all students who receive all non-passing grades within a payment period to determine the student's correct amount of Title IV eligibility.<sup>20</sup>

### ***Responses to the PRR and the Final Program Review Determination***

Lehman submitted a series of responses to the PRR between November 2016 and December 2017. On May 14, 2018, the Department issued its Final Program Review Determination addressing the PRR findings, Lehman's responses, and assessing liabilities.

In the FPRD, the Department further updates its conclusions about the five students whose files raised issues of whether Lehman had adequate documentation of student enrollment. As noted in the PRR, for Student 1, Lehman provided a copy of the student's final exam showing that the student completed the payment period and was correctly assigned an "F" grade. For Student 2, Lehman provided a copy of the professor's roster, which showed the student's last date of attendance at an academic related activity confirmed that the student attended class for more than 60% of the payment period, and so there is no liability for Student 2. For Student 3, Lehman submitted documentation that his last date of attendance in an academic related activity made him only eligible up until the midpoint of the term. Lehman acknowledged that it inadvertently miscalculated the amount of Pell Grant money needing to be returned, and conducted a new R2T4 calculation to determine the amount which is now assessed in Finding 3 of the FPRD and is not challenged by Lehman in this proceeding. For Student 4, the Department

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<sup>20</sup> PRR at 7.

noted that Lehman produced documentation that showed that the student began both courses at issue but was unable to provide documentation to show that the student attended academically related activities until the end of the term. Lehman noted that, therefore, the professor for the second session assigned a WU grade and conducted an R2T4 calculation which is listed and unchallenged in Finding 3 of the FPRD. Finally, for Student 5, as noted in the PRR, the student only attended the class once and the professor gave the student an “F” grade, which the professor admitted was in error, and so the grade was changed to an WU and an R2T4 calculation was conducted. The funds were already returned to the Department on April 4, 2016, which is more than a month before the PRR was issued. In summary, for Students 1 and 5, any issue of liability was rectified before the PRR was issued, for Student 2, Lehman was able to provide documentation before the FPRD to show that no liability was owed, and for Students 3 and 4, Lehman did a new R2T4 calculation, for which the liability owed is included in Finding 3 and which is unchallenged.

The FPRD also reports that the Department accepted Lehman’s corrective action plan and the file review that was ordered in the PRR. From that file review, the Department determined in the FPRD that there were 318 instances where Lehman was unable to “conclusively demonstrate the students attended all registered courses, and/or completed the payment period, as required.”<sup>21</sup> Based on the Department’s position that proof of the last date of attendance in an academic related activity was required, the Department concluded that from the 2012/13 through 2015/16 years, the total liabilities for Finding 1 was \$350,211.53.

Lehman argues that the regulations and statutes cited by the Department do not support the liabilities assessed in Finding 1 of the FPRD, so the Department has not met its prima facie

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<sup>21</sup> FPRD at 10.

case.<sup>22</sup> Lehman points out that the Department is required to “identify facts and laws that support the findings in the FPRD.”<sup>23</sup> Lehman argues that as a non-attendance taking institution, the laws cited by the Department do not support the Department’s demand in Finding 1 that Lehman must produce documentation of the last date of attendance in an academically-related activity. Lehman asserts that it should be able to rely upon its grading policy as documentation of whether a student has unofficially withdrawn and the Department cannot require Lehman to maintain documentation as an academically-related activity to substantiate those grades.<sup>24</sup>

The Department contends that it has met its prima facie burden by identifying the files at issue, giving notice of what it contends are errors in those student files, and providing references to the regulations showing the noncompliance in the FPRD and the PRR.<sup>25</sup> The Department argues that because this is a Subpart H hearing, Lehman has the burden of proving that its expenditures were proper and submitting relevant and credible evidence that makes that showing by a preponderance of the evidence, and the school has not met its burden.<sup>26</sup> The Department asserts that, as a fiduciary, Lehman has an obligation to maintain accurate and complete records supporting Title I payments, which it has not done.<sup>27</sup> Specifically, the Department asserts that Lehman has not adequately shown that it properly utilized its grading system to sufficiently confirm the enrollment status. The Department asserts that for four students, the program review showed that grades were given to students without adequate evidence that they completed the period. The Department contends that what it views as Lehman’s non-adherence to its grading policy left only one option to confirm enrollment status; namely, the documentation of the last

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<sup>22</sup> CUNY Lehman College Brief at 2.

<sup>23</sup> Id..

<sup>24</sup> Letter from Jose Luis Cruz to Susa Crim (June 26, 2018); CUNY Lehman College Brief at 4.

<sup>25</sup> Brief of the Office of Federal Student Aid at 6.

<sup>26</sup> Brief of the Office of Federal Student Aid at 5.

<sup>27</sup> Brief of the Office of Federal Student Aid at 5.

date of attendance.

