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

In the Matter of

ALVAREITA'S COLLEGE OF COSMETOLOGY

Respondent

Docket Nos. 16-25-SP, 16-26-SP

Federal Student Aid Proceeding

PRCN: 2016-105-29164
PRCN: 2016-105-29165

Appearances: Ronald L. Holt, Esq., Kirsten Clevenger, Esq. for Alvareita's College of Cosmetology

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

Before: Robert G. Layton, Administrative Judge

DECISION

Alvareita's College of Cosmetology (ACC) is a proprietary institution of higher education, with locations in Edwardsville, Illinois and in Godfrey, Illinois.[1] ACC has filed timely appeals of the two Final Program Review Determinations (FPRD) issued by the Department of Education's Federal Student Aid office. ACC had previously entered into a program participation agreement with the U.S. Department of Education (ED) office of Federal Student Aid pursuant to Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.*

When an institution signs a program participation agreement with the Department for the purpose of disbursing federal student financial aid, that institution agrees to comply with all Title IV program requirements and to act as a fiduciary over those funds. 34 C.F.R. §§ 668.82(a), (b)(1). In its capacity as a fiduciary of these federal funds, it owes the Department the highest standard of care and diligence to ensure the proper and efficient administration of these programs. 34 C.F.R. § 668.82(b). The institution must also comply with all Title IV statutory and regulatory requirements. 34 C.F.R. § 668.16(a).

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[1] Each of the 2 locations has a separately docketed appeal; however, the parties agreed that both appeals present the same legal questions, facts and evidence, and ACC's motion to consolidate was granted. ACC is a reference to the two locations collectively.

In this type of proceeding, the institution has the burden of proving by a preponderance of the evidence that it has satisfied its role as a fiduciary for federal student aid funds, and the disbursement of those funds was in accordance with statutory and regulatory guidelines. 34 C.F.R §§ 668.14, 668.82 (a) and (b), and 668.116(d). *See also, In the Matter of Sinclair Community College*, Dkt. No. 89-21-S, U.S. Dep't of Educ. (Sept. 26, 1991). ACC has failed to meet this burden.

The FPRDs findings assessed liabilities of $376,499.35 for the Edwardsville location and $276,235.05 for the Godfrey location, with total liability for ACC of $652,734.40. ACC asserts the liabilities are not valid, but does not contest the sums at issue in the FPRDs. To prevail in these appeals, ACC must establish that both of the two contested findings were in error. In a third issue, ACC contends that the FPRDs were actions to terminate ACC's participation in the Title IV program, and seeks to have this tribunal reverse what it characterizes as a termination action.

Pursuant to 34 C.F.R. § 668.116(d), in these appeals, ACC has the burden of proving by a preponderance of the evidence that it complied with all Title IV program requirements and regulations in its disbursement of federal funds.

Uncontested Findings:

Alvareita Giles was the CEO of ACC until her death on August 4, 2013. The ownership of ACC was held in the form of the Alvareita A Giles Living Trust. When Alvareita Giles died, ownership of ACC was transferred to her five children as the beneficiaries of the trust. Sheila Fudge is one of Alvareita Giles' daughters, and succeeded her mother as trustee. Fudge had helped manage ACC for years prior to her mother's death.

On August 16, 2013, twelve days after Giles' death, Fudge called FSA's Chicago/Denver school Participation Division.

No reporting paperwork was filed by ACC with FSA within ten days of August 4, 2013. Nearly a year later, on July 29, 2014, ACC's Godfrey location filed a recertification application. The filing was after FSA contacted ACC to ask why it had not filed the recertification. That recertification application was required to be filed by June 30, 2014, and was therefore untimely. The application's signature page was signed "Alvareita Giles". Fudge acknowledges she signed that application using the name of Alvareita Giles.

In a certified mail letter dated January 13, 2015 which was addressed to "Alvareita Giles, President (ACC)," FSA stated ACC had lost its Title IV eligibility due the expiration of ACC's Participation Agreement.

On January 27, 2015, an FSA employee emailed Fudge and another ACC employee, and stated that Fudge could not sign the documents seeking to restore eligibility, since the FSA employee identified Alvareita Giles as still serving as the CEO (even though she had died in August, 2013). On January 28, 2015, an email from an ACC employee gave written notice to an FSA employee that Alvareita Giles had died in August 2013.

