

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY

In re: DECKER COLLEGE, INC.,

Debtor

CASE NO. 05-61805
CHAPTER 7

ROBERT W. KEATS, TRUSTEE,

Plaintiff

vs.

COUNCIL ON OCCUPATIONAL EDUCATION, INC.,

Defendant

ADV. PROC. NO. 09-3091

FINDINGS OF FACT

THIS ADVERSARY PROCEEDING is before the Court for findings of fact only after a trial held for purposes of examining whether Defendant made factually erroneous statements to the United States Department of Education (the “Department”) regarding its approval of certain of Plaintiff’s degree programs. As more fully discussed in this Court’s Order entered October 20, 2010, Plaintiff has appealed the Department’s revocation of certain funding through the Department’s administrative appeals process. The Department, however, has stayed those proceedings so that this Court may make the within findings, which will be used by the Department in its proceedings. This is a core proceeding under 28 U.S.C. § 157(b) and the Court otherwise has jurisdiction over this matter because it falls within the “public rights exception” discussed in *Stern v. Marshall*, 131 S. Ct. 2594, 2612-15 (2011). Moreover, Plaintiff and Defendant have agreed to have this Court hear this Adversary Proceeding and make findings of fact with respect to the subject matter herein. See 28 U.S.C. § 157(c)(1). The following constitutes the Court’s Findings of Fact

pursuant to Federal Rule of Bankruptcy Procedure 7052.

FINDINGS OF FACT

In its Complaint, Plaintiff alleges that Defendant intentionally or negligently made “factually erroneous statements” to the Department that Defendant “had not approved three Decker College degree programs ... for delivery using primarily on-line technology.” The parties and the Department have requested that this Court examine such statements and make findings as to whether such statements were factually erroneous. The Court is *not* charged at this time with determining Defendant’s *intent* in making such statements.

A. What Were the Statements?

Plaintiff asserts that Defendant erroneously informed the Department that Defendant had not approved Plaintiff’s offering of its carpentry, electrician and HVAC associate degree programs (the “Programs”) through distance education—i.e., using primarily on-line technology. The statements in question (the “Statements”) were made during the period from June through September 2005, by way of telephone conversations, letters and a face to face meeting between representatives of Defendant and representatives of the Department, as follows.

On June 6, 2005, Ralph LoBosco (“Mr. LoBosco”) of the Department’s Federal Student Aid Kansas City Case Team spoke twice with representatives of Defendant by telephone, first with Gary Puckett, Defendant’s Executive Director (“Mr. Puckett”), alone, then with Mr. Puckett and Defendant’s staff members Sue Schooler (“Ms. Schooler”) and Alex Wittig, Associate Executive Director (“Mr. Wittig”), together (the “June 6 LoBosco Calls”). Mr. LoBosco told Defendant’s representatives that his team was reviewing Plaintiff’s compliance with regulations governing federal financial aid and asked if Defendant knew that Plaintiff was offering the Programs primarily through distance education. Mr. Puckett in the first call stated that he did not know that the Programs were being offered through distance education but wanted to verify the same with his staff. 3/28/12 Tr. at 68. He conferred with Mr. Wittig, then joined with Mr. Wittig and Ms. Schooler in the second call with Mr. LoBosco. During that call, according to Mr. Wittig’s testimony, “the response was rather immediate and emphatic and I said no, we did not know that they were offered primarily via distance education.” 3/29/12 Tr. at 199. Mr. LoBosco asked Mr. Wittig to follow up with a letter explaining his belief that the programs in question were to be offered through traditional

“bricks and mortar instruction.” *Id.*

Shortly after the June 6 LoBosco Calls, Mr. Puckett spoke by telephone with John Barth (“Mr. Barth”), the Department’s Director of Accreditation and State Liason, Office of Postsecondary Education. Defendant was at the time seeking to renew its own accreditation by the Department, including authority to accredit distance education programs, and Mr. Barth was involved in the Department’s review of Defendant’s application. Mr. Puckett testified that he felt the need to assure Mr. Barth of Defendant’s position that it did not accredit Plaintiff to teach the programs in question via distance education. 3/28/Tr. at 127-28.