### **PRINCIPLES OF LAW**

While Lehman has the burden of proof in this proceeding, the Department has the prima facie obligation to show that it has provided adequate notice of its demand to the school.<sup>28</sup> Part of the burden placed on the Department is that it must provide sufficient legal support for its demand.

When challenging a finding in an FPRD in a Subpart H proceeding, the Respondent 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 program requirements.<sup>29</sup> Before participating in Title IV programs, institutions are required to sign program participation agreements.<sup>30</sup> When an institution enters into this agreement, it agrees to comply with the statutory and regulatory provisions applicable to the Title IV programs it administers, establish and maintain administrative and fiscal procedures and records “as may be necessary to ensure proper and efficient administration” of Title IV funds, and that it is liable for all improperly spent or unspent Title IV funds.<sup>31</sup>

When a student begins to attend a school but then withdraws from the school within the same payment or period of enrollment, the institution must determine the amount of Title IV funds the student earned as of the student’s withdrawal date.<sup>32</sup> The institution must then conduct a R2T4 calculation and return to the Department any unearned Title IV funds.<sup>33</sup> For institutions

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<sup>28</sup> *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep’t of Educ. (July 26, 2016) at 2.

<sup>29</sup> 34 C.F.R. § 668.116(d).

<sup>30</sup> 34 C.F.R. § 668.14(a).

<sup>31</sup> 34 C.F.R. §§ 668.14(b)(1), (4), and (25); 34 C.F.R. § 668.116(a) and (d).

<sup>32</sup> 34 C.F.R. § 668.22(a)(1).

<sup>33</sup> 34 C.F.R. § 668.22(g).

that elect not to take attendance, the withdrawal date to be used in the R2T4 calculation is determined by one of three options:<sup>34</sup> (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 his or her intent to withdraw; or (3) if the student withdraws without providing notice in either of those two methods, then the withdrawal date is the midpoint of the payment period or period of enrollment.<sup>35</sup>

If a student officially withdraws during a term, the inquiry moves to the R2T4 calculation to determine the amount of Title IV funds needing to be returned. When a student receives all non-passing grades within a term and has not officially withdrawn, however, the inquiry becomes more challenging. The regulations do not require an institution to have a policy of maintaining attendance records to determine whether a student has withdrawn.<sup>36</sup> Rather, if a student's attendance cannot be confirmed by attendance records, "an institution's grading system provides an alternative method to confirm a student's attendance."<sup>37</sup> As part of a program review, however, the Department may test the application of a school's grading policy as a reliable measure of whether or not a student 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.<sup>38</sup>

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<sup>34</sup> The regulations provide an alternative method of determining the date of withdrawal for a student who leave because of a circumstance out of his or her control or because of an approved or unapproved leave of absence. 34 C.F.R. § 668.22(c)(iv)-(vi).

<sup>35</sup> 34 C.F.R. § 668.22(c)(i)-(iii).

<sup>36</sup> *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016) at 3.

<sup>37</sup> *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016) at 3 (internal citations omitted).

<sup>38</sup> *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016) at 5; *Cincinnati State Technical and Community College*, Dkt. No. 97-65-SP, U.S. Dep't of Educ. (Sept. 4, 1998) at 4.

## ANALYSIS

### *Department's Prima Facie Case*

In Finding 1 of the PRR, the Department correctly notes that: (1) a student must be enrolled in an eligible program at an eligible institution to be eligible to receive Title IV funds; (2) institutions may only disburse Title IV funds after determining that the student is eligible; (3) institutions have an obligation to maintain accurate and complete records supporting the disbursement of funds; and (4) that if a student does not begin attendance during a payment or enrollment period, the institution must return all Title IV funds disbursed for that student during the period.<sup>39</sup> The Department then refers to the Federal Student Aid Handbook (the Handbook) and the Dear Colleague Letter GEN-04-03 (the DCL) for additional guidance and notes that Volume 2 of the 2006/07 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.”<sup>40</sup> The Department contends that Lehman was non-complaint with its obligations because “Lehman did not have a process in place to confirm whether or not students who failed to earn a passing grade during the payment period actually completed the payment period.”<sup>41</sup>

Lehman had a grading policy in place that it used to determine if a student unofficially withdrew. The five student files used to test Lehman’s adherence to the policy were selected only from the 2015/16 award year. The Department believes that four of the files do not have sufficient evidence of adherence to the policy.<sup>42</sup> The Department asserts that this indicated

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<sup>39</sup> PRR at 5.

<sup>40</sup> PRR at 5.

<sup>41</sup> PRR at 5.

<sup>42</sup> PRR at 5-7.

“systemic” noncompliance and ordered Lehman to conduct a full file review over a four year period and to develop a new process for reviewing all students who receive all non-passing grades within a payment period to determine the correct Title IV eligibility.