After FSA received the written notice, on March 26, 2015, FSA notified ACC that due to its failure to report the change of ownership and control, it was ineligible to participate in the Title IV program.

The FSA 2014-2015 Handbook had a section with advice for participating institutions that ownership transfers to family members were excluded from those transfers that automatically disqualified an otherwise eligible institution.

That same Handbook section, however, informed participating institutions that "even though transferring ownership interest through death or retirement may be excluded from being considered a change in ownership resulting in a change of control, the resulting change in percentages of ownership interests must be reported to the Department."

No evidence was offered in these appeals that anyone from ACC read or relied on that section of the Handbook.

Additional Findings:

There is competing evidence about what was and was not said during the August 16, 2013 phone call from Fudge to FSA. Neither side's proof contains specific details that would provide corroboration or a means to confirm the probative value of the evidence.

ACC's proof is in the form of an affidavit by Fudge. The affidavit was sworn to three years after the phone call. It states she spoke to some unknown person, verbally informed them that Alvareita Giles had died, and was not given any further directions about further necessary actions. The lack of any specific information is completely understandable, given that the phone call would have occurred shortly after the tragedy and loss that comes from the death of a parent.

FSA's proof is in the form of an undated declaration by FSA's Mark Holland, a Senior Institutional Review Specialist in the Chicago office. It states he spoke to some unknown person whose family member (and school owner) had passed away. It states generally the phone call "would have discussed" the filing and reporting needs after such an event, and states his belief FSA has never accepted telephonic notification of ownership changes.

Even if it is assumed that ACC's proof established with specificity that Fudge contacted FSA, and was not directed how to report the change in ownership, ACC has still not established any facts that would allow it to assert estoppel or reasonable reliance on inaccurate information by FSA.[2]

As the party bearing the burden of proof, ACC has not met its burden of proving the facts

[2] The availability of estoppel in the administrative context is somewhat limited, generally being reserved for only those situations where Congress has failed to either expressly or implicitly expressed what is required of a party. *Cf. Asotria Fed. Sav. And Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991). Moreover, by signing her deceased mother's name, Ms. Fudge is not entirely blameless in a conflict arising out of ACC's responsibility to properly notify FSA that Ms. Giles had passed away and was no longer an owner of ACC, making an appeal to the use of equitable arguments less compelling. *Cf. Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815 (1945).

surrounding the content of the August 16, 2013 phone call from Fudge to FSA.

This decision now reviews FSA's two findings based on the above facts.

Finding 1. Lack of Administrative Capability – Updating Application Information

The first finding in the FPRDs is a violation based on 34 C.F.R §600.21 "Updating application information," which sets forth the changes in ownership and control that ACC or any institution is required to report to the Department. This regulation applies even if the "family transfer" exception to a change in ownership is met. The violation in the finding is that when Alvareita Giles died, ACC did not, report within ten days "any change in a person's ability to affect substantially the actions of the institution, if that person did not previously have this ability." 34 C.F.R. §600.21(a)(6). This language imposes a reporting obligation whenever there is a change in a person's ability to affect substantially the actions of the institution. This is a reporting obligation that is separate from rules for any change of ownership.

The legal basis for the violation in Finding 1 is found in the relevant portions of 34 C.F.R. §600.21, which state:

> §600.21 Updating application information.
>
> (a) Reporting requirements. ... an eligible institution must report to the Secretary in a manner prescribed by the Secretary no later than 10 days after the change occurs, of any change in the following:
>
> ...
>
> (6) A person's ability to affect substantially the actions of the institution if that person did not previously have this ability. The Secretary considers a person to have this ability if the person—
>
> (i) Holds alone or together with another member or members of his or her family, at least a 25 percent "ownership interest" in the institution as defined in §600.31(b);
>
> (ii) Represents or holds, either alone or together with other persons, under a voting trust, power of attorney, proxy, or similar agreement at least a 25 percent "ownership interest" in the institution, as defined in §600.31(b); or
>
> (iii) Is a general partner, the chief executive officer, or chief financial officer of the institution.
>
> (7) The individual the institution designates under 34 CFR 668.16(b)(1) as its Title IV, HEA Program administrator.
>
> ...
>
> (c) Secretary's response to reporting. The Secretary notifies an institution if any reported changes affects the institution's eligibility, and the effective date of that change.
>
> ...
>
> (e) Consequence of failure to report. An institution's failure to inform the Secretary of a change described in paragraph (a) of this section within the time period stated in that paragraph may result in adverse action against the institution.
>
> (f) Definition. A family member includes a person's—