As the requested follow-up to the June 6 LoBosco Calls, Mr. Wittig sent a letter on June 17, 2005 (the “June 17 Response”) to Mr. LoBosco enclosing copies of Plaintiff’s applications to Defendant for accreditation. PX 1. The June 17 Response stated, among other things, as follows: “As I indicated in our telephone conference call, these programs were not perceived as online programs by COE although I did understand that some of the General Education courses for the NCCER-based programs may include online options either for retrieving assignments or for accessing student work.” *Id.* In the June 17 Response, Mr. Wittig also discussed several aspects of the enclosed documents, including that attached state approval applications had “no mention of online instruction,” and expressed his “conviction that these programs are not intended to be taught in an online environment.” *Id.*

On August 1, 2005, Mr. LoBosco sent Defendant a letter (the “August 1 LoBosco Letter”) outlining the Department’s understanding of how the Programs were actually being offered through distance education and asking Defendant whether Defendant had approved the Programs as outlined. DX 1. As further discussed below, Defendant did not respond to the August 1 LoBosco Letter in writing until August 23, 2005.

In the meantime, on August 18, 2005, at Mr. Puckett’s request, Mr. Puckett, Mr. Wittig and Harry Bowman, Defendant’s former president (“Mr. Bowman”), met in Washington, D.C. with Mr. Barth and the Department’s Chuck Mula (“Mr. Mula”) and Carol Griffiths (“Ms. Griffiths”). Among other things, Mr. Puckett emphasized at the meeting that Defendant had not approved Plaintiff’s offering of the Programs primarily through distance education. 3/28/12 Tr. at 129-30.

By letter dated August 23, 2005 (the “August 23 Response”), Mr. Puckett responded to the August 1 LoBosco Letter, with copy to Mr. Barth. PX 9. In the August 23 Response, Mr. Puckett

stated that Defendant “understood that these degrees would be taught primarily using the traditional delivery mode with limited distance education, which may include the general education courses as an option and access to instructional materials via the Internet.” *Id.* He concluded that “COE did not approve these associate degrees to be offered primarily through distance education as outlined above.” *Id.* In reaching this conclusion, Mr. Puckett discussed several parts of the applications that described methods of instruction but made no mention of online learning and parts of the applications that stated that the Programs would have the same technical coursework as previously approved certificate programs, which were approved for “traditional” delivery. *Id.* Mr. Puckett did note that the applications stated that the Programs would be taught “day/evening/online,” but further noted that in response to Defendant’s query about the same, Plaintiff’s staff had responded that “students would have access to instructional materials via the internet.” *Id.* He also stated that “COE was aware that the general education courses would also be available via the internet as an option.” *Id.*

On August 26, 2005, Mr. Puckett sent a letter to Mr. Mula enclosing Plaintiff’s latest annual report and self-study (the “August 26 Letter”). PX 75. In the August 26 Letter, Mr. Puckett asked Mr. Mula to “note that the program and course descriptions make no mention of distance education.” *Id.* He also noted that the “self-study makes several references to distance education” but added that “the self-study is not the appropriate document to report a substantive change such as changing a traditional program to one that is offered by distance education.” *Id.* He further stated that “COE approved the programs in question to be offered as traditional programs based on the applications submitted by the institution.” *Id.*

On September 9, 2005, Mr. Puckett sent a letter to Mr. Barth, with copy to Mr. Mula, thanking Mr. Barth for the August 18, 2005 meeting (the “September 9 Letter”). PX 31. In the September 9 Letter, Mr. Puckett stated that “[i]t was important to communicate with you COE’s position on Decker College and to clarify that the programs in question had not been approved to be offered primarily through distance education.” *Id.*

On September 30, 2005, Mr. Puckett sent a letter (the “September 30 Letter”) to William Weld, Chief Executive Officer of Plaintiff (“Mr. Weld”), with copy to Mr. LoBosco and Mr. Barth, conveying Defendant’s formal decision to affirm the June 17 Response. In the September 30 Letter, Mr. Puckett stated as follows:

As stated at the September 19, 2005, Commission meeting, the degree programs in question remain approved as a part of your accredited institution. However, they must be delivered by the traditional method of instruction, except for the general education courses which may be offered as a distance education option. The critical element is that the programs were approved to be “taught primarily using the traditional delivery mode” as stated in my letter of August 23, 2005. The programs were not approved to be taught primarily through the distance education mode of delivery.

PX 54.

B. Were the Statements Factually Erroneous?

As is clear from the above findings, the Statements boil down to one primary assertion, that Defendant had not approved Plaintiff’s offering of the Programs through distance education. In order to determine whether such assertion was factually erroneous, the Court will consider the relevant criteria for application and approval of program accreditation applications used by Defendant, the actual content of Plaintiff’s accreditation applications, Defendant’s actions in communicating its approval of the applications, and Defendant’s actions between approving the Programs and making the Statements.