Lehman submitted adequate documentation to show that all five students began attendance in every class. The Department alleges Lehman did not adequately confirm if a student who did not pass any courses finished each course and academically failed or simply did not complete the course. The Department agrees Lehman met the requirement that a school document that a student began the course. The Department then cites to the policy in the Handbook that the school document whether the student finished the course, which the Department asserts Lehman failed to do. The PRR did notify Lehman of the regulatory obligation to confirm a student’s eligibility and maintain records of that determination. It also identified the policy for the school to document whether a student with all non-passing grades withdrew or completed and failed all of his or her courses. The PRR also notified Lehman that it had tested Lehman’s adherence to the grading policy related to five students in award year 2015/16 and, based on the Department’s understanding of what was required to document that grades were properly assigned under the policy, concluded that Lehman had not met its burden of producing required documentation.

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 the funds; and (2) the specific reason that the Department asserts that the school did not meet this obligation.<sup>43</sup> In this case, the Department gave Lehman notice of the regulatory requirements to

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<sup>43</sup> See *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep’t of Educ. (July 26, 2016) at 2.

determine and document eligibility and the specific reason the Department believed (correctly or not) that the obligation was not met. Based on the records of the fifteen students, the Department determined that Lehman did not systemically adhere to its grading policy, and also determined Lehman did not have a sufficient process in place to confirm if a student with all non-passing grades during a term actually completed the term.

Lehman contends the Department is wrong in saying that a school is required to produce attendance records showing the last date of attendance in an academically related activity. Since the Department had not previously stated that as a requirement, Lehman identifies the Department's attempt to impose the requirement as giving Lehman inadequate notice that attendance records were required.<sup>44</sup> Lehman is correct that the Department cannot demand evidence of the last date of attendance as the only acceptable proof that Lehman sufficiently followed its grading policy. However, the Department has met its prima facie burden by identification of what files are at issue, giving notice of what it contends are the errors in those student files, and providing references to the regulations showing what it contends is the noncompliance in the FPRD and the PRR.

### *Adequacy of Grading Policy*

Although the Department exceeded its authority demanding that Lehman justify the use of its grading policy by providing the last date of attendance in an academically related activity, Lehman still has the burden of proving that it is justified in relying on its grading policy to determine whether a student has unofficially withdrawn from the school.

As both parties have acknowledged, a school can use a grading policy to make a

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<sup>44</sup> CUNY Lehman College Reply Brief at 3-4.

determination whether a student with no passing grades during a term has unofficially withdrawn. The dispute in this case is whether Lehman followed its grading policy sufficiently to rely on that policy.

Lehman's grading policy distinguishes between a "WU" and an "F" grade, stating:

A grade of "WU" is a failure grade given to a student who began attending the class (at least one session) and stopped attending. This grade is assigned by the instructor to indicate that the student stopped attending the course before the end of the semester; or as a result of excessive absences or which there is no basis to give a final letter grade of "A to "F," and the conditions for a grade of "INC" do not apply. . . . (A "WU" grade should never be given in place of an "F" grade, the "F" grade is an earned grade based on poor performance.)

A grade of "F" is a failure grade given to a student who completed the class and failed. This grade is assigned for work that in the judgement of the instructor does not deserve college credit.<sup>45</sup>

Lehman asserts its grading policy allows the faculty to distinguish between students who attend the course at least once and do not finish, and those students who finish the course but fail the course based upon poor performance. The Department responds that its review showed that for four of the fifteen students in the sample, the Department believes Lehman did not adhere to its policy and, so, Lehman cannot adequately show that its grading policy suffices to determine whether a student completed the term or withdrew. Examining those students, it appears that one, or at most two of the fifteen students in the sample received an erroneous grade under the policy and even for those one or two students, some of the professors did follow the grading policy.

#### Student 1

Student 1's transcript indicated that she earned "F" grades during the fall 2015 semester, but during the program review Lehman failed to provide documentation to establish whether she

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<sup>45</sup> Lehman College Undergraduate Bulletin 2013-2015.

completed the semester. After the program review, however, Lehman provided confirmation of her attendance from “both” of her professors, including copies of at least one of the student’s final exams, confirming that she did attend class for the entire term but failed both the midterm and final exams. By the time the PRR was issued, the Department had confirmed that Student 1’s failing grades were the proper grade and verified her attendance rather than a withdrawal.<sup>46</sup> The use of the terms “‘F’ grades” and “both professors” in the PRR would appear to indicate that there were at least two properly assigned “F” grades.

#### Student 2

Student 2’s transcript indicated that he failed to pass any of his three courses, earning 2 WU grades and one F grade. In the PRR, the Department charged that Lehman had provided documentation that showed he attended each of the classes but did not provide “any documentation indicating the last date of attendance at an academic related activity to confirm whether or not the student completed the entire period for any course.”<sup>47</sup> Under Lehman’s policy, if a student attended each of their classes, then a grade of either a WU or an “F” would be appropriate. The only issue would be whether the student completed the course where they earned the “F.” Lehman submitted a copy of the professor’s roster which showed that for the student’s last date of attendance in an academically related activity for the Accounting 1 course, records established that the student had not completed the term. But because the student had completed more than 60% of the term, there was no liability related to this student’s withdrawal.<sup>48</sup> It is not clear if Accounting 1 is a course for which the student earned a WU or if it is the one class where the student earned an “F.” Lehman, however, has submitted Student 2’s

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<sup>46</sup> PRR at 6.