(1) Parent or stepparent, sibling or step-sibling, spouse, child or stepchild, or grandchild or step-grandchild;

The language shows that the purpose and design of 34 C.F.R §600.21 are clear-the Department requires complete and timely reporting of any changes for a Title IV participating institution. This must be provided in order for the Department to be able to meet its duty to oversee those changes and review changes for possible effects on the institution's eligibility to administer Title IV funds.

The failure to report is a violation because 34 C.F.R §600.21(a) requires such changes to be reported within 10 days. There is no dispute that no such report was filed. There are two listed subjects of change that were not reported. 34 C.F.R §600.21(a)(6) requires reporting of any change in a person's ability to affect substantially the actions of the institution if that person did not previously have this ability. A person has that ability if they with their family hold at least a 25 % ownership interest in the institution, or is the CEO of the institution. 34 C.F.R §600.21(a)(6)(i) and (iii).

ACC argues that because of the exclusion found in 34 C.F.R. §600.31, the above language from 34 C.F.R §600.21 does not apply to family ownership transfers. To accept that argument requires ignoring the clear and specific language referred to above. When Alvareita Giles died, her previous ownership interest went to her five children such that they collectively owned 100%, which is a change specifically listed in 34 C.F.R §600.21(a)(6)(i). The second subject not reported is that one of her children, Sheila Fudge, became the CEO, which is a change specifically listed in 34 C.F.R §600.21(a)(6)(iii). Both of these changes are expressly required to be reported.

ACC argues it made a good faith oral effort to report Ms. Giles's death. A family death is a most deeply felt and unfortunate loss; however, even if that argument is accepted, a good faith oral effort to report is insufficient to meet the reporting requirements of FSA. It is completely understandable that in the days immediately after losing her mother, Ms. Fudge's memory may not be detailed and crystal clear, especially when she has been asked to recall those details three years later. Nonetheless, the vagueness and uncertainty of the competing proof provided in these appeals illustrate very clearly why a government agency cannot accept verbal telephone reporting with unknown individuals for its reporting requirements.

ACC has also submitted that the language in FSA's 2014-2015 Handbook is a basis for ACC to not be required to meet the reporting requirement. The Handbook includes information correctly noting that changes of ownership to family members does not automatically disqualify a school as an eligible institution. But within the same section, the Handbook includes information correctly noting that, even though family transfers may be excluded, the school still must report changes in ownership interest to the Department.

ACC argues that it would be reasonable for a school to stop reading the section immediately upon coming to the section excluding family member transfers, and that it would be reasonable for a school to ignore the additional information requiring schools to still report the changes to the Department. Because of this, ACC argues the Handbook's direction made it

reasonable for ACC to not report the changes.

It is not reasonable for ACC to ignore plain unambiguous language in the same section of the Handbook simply because that language was placed after the favorable language ACC refers to. Furthermore, there cannot be any governmental estoppel or detrimental reliance asserted, because ACC has not even submitted that anyone from ACC relied on or even read the Handbook that is referenced.

Nor can the reporting requirement be dismissed as simply a technical oversight. FSA must have accurate and immediate information on the detailed nature of any institution which is acting as a fiduciary in administering Title IV funds. In fact, in the present case, on June 30, 2014, 10 months after Ms. Giles' death, ACC was required to submit an application to be recertified to participate in Title IV programs. When ACC failed to file the application on time, FSA reached out to ACC to discuss the missing application. Even then the FSA employee's notes had nothing about Ms. Giles' having died, and when the application was filed on July 29, 2014, it was signed in the name of Alvareita Giles, who had died 11 months earlier. Such failures to keep FSA informed on ACC's critical details as those in Finding 1 are not minor or clerical.