1. Relevant Application/Approval Criteria

Defendant’s Handbook of Accreditation (the “Handbook”) sets forth in detail Defendant’s expectations for institutions accredited or seeking accreditation and reaffirmation of accreditation by Defendant. It also provides such institutions guidance concerning what they can expect from Defendant. The Handbook states that accreditation “has two fundamental purposes: (1) to assure the quality of the institution or program and (2) to assist in the improvement of the institution or program.” PX 3 at 1. It is considered the “bible” of Defendant. 3/29/12 Tr. at 22. There are ten “Standards” that institutions must address in seeking accreditation. *See* PX 3 at 37-55.

“Standard Two” of the Handbook sets forth Defendant’s accreditation objectives with respect to educational programs. PX 3 at 39-42. Those objectives include, among other things, the following: “To assure that the title, program length, and general education components of all associate degree programs offered meet or exceed the minimum acceptable requirements as defined in the criteria” and “[t]o assure that all programs offered by the institution, regardless of location or

mode of delivery, are qualitatively consistent with those offered on the main campus.” *Id.* at 39. With regard to instruction specifically, Defendant seeks to assure that “instruction is competency-based, including current knowledge, skills, and work ethics relevant to the occupations for which the programs prepare students” and that “competencies are taught with equipment and in settings reflecting current workplace requirements.” *Id.* at 39-40. As further stated in the Handbook, Defendant seeks to assure that “sufficient practice is provided with equipment and materials similar to those currently used in the occupation” and that “[i]nstruction in classrooms, shops, laboratories, and distance education locations is effectively organized as evidenced by course outlines, lesson plans, competency tests, and other instructional materials.” *Id.* at 42. “Distance education” is defined in the Handbook “for purposes of accreditation review” as “a formal educational process in which the majority of the instruction occurs when student and instructor are not in the same place....” *Id.* at 57.

In 2004, Plaintiff was already accredited by Defendant to offer several certificate programs. It sought to extend its accreditation to include accreditation of the Programs. To do so, Plaintiff had to submit applications in the form designated by Defendant (the “Application Form”). *See* PX 2, PX 4 and PX 23. As admitted by Defendant, when Plaintiff applied for accreditation of the Programs in 2004, the Application Form did not ask applicants “to break out the quantity of online versus classroom instruction.” 3/28/12 Tr. at 115. Although expressing generally Defendant’s objective to ensure quality of program regardless of mode of delivery and identifying generally the types of materials that would evidence effective organization of instruction, the Handbook also did not at that time mandate the particular information to be submitted with respect to an institution’s distance education programs or that a particular procedure be followed concerning approval of distance education.

In 2004, Plaintiff also had to undertake reaffirmation of its institutional accreditation. According to the Handbook, the accreditation process “incorporates a comprehensive institutional self-study, peer evaluation, and decision of the Commission based on Council-approved standards and criteria for accreditation.” PX 3 at 11. Reaffirmation of accreditation, which institutions must seek two to six years after initial accreditation, also includes self-study and peer evaluation. PX 3 at 24. The self-study examines “an institution’s qualifications for accreditation through a comprehensive self-evaluation conducted by institutional personnel.” PX 3 at 11. As part of the

peer evaluation of an applicant, Defendant sends a visiting team to the applicant “to determine whether or not the institution is in compliance with the standards and criteria required for accreditation....” *Id.* According to the Handbook, “[i]nformation sources utilized by team members in conducting the on-site evaluation include the institutional self-study report, documentation available at the institution, interviews of individuals associated with the institution, and observation of conditions and practices.” *Id.*

2. Plaintiff’s Applications

Plaintiff submitted its application for accreditation of its Associate of Applied Science (“AAS”) in Carpentry Science program on April 12, 2004, its AAS in Electrical Science program on May 5, 2004, and its AAS in HVAC Science program on May 5, 2004. *See* PX 2, PX 4, and PX 23. With one exception, discussed below, the three applications contain the same disclosures with regard to Plaintiff’s intention to use distance education.¹ They consist of Plaintiff’s reference to “online courses” in response to Question 9 of the Application Form, its reference to a “Division of Distance Education” in personnel forms attached to its applications in response to Question 14 of the Application Form, and, with respect to the Carpentry Science and HVAC Science programs, its reference to “distance education” in the application for accreditation to the Georgia Nonpublic Postsecondary Education Commission (the “Georgia Commission”) attached in response to Question 22 of the Application Form.² *Id.*

Question 9 of the Application Form states as follows: “Identify by main campus, branches and extensions, the locations where the new program will be taught. (Also indicate type of classes – day or evening – and clock hours per week, etc.)” Plaintiff responded with the following:

Decker College, Main Campus, Louisville, KY

Decker College, Branch Campus, Atlanta, GA

Day/Night/On-line courses offered, generally 12 hours a week

¹Indeed, the parties have stipulated that the applications are substantially similar.