<sup>47</sup> PRR at 6.

<sup>48</sup> FPRD at 9.

final exam for “Principles of Management,” which shows that he completed the course but earned a failing grade on the final exam.<sup>49</sup> The student earned at least one “F” grade, and Lehman properly assigned grades under its policy for Student 2.

### Student 3

In the PRR, the Department reports that Student 3’s transcript indicated that he failed to pass any of his four courses during the fall 2015 term, earning 2 WU grades and two F grades. The Department states that Lehman provided documentation that showed that the student attended each of the four classes but did not provide “any documentation indicating the last date of attendance at an academic related activity to confirm whether or not the student completed the entire period for any course.”<sup>50</sup> Such documentation is not required. An institution that is non-attendance taking can demonstrate the adequacy of its grading policy and the use of that policy without providing documentation of the last date of attendance in an academically related activity. Lehman submitted a response agreeing that all four of Student 3’s grades should have been “WU”s.<sup>51</sup> As a result of an “oversight” it failed to account for the ineligible amount owed back to the Department.<sup>52</sup> As a result, a R2T4 calculation was conducted and a liability was identified and included as part of the liability assessed under Finding 3, which is not challenged by Lehman.

### Student 4

Student 4’s transcript indicated that she failed to pass either of her two courses, earning WU grades for both classes.<sup>53</sup> The Department acknowledged in both the PRR and the FPRD

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<sup>49</sup> R-1.

<sup>50</sup> PRR at 6.

<sup>51</sup> FPRD Appendix C-7.

<sup>52</sup> FPRD at 10.

<sup>53</sup> FPRD at 8.

that Lehman provided documentation that showed she attended each class on at least one occasion but argued that the school did not provide “documentation to confirm that the student completed the period.”<sup>54</sup> After the program visit, Lehman provided emails from the professors for the two classes. The professor for the class taught first indicated that the student attended the lecture class but did not continue to attend and that there were no grades for the student for the 5 quizzes and the final exam given during the term.<sup>55</sup> The professor for the class taught second stated that the student attended the lecture classes but did not return and that there were no grades for the two midterm exams given during the term for the class.<sup>56</sup>

The Department determined that this information was incomplete because “Lehman is required to provide the student’s last date of attendance [in] an academic related activity” and if Lehman cannot provide this information, then the student is only eligible for Title IV moneys up to the midpoint in the payment period.<sup>57</sup> At issue in this finding was not the amount of money needing to be returned based on the R2T4 calculations, rather that is the basis for the unchallenged liability in Finding 3. At issue in Finding 1 is whether Lehman properly used its grading policy to confirm whether a student completed the term. In this case, the student received a WU grade for both classes. The Department does not dispute that during the program review there was proof that the student attended at least one session of each class, making the assigned grade of WU correct.

#### Student 5

Student 5 was enrolled in two classes during the fall 2015 term, and received an F in one course, BIO 166, and a WU in the other course. During the site visit, Lehman provided

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<sup>54</sup> PRR at 6; FPRD at 8.

<sup>55</sup> PRR at 6.

<sup>56</sup> PRR at 6; FPRD at 8.

<sup>57</sup> PRR at 6.

documentation that the student began both courses. The Department states in the PRR that “Lehman was not able to provide documentation to confirm that the student completed the payment period, as required.”<sup>58</sup> After the program review, Lehman submitted documentation from the professor for BIO 166, who noted that the student only attended one class and did not complete any of the three exams or any assignments during the term. The professor acknowledged that it was an error to give the student an F when the grade should have been a WU.<sup>59</sup> Lehman submitted documentation, dated March 31, 2016, indicating that once this was brought to the school’s attention an R2T4 calculation was completed.

For only one, or at most two of the fifteen students, there were problems with the assignment of grades. For Student 5, Lehman has not shown that the single “F” grade was properly assigned. And while Student 3’s “F” grades were also revised (due to records kept by Lehman to support its grading policy), the Department had already and erroneously found noncompliance based on its contention that Lehman must provide the student’s last date of attendance in an academic related activity.

For the remaining students, Lehman has shown that it properly applied its grading policy for all grades. The evidence shows that of the fifteen students in the initial sample, one, or at most two, were not compliant because an erroneous grade was assigned. The evidence also shows that Lehman maintained extremely good records to back up its grading policy, as shown by those records confirming or disproving the asserted liabilities.