Failure to comply with the applicable statutes and regulations will constitute grounds for Department action to be brought against the school. ACC must meet its fiduciary duty to the Department, and telephone calls are not an adequate alternative to filing the required reporting with FSA. ACC has failed to meet its burden of proof by showing that the institution did not violate 34 C.F.R. §600.21.

Under the uncontested facts and the clear language of the regulatory requirements referenced, Finding 1 of FSA is affirmed, and ACC's Title IV disbursements made after August 4, 2013 are ineligible disbursements which establish ACC's total liability of $652,734.40.

Finding 2. Change of Ownership and End of ACC's Qualifying as an Eligible Institution

The second finding for the FPRDs is a violation based on the provisions of 34 C.F.R. §600.31(a)(1) concerning change in ownership. FSA made this as a second and separate basis for ACC's liability due to it ceasing to qualify as an eligible institution. For reasons set forth below, this decision finds the family transfer language in (e) applies.

The legal basis for the violation in Finding 2 is found in the relevant portions of 34 C.F.R. §600.31, **Change in ownership resulting in a change in control for private nonprofit, private for-profit and public institutions** which state:

> (a)(1) Except as provided in paragraph (a)(2) of this section, a private nonprofit, private for-profit, or public institution that undergoes a change in ownership that results in a change in control ceases to qualify as an eligible institution upon the change in ownership and control. ...

(b) Definitions. The following definitions apply to terms used in this section:

...

Ownership or ownership interest.

(1) Ownership or ownership interest means a legal or beneficial interest in an institution...

...

(e) Excluded transactions. A change in ownership and control reported under §600.21 and otherwise subject to this section does not include a transfer of ownership and control of all or part of an owner's equity or partnership interest in an institution, the institution's parent corporation, or other legal entity that has signed the institution's Program Participation Agreement—

(1) From an owner to a "family member" of that owner as defined in §600.21(f) (which includes a child as a "family member");

...

From the above regulation, 34 C.F.R. §600.31 (a)(1)'s rule is that an institution participating in the Title IV program ceases to be eligible when it undergoes a change in ownership, and 34 C.F.R. §600.31(b)(1) defines ownership as a legal or beneficial interest in an institution. 34 C.F.R. §600.31(e) excludes a change in ownership when new owner is a family member.

Despite the uncontested facts set forth above, FSA argues that this is not an excluded transaction because Alvareita Giles was the trustee until her death, and Sheila Fudge became the trustee upon Giles' death. According to FSA, the §600.21 definition of family member does not apply, because Ms. Fudge is also the trustee.

FSA admits that when Ms. Giles died, the beneficial interest in ACC transferred to her five children, which would mean this is an excluded transaction. Nonetheless, FSA contends that because Sheila Fudge is the trustee, it was a "nonbeneficial, legal interest" which is at issue in this finding.

FSA's argues that because Sheila Fudge became the successor trustee, this transaction should be considered only as it relates to the conveyance of what FSA characterizes as a legal interest and not a beneficial interest, and that it is not the sort of ownership transfer excluded by the language above.

The language of 34 C.F.R. §600.31 (a)(1) does not support FSA's argument. It makes no distinction between legal or beneficial ownership, and specifically says either a legal <u>or</u> beneficial interest qualifies as an ownership interest that is excluded when the new owner is a family member. When Alvareita Giles died, the FSA concedes the beneficial interest in ACC was transferred to her children, who are family members.

As with Finding 1, the facts for Finding 2 are uncontested. ACC met the regulatory

exception for changes in ownership involving family members, so there was no violation of 34 C.F.R. §600.31(a)(1)'s change in ownership due to ACC ceasing to qualify as an eligible institution. FSA's Finding 2 as a second basis for ACC's liability due to ACC ceasing to qualify as an eligible institution is reversed.

Due Process and Applicable Regulations

The final issue presented by ACC is its argument that this is an action by FSA to terminate ACC's participation in the Title IV program. For such a termination proceeding, ACC would be entitled to a proceeding conducted under the regulations and procedures of Subpart G, 34 C.F.R §668.81 et seq..