²It is not clear to the Court that Plaintiff attached the Georgia materials to the Electrical Science program application. *But see* PX 57.

PX 2 at COE00017121, 29, PX 4 at COE00002223, and PX 23 at 4.

Question 14 of the Application Form, among other things, asks applicants to “[c]omplete the attached Personnel Form for each NEW person employed in an administrative or instructional capacity in connection with this new program.” *Id.* In response, Plaintiff completed and attached two such forms, each identifying an employee of “Decker College, Division of Distance Education.” PX 2 at COE00017175-76, PX 4 at COE00002269-70, and PX 23 at 64-65.

Question 22 of the Application Form states as follows: “Provide evidence of licensure and/or certification by state and local agencies showing the institution is approved to conduct this training.” Plaintiff responded as follows: “Please see evidence of licensure by the appropriate boards of Kentucky to verify that Decker College is approved to conduct this training.” PX 2 at COE00017122, 30, PX 4 at COE00002224, and PX 23 at 5. In the applications for Carpentry Science and HVAC Science, rather³ than attaching evidence of licensure by Kentucky, Plaintiff attached a copy of Exhibit E to its application for licensure to the Georgia Nonpublic Postsecondary Education Commission (the “Georgia Application”). PX 2 at COE00017205-06 and PX 23 at 103-04. In Item 15 of the Georgia Application, which asks applicants to “Check All Applicable Boxes to Describe the Program of Instruction,” Plaintiff marked as applicable, “Taught through distance education” as well as “Taught on campus,” “Taught at remote locations,” and “Normally taught during the day.” *Id.*

With respect to the responses to Question 9 of the Application Form, Mr. Wittig testified that “on more than one occasion” prior to Plaintiff’s submission of its applications he spoke with Cindy Thomas, then Director of Regulatory Compliance for Plaintiff (“Ms. Thomas”), and that she “did mention” that Plaintiff’s applications would include “a distance education option for the general education course and an online component for the construction courses.” 3/29/12 Tr. at 180. Ms. Thomas testified that she did not recall speaking with Mr. Wittig about distance education and that it would not have been inaccurate for her to have told him that only general education courses would be taught through distance education. Transcript of Videotaped Deposition of Cindi Thomas at 40. Both witnesses were credible, leading the Court to believe that perhaps there was a mis-

³It is not clear to the Court whether Plaintiff also attached the Kentucky materials to these applications. *See* PX 57.

communication during their conversations. In any event, Mr. Wittig never confirmed his understanding of Ms. Thomas's statement in writing and never requested that Plaintiff supplement its application formally to clarify its response to Question 9. From this, the Court must infer that Defendant was not really concerned about the extent of Plaintiff's on-line delivery of course content.

With regard to the responses to Questions 14 and 22, Defendant argues that such references to "distance education" were "buried" in Plaintiff's applications and that, therefore, they could not constitute adequate disclosure of Plaintiff's intentions. The Court notes, however, that Plaintiff made such statements in forms and documents attached to its applications *at Defendant's request*. Accordingly, it is reasonable to expect that Defendant would have reviewed such material and noted the statements. Indeed, the person assigned by Defendant to review Plaintiff's applications for completeness, Mr. Wittig, grudgingly admitted seeing the reference to distance education in the Georgia Application, although he also maintains that Georgia's definition of "distance education" is not necessarily the same as the Handbook's definition. 3/29/12 Tr. at 220, 244. That being the case, it was incumbent upon Defendant to request formal clarification from Plaintiff concerning at least that disclosure. Because Defendant did not request such clarification, the Court must infer that Defendant was not concerned with the manner of Plaintiff's delivery of course content.