Moreover, Lehman has represented that, during the review and FPRD process, if FSA had allowed faculty attestations as proof of the adequacy of using its grading policy, Lehman would have been able to provide faculty attestations demonstrating that the faculty understood

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<sup>58</sup> PRR at 6.

<sup>59</sup> PRR at 6-7.

the grading policy and properly assigned non-passing grades. Such attestations were filed in this appeal's record, and are discussed below in further detail. One month before the PRR was issued in this matter, the same compliance manager who oversaw this program review responded to attestations from the professors and department chairs at another CUNY school that the faculty had reviewed on-passing grades assigned to students and confirmed that the grades were correct with an email stating that the "Department's position is that the attestations, without additional supporting source documents, do not suffice as adequate documentation for students' attendance as an academically related activity through the end of the term."<sup>60</sup>

Lehman submitted a sample of twelve faculty attestations from faculty who assigned both an "F" grade and a "WU" grade during the academic terms in question. Every attestation was signed and notarized. The sworn attestations indicated that: (1) prior to the end of each semester, including the one at issue, the faculty member received a copy of the grading policy from the registrar's office; (2) during the term at issue and before assigning grades, the faculty member reviewed the grade definitions in the grading policy; (3) the faculty member understands that "a 'WU' grade is given when the student stops attending and has not completed enough coursework in order to obtain an earned grade," compared with an "F" grade which is "an earned grade based upon poor performance" and that the "student did not complete the coursework successfully." Every sworn faculty statement also identified each student during the term who received an "F" grade and confirmed that the student completed the course but was unsuccessful and an "F" was the correct grade. Finally, every single sworn attestation stated that the faculty member had given other students a "WU" grade either during the same term or in prior terms.

The Department argues that our decision in *Housatonic* is controlling and the facts in that

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<sup>60</sup> Email from Christopher Curry to William Faulkner (April 11, 2018).

case are indistinguishable from the facts in this matter.<sup>61</sup> Like this case, in *Housatonic*, the Department concluded that the school did not adequately confirm student attendance based purely on the institution's grading policy. In that case, the school submitted an affidavit from the Acting Dean of Academic Affairs swearing that approximately 75% of students at issue attended at least one class but the affidavit did not indicate how the dean made that calculation. In support of the affidavit, the school submitted one class roster and select email from professors recalling specific students' attendance. The only signed statement came from a dean, who had no firsthand knowledge of students' attendance. That statement asserted an approximate percentage of students attended at least one class with only a single class roster and a selection of emails to support the assertion.

By contrast, in this case, Lehman has supplied signed and notarized affidavits, rather than emails, from twelve professors with firsthand knowledge. The professors: (1) attest that Lehman has distributed guidance about the grading policy each term and the professors reviewed the information; (2) state that the professors understand the grading policy with a correct statement of their understanding; (3) confirm that specific student who failed a course were properly awarded an "F" grade; and (4) demonstrate that, understanding the difference between an "F" and a "WU," have awarded "WU's" in the past.

The exhibits presented by Lehman in support of its application of the grading policy are of much higher evidentiary value and much better quality than the evidence presented by the school in *Housatonic*. These were not rubber stamp or form affidavits. Each was individually prepared and unique. While there were some common elements, each sworn statement was significantly particularized, and provided convincing, specific and differing details from faculty.

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<sup>61</sup> Brief of the Office of Federal Student Aid at 11.

that establish that Lehman could rely on its grading policy.

As noted, from its initial review of the files from fifteen students in one award year, FSA concluded that there were systemic issues and ordered a full file review of four years. FSA, based on that expanded review, then concluded that Lehman was unable to “conclusively” demonstrate that 318 students completed their terms and assessed liability accordingly. Based upon its directions throughout the PRR, FSA indicated to Lehman that only the attendance-related documentation of last date of academically-related activity would be accepted. Based on the directions that FSA gave Lehman, to produce documentation of the last date of attendance for two of the students, and because of the instructions given to another CUNY school stating that any affidavit is insufficient to corroborate a school’s adherence to its grading policy, Lehman did not produce affidavits supporting the grades assigned to those students during the review period. In this appeal, however, Lehman submitted evidence, in the form of affidavits, to meet its burden of proof. Based upon the quality of the affidavits submitted by individual professors and the relatively high instances of correct grades assigned among the sample of students examined during the program review, Lehman has convincingly shown that it has adequately adhered to its grading policy and through that policy has sufficiently documented the enrollment status of its students.

***The Department’s Demand for Evidence of the Last Date of Attendance***

What documentation is an institution required to keep for a student who begins attending classes but then receives all non-passing grades without officially withdrawing? The assumption is that the student unofficially withdrew during the term unless “the institution can document that the student completed the period.”<sup>62</sup> An institution can meet the documentation requirement by

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<sup>62</sup> PRR at 5.

adequately following a grading policy which provides a means to determine whether a student completed the enrollment period.