The two actions at issue in these appeals are the Final Program Review Determinations for ACC's Edwardsville, IL and Godfrey, IL locations, and FSA's requirement that ACC return a combined total of $652,734.40 in Title IV funds that ACC received during the period it was ineligible to participate in the program. Subpart H, found at 34 C.F.R. §668.111, mandates the appeal procedures for such FPRDs, and also mandates the scope of such proceedings. It states in relevant part:

> (a) This subpart establishes rules governing the appeal by an institution or third-party servicer from a final audit determination or a final program review determination arising from an audit or program review of the institution's participation in any Title IV, HEA program or of the servicer's administration of any aspect of an institution's participation in any Title IV, HEA program.
> ...
> (c) This subpart does not apply to proceedings governed by subpart G of this part or to a determination that—
>
> (1) An institution fails to meet the applicable statutory definition set forth in sections 435, 481, or 1201 of the HEA, except to the extent that such a determination forms the basis of a final audit determination or a final program review determination; or
> (2) An institution fails to qualify for certification to participate in the title IV, HEA programs because it does not meet the fiscal and administrative standards set forth in subpart B of this part, except to the extent that such a determination forms the basis of a final audit determination or a program review determination.

By comparison, Subpart G, 34 C.F.R. 668.81, provides in its entirety:

> (a) This subpart establishes regulations for the following actions with respect to a participating institution or third-party servicer:
>
> (1) An emergency action.
> (2) The imposition of a fine.
> (3) The limitation, suspension, or termination of the participation of the

institution in a title IV, HEA program.

Although ACC contends it should already have its eligibility restored, that lack of restoration is simply not a termination as described and governed by Subpart G, 34 C.F.R. 668.81. ACC cites *Accord In the Matter of Phillips College of Atlanta,* Docket No. 91-96-SA in support of its contention. The question of applicability of Subpart G or Subpart H was addressed in that final audit determination. In applying the above regulatory language, this tribunal stated:

> Under 34 C.F.R. § 668.111(c)(1), Subpart H does not apply to a determination that an institution fails to meet the statutory definition of an eligible institution set forth in 20 U.S.C. § 1085, <u>except to the extent that such a determination forms the basis of a final audit (or program review) determination.</u> Conversely, Subpart H does apply to a final audit determination that an institution fails to meet the statutory definition of an eligible institution because it employs or uses commissioned salesmen to promote the availability of GSLP or PLUS program loans. Such is the case here, since that determination as to eligibility forms the basis for the final audit determination in Finding No. 1.
>
> In making this determination, no action is being taken such as is contemplated in a termination proceeding under Subpart G. Rather <u>it is a determination of eligibility only for the purpose of deciding whether or not the institution validly participated in GSL, PLUS, and SLS Programs and thereby has an audit liability.</u>
>
> <u>As a result, Subpart H is properly applicable to this case, and PCA has the ultimate burden of proving that the disallowed expenditures were proper or that the institution complied with program requirements.</u> *Phillips College of Atlanta, at 9.*

Simply put, ACC's program eligibility is not at issue in these appeals to determine if ACC was terminated from Title IV. In fact, eligibility is <u>only</u> to be considered in a Subpart H to decide whether FSA's assessment of liability against an ineligible institution was proper.[3]

These are not appeals of termination actions. These are actions by the Department imposing liability on ACC for Title IV funds improperly disbursed after ACC lost eligibility to participate in the program based on ACC's failure to follow reporting requirements. ACC's argument is that because the FPRD imposes liability based on its ineligibility, it amounts to a termination action, and that this tribunal should also consider reversing what ACC says is a termination action. The regulations and previous decisions preclude this tribunal from considering the relief sought by ACC, even if ACC had complied with the reporting requirements to maintain eligibility in the Title IV fund program.

ACC has not been denied any procedural due process, and Subpart H, 34 C.F.R. § 668.111 has been followed in these appeals to provide the proper appeal procedures for these Final Program Review Determinations.

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[3] Even though any termination cannot be addressed under a Subpart H proceeding, there is nothing in these appeal records to indicate that FSA ever terminated ACC, and nothing to indicate that Subpart G appeals are at this point available to ACC.

ORDER

On the basis of the above findings, it is **ORDERED** that Alvareita's College of Cosmetology pay to the U.S. Department of Education the sum of $652,734.40, as demanded in the Final Program Review Determinations.

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Judge

Dated: March 13, 2017