In this review, the Department tested Lehman's adherence to its grading policy by requiring Lehman to investigate whether five identified students completed the payment period in question.<sup>63</sup> For reasons that are not clear, the Department also required Lehman to provide the last date of attendance in an academically related activity for three students.

The Department concluded that the grades assigned were properly earned for Student 1. It is Students 2, 3 and 4 which are the focus of the documentation issue. Students 2 and 3 were both identified in the PRR as having earned a combination of "F" and "WU" grades. In fact, Student 3's grades were all "WU", which Lehman contends should allow eligibility for funding through the mid-term. The school provided adequate documentation that the students attended the courses, and yet the Department contended Lehman was required to provide documentation "indicating the last date of attendance in an academic related activity" to confirm whether the student completed the entire period of any course.

Similarly, Student 4 earned "WU" grades for each of her two courses. The school again provided adequate documentation that the student attended each class at least once, and again the Department contended Lehman had to also document the "last date of attendance in an academic related activity". According to the Department, "if the school is unable to provide this information, the student is only eligible for Title IV funds up to the midpoint of the period."<sup>64</sup>

For Student 4, the Department is correct that Title IV fund eligibility ends at the midpoint of the period. But that is because the school's grading policy for "WU" established that she did not take the final exam, and that she did not complete the course. This error in calculating the

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<sup>63</sup> PRR at 5.

<sup>64</sup> PRR at 6.

amount of funds to be returned to the Department is specifically addressed in Finding 3's "Incorrect Return of Title IV Calculation"<sup>65</sup>, which is not being challenged in this appeal. Still, in Finding 1, separate from Finding 3, the Department again contends Lehman was required to provide documentation "indicating the last date of attendance in an academic related activity" to confirm whether the student completed the entire period of any course.

Student 5's documentation is correctly noted as a Finding 1 error by Lehman. Again, after the Department's initial review, Lehman was required to conduct a further review for five of those fifteen students. In that review, Lehman determined and pointed out its mistake for Student 5. Lehman noted that the records showed Student 5 earned one failing grade and one WU grade. When it investigated, Lehman found that the professor who assigned an "F" grade admitted this grade was given in error. The Department points out and Lehman agrees that for Finding 1, Student 5's "F" grade should have been a "WU".

For the program review in this appeal, the Department identified a total sample of fifteen students for review from the 2015/2016 award year. The Department selected these fifteen students randomly from students who did not graduate and had withdrawn or stopped attending school, and who had also received all non-passing grades for the term being reviewed.<sup>66</sup> The Department then identified the above five students for further review by Lehman. No errors were identified by the Department for the remainder of the fifteen students in the sample.

For three of the five students at issue in Finding 1 (Students 2, 3, and 4), the Department specifically faulted Lehman for not providing the last date of attendance in an academic related activity, before any determination that its grading policy was not reliable. As a result of the Department's determination of four instances of what it interpreted as non-compliance among

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<sup>65</sup> PRR at 10-11.

<sup>66</sup> PRR at 4.

the fifteen students, the Department concluded the violation was of a “systemic nature,” and the Department ordered Lehman to do a full file review of all students who received all non-passing grades for every pay period between the 2012/13 school year and the 2015/16 school years.<sup>67</sup>

From that systemic review, the Department’s Final Program Review Determination for Finding 1 identified 318 instances of error, based on the Department’s determination that Lehman could not “conclusively demonstrate the students attended all registered courses,” when Lehmann had been repeatedly told proof whether the student completed the entire period of any course required documentation “indicating the last date of attendance in an academic related activity” to confirm.<sup>68</sup>

The PRR and subsequent FPRD are flawed. The Department bootstrapped an erroneous requirement of “last date of attendance in an academically related activity” into finding a systemic problem requiring full file review. That error was continued erroneously into the full file review, and compounded by the Department’s sole permissible documentation during that full file review.

Lehman argues that requiring Lehman to document the last date of attendance, either as a mandatory method of determining a student’s enrollment status or as a method of testing the use of a grading policy as the measure of a student’s enrollment status violates the regulations, the Department’s published policies, the Administrative Procedures Act and past decisions from this tribunal.

Lehman notes the regulations give non-attendance taking institutions the option of either using the mid-point or have documentation of the last date of attendance in an academically related activity, and asserts that requiring Lehman to have documentation for every student who

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<sup>67</sup> Brief of the Office of Federal Student Aid at 4.

<sup>68</sup> FPRD, at 9.

did not receive a passing grade effectively eliminates the option to use the mid-point of the term.<sup>69</sup> Lehman provided the 1999 notice of proposed rulemaking that proposed changes to 34 CFR Part 668. The preamble to the issued final rules that indicates that the intention was to make the option of producing documentation of the last date of attendance in an academically related activity permissive.<sup>70</sup> Nothing in either preambles supports the premise that such documentation is required to test the use of a grading policy that distinguishes between a failing grade and an unofficial withdrawal.<sup>71</sup>

Lehman also refers to the FSA Handbook (the Handbook) and the Dear Colleague Letter GEN-04-03 (the DCL). Lehman contends that the DCL and the Handbook provide further guidance.

The 2015-2016 FSA Handbook requires an institution to have a procedure for determining whether a student has completed the period or has unofficially withdrawn. It specifically says that FSA does not require a specific procedure be used. Lehman identifies the two options outlined in the Handbook, one that relies on a school having a policy of using reported grades, like Lehman did, and one that has a policy of using the last date of attendance for all students receiving non-passing grades.<sup>72</sup>

The DCL expressly allows for the use of a grading policy as adequate documentation for determining whether a student who received no passing grades unofficially withdrew or completed a period. It provides that a grading policy that requires instructors to award an “F” grade or the equivalent only for students who have completed the course serves as sufficient

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<sup>69</sup> Letter from Jose Luis Cruz to Susa Crim (June 26, 2018) at 3.

<sup>70</sup> Letter from Jose Luis Cruz to Susa Crim (June 26, 2018) at 4; CUNY Lehman College Brief at 4-5.

<sup>71</sup> CUNY Lehman College Brief at 5.

<sup>72</sup> CUNY Lehman College Brief at 6.

documentation that the student did not unofficially withdraw.<sup>73</sup>

Both FSA's Handbook and its DCL give institutions the option to either use a grading policy or to document the last day of attendance. Each makes it clear that these are options and that both do not need to be done.<sup>74</sup>

Lehman acknowledges the rules allow for program reviews and audits to examine whether the school is accurately assigning failing grades when the school is using its grading policy to determine whether a student has unofficially withdrawn.<sup>75</sup> Lehman objects to the Department requiring Lehman to submit evidence of the last date of attendance as the only way to test the grading policy.<sup>76</sup> Lehman relied on the DCL and the Handbook 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.<sup>77</sup> Lehman believes 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."<sup>78</sup> Lehman is correct that requiring it to use documentation of the last date of attendance to test the policy effectively eliminates the grading policy the Department's published policies outline.<sup>79</sup>

Lehman further argues that, in this case, the Department seeks to enforce a policy that it created in violation of the Administrative Procedures Act (APA). Lehman argues that the Department is creating a requirement that institutions maintain last date of attendance documentation even when choosing to use the grading policy option. Specifically, Lehman

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<sup>73</sup> Letter from Jose Luis Cruz to Susa Crim (June 26, 2018) at 6; CUNY Lehman College Brief at 7.

<sup>74</sup> CUNY Lehman College Brief at 7.

<sup>75</sup> Letter from Jose Luis Cruz to Susa Crim (June 26, 2018) at 7.

<sup>76</sup> Letter from Jose Luis Cruz to Susa Crim (June 26, 2018) at 7; CUNY Lehman College Brief at 7.

<sup>77</sup> CUNY Lehman College Brief at 7.

<sup>78</sup> Letter from Jose Luis Cruz to Susa Crim (June 26, 2018) at 7.

<sup>79</sup> CUNY Lehman College Brief at 8.

argues that while the DCL and the Handbook indicate that grading policies may be tested, they do not outline how a grading policy would be tested or what documentation would be required.<sup>80</sup> Lehman asserts that if the Department expected institutions to keep last date of attendance records to test the grading policies, then it should have indicated as much.<sup>81</sup> Lehman argues that requiring last date of attendance records, which is one option, to test the other option effectively changes the published policy that allowed schools to rely on the option to use a grading policy.<sup>82</sup> Lehman asserts that, under the APA, the Department cannot make this change without providing for an opportunity for notice and comment before implementing the change.<sup>83</sup>

Lehman further notes that while the regulations explicitly require institutions to document when students begin a course, there is no regulatory requirement that specifically requires that institutions document the last day of attendance. Additionally, Lehman notes that in decisions from this Tribunal in both *In re Housatonic Community College*, 15-36-SP (*Housatonic*), and *Cincinnati State Technical and Community College*, 97-65-SP (*Cincinnati State*), we expressed that institutions must demonstrate that a student began attending a class, but there is no requirement that schools adopt or continue to monitor attendance.<sup>84</sup>

34 C.F.R. § 668.22 addresses how an institution treats a withdrawn student. Section (a) requires : “When a recipient of title IV grant or loan assistance withdraws from an institution during a payment period or period of enrollment in which the recipient began attendance, the institution must determine the amount of Title IV funds that the student earned as of the student’s withdrawal date in accordance with paragraph (e) of this section.” When a student withdraws, a

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<sup>80</sup> CUNY Lehman College Brief at 9.

<sup>81</sup> CUNY Lehman College Brief at 9.

<sup>82</sup> CUNY Lehman College Brief at 9-11.

<sup>83</sup> CUNY Lehman College Brief at 11.

<sup>84</sup> CUNY Lehman College Brief at 12-13.

R2T4 calculation is completed. Section (c)(1) indicates how a non-attendance taking institution calculates the date a student withdraws. 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. Within section (c)(1), the regulations provide three options for calculating the date of a student's withdrawal. The first two options require using a specific date, either the date the student began the withdrawal process or the date the student provided official notice of an intent to withdraw.<sup>85</sup> The third option is to use the "mid-point of the payment period."<sup>86</sup> The regulations specifically give an institution the option to be non-attendance taking and then once a school has exercised that option, to either use a specific date or use the mid-point of the term for the R2T4 calculations.

When adequately followed, a grading policy provides a sufficient basis for determining whether a student has un-officially withdrawn during the term.<sup>87</sup> The Department tests Lehman's adherence to its attendance policy by requiring it: (1) to document the last date of attendance; (2) to identify the date of withdrawal; (3) to prove whether a student did or did not attend classes throughout the term; (4) as the sole method of documenting whether a student unofficially withdrew. This voids Lehman's right to make the selection provided by the regulation, which allows Lehman to be a non-attendance taking institution that chooses not to document a specific date but instead use the third option to use the mid-point of the term for R2T4 calculations. Moreover, the evidence in this case strongly established that Lehman sufficiently adheres to its grading policy.

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<sup>85</sup> 34 C.F.R. §§ 668.22(c)(1)(i) and (ii).

<sup>86</sup> 34 C.F.R. § 668.22(c)(1)(iii).

<sup>87</sup> *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016) at 3.

The Department's contention is that Lehman owes the liability asserted in Finding 1 because it did not have an adequate process in place "to confirm whether or not students who failed to earn a passing grade during a payment period actually completed the payment period." In FSA's view, Lehman did not have an adequate system in place to monitor changes in student enrollment as required pursuant to 34 C.F.R. § 668.22.<sup>88</sup> The Department contends that while a school does not need to have an attendance policy in place under the regulations, it must be able to confirm the student's enrollment status. That is correct, but then the Department wrongly applied the attendance requirement to claim Lehman's grading system was inadequate.

According to the Department, although a grading system may be used to confirm enrollment status, the program review revealed that Lehman failed to use its grading system to confirm enrollment for four of fifteen students.<sup>89</sup> Unfortunately, the Department uses the attendance requirement as a basis for assigning failure of the grading policy, and then contends that Lehman's "non-adherence to its grading policy eliminated the grading option." Citing 24 C.F.R. § 668.22(c)(1)(iii), the Department, argues that "to establish a student's withdrawal date before performing a [R2T4] calculation, the only option left was to use the last date of attendance as an academically-related activity to confirm whether or not the student completed the entire period of the course."<sup>90</sup> The Department has mixed up the two parts of the test. First, the school must determine whether the student completed the term, and consistent with the regulations, may use a grading policy if the institution exercises its option to be non-attendance taking, therefore not requiring the taking of attendance. Once it is determined that the student has withdrawn, the school must determine the date of withdrawal using a documented date or the

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<sup>88</sup> Brief of the Office of Federal Student Aid at 8-11.

<sup>89</sup> Brief of the Office of Federal Student Aid at 11-13. As noted above, however, the evidence shows that the grading policy was not properly applied for only one or at most two students out of the fifteen in the sample.

<sup>90</sup> Brief of the Office of Federal Student Aid at 13.

mid-point of the term in order to do the R2T4 calculation.

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. To do so would eliminate the choice the regulations give to schools once a student has been identified as having withdrawn, to either have documentation of the date of last attendance or use the mid-point of the term in the R2T4 calculations.

### **Findings of Facts and Conclusions of Law**

- 1. The Department provided a prima facie case assessing liabilities under Finding 1.**
- 2. Lehman has relied on its grading policy consistent with Department policy and regulations to establish the date a student unofficially withdrew.**
- 3. The Department erred in requiring Lehman to submit evidence of last date of attendance in an academically related activity to determine whether a student unofficially withdrew or completed the term.**

### **ORDER**

Lehman is not liable for the return of \$350,211.53 in Title IV funds assessed in Finding 1 of the FPRD. Finding 1 is **REVERSED**. The liabilities assessed in Findings 3 and 5 are unchallenged and **AFFIRMED**. Lehman is liable for and is **ORDERED** to repay to the United States Department of Education the \$15,337.47 in liabilities assessed in Findings 3 and 5 with any appropriate interest.

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Robert G. Layton  
Administrative Law Judge

**Dated: April 22, 2020**

## 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.

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\*

Secretary of Education c/o Docket Clerk  
Office of Hearings and Appeals  
U.S. Department of Education  
550 12<sup>th</sup> Street, S.W., 10<sup>th</sup> Floor  
Washington, DC 20024

U.S. Postal Service\*

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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.

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And to:

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