In addition, although not expressly referring to distance education, Plaintiff responded to Question 8 of the Application Form, which, among other things, asked applicants to provide documentation showing the date the applicant informed Defendant of its plan to offer the particular program, by referring to "multiple meetings over the last year....used not only to apprise COE of our intent to offer this associate degree as well as others, but also to gather information to help us with the development of this initiative and garner support for the program." PX 2 at COE00017125, 33, PX 4 at COE00002227, and PX 23 at 8. This referred to a series of meetings in 2003 and 2004 held with representatives of Defendant (the "Pre-Application Meetings") at which, according to credible testimony by, among others, Mr. Weld, Plaintiff's representatives and agents discussed Plaintiff's plans for distance education in detail, including through the use of electronic presentation and an demonstration of the actual program. 3/26/12 Tr. at 55-60. Other witnesses testifying to that effect included Robin Baliszewski ("Ms. Baliszewski"), then President of the Career Health Education and Technology Division of Pearson, PLC, a third-party contractor with Plaintiff. *See* Video Deposition of Robin Baliszewski at 5-6. Mr. Puckett did not deny attending at least some of the Pre-Application

Meetings but did not recall much of the details of the meetings and testified that he did not take from those meetings the impression that Plaintiff was intending to implement its programs through distance education. 3/28/12 Tr. at 30-35. The Court finds Plaintiff's witnesses more credible than Mr. Puckett, particularly Ms. Baliszewski. Ms. Baliszewski, who has no direct stake in the outcome of this litigation, testified in at great length and in great detail about the discussion and demonstration of distance education at the meetings and her belief that Defendant supported Plaintiff's intention to pursue the same. Video Deposition of Robin Baliszewski at 29-58. In contrast, Mr. Puckett, who is still Defendant's Executive Director, had difficulty remembering any details of the meetings. Accordingly, the Court finds that Plaintiff did disclose its intention to offer the Programs through distance education during the Pre-Application Meetings.

Defendant argues that Plaintiff did not clearly disclose its intention to offer the Programs through distance education in its applications, citing several instances where it believes Plaintiff should have included references and/or discussions of the details of its proposed programs. For example, Defendant points to the budgets attached to the applications, noting that they do not include items that one might expect to be needed to offer courses on-line, and points to where Plaintiff stated that "there is no change in our organizational chart as a result of adding this program" in response to Question 15 of the Application Form, which requested disclosure of any such changes. Defendant's argument about what and where Plaintiff should have discussed its intentions regarding distance education does not, however, address the disclosures that Plaintiff *did* make. Those disclosures, however cursory, put Defendant on notice that Plaintiff intended to use some form of distance education to deliver course content. If Defendant was truly concerned about the *mode* of delivery of course content, as opposed to the course content itself, it would have sought formal clarification from Plaintiff of its intentions.

3. Defendant's Approval of the Programs

On June 15 and 16, 2004, Defendant sent Plaintiff letters approving the Programs (the "Approval Letters"). PX 11. The Approval Letters were identical except for the list of approved programs and stated in pertinent part as follows:

The Commission of the Council on Occupational Education has received and reviewed the applications and reader reports for the offering of new associate degree programs.

Based on the applications and reader reports, the Commission has extended accreditation to include the following new associate degree programs for inclusion in the list of approved programs for Decker College, 981 South 3rd Street, #106, Louisville, KY 40203:

....

- * AAS in HVAC Science - 90 Quarter Hours
- * AAS in Carpentry Science - 90 Quarter Hours

....

- * AAS in Electrical Science - 90 Quarter Hours

....

- * AAS in Carpentry Science - 90 Quarter Hours (Atlanta, GA)

....

Id. Although the Approval Letters did not specifically address distance education, Defendant's approval of the Programs was expressly "based on the applications."⁴ Given that the applications disclosed Plaintiff's intention to offer the Programs through distance education, as discussed above, the Approval Letters' reference to the applications implicitly authorized Plaintiff to do so.⁵

4. Defendant's Pre-Statement Actions

Was Defendant's behavior toward Plaintiff during the time between issuing the Approval

⁴The Approval letters also made reference to "reader reports," which were checklists completed by the persons assigned by Defendant to review the substance of the applications. The checklists focused on course content and teacher qualification. None of the checklist items addressed *mode* of delivery of course content.

⁵Defendant asserts that because approval letters sent to other applicants expressly addressed distance education, Defendant would have also addressed it in the Approval Letters if Defendant intended to approve Plaintiff's use of the same. The Court finds Defendant's assertion unpersuasive. First, as discussed above, nothing in the Application Form or the Handbook mandates any specific procedure concerning distance education proposals. Second, Defendant did not provide sufficient evidence to persuade the Court that Defendant had developed a standard practice to permit applicants to offer distance education only if expressly approved in their program approval letter. Indeed, if Defendant's behavior with respect to Plaintiff's application is any indication, Defendant's standard practice at the time would seem to have been to pay very little attention to the details of proposed distance education programs.

Letters and making the Statements consistent with the fundamental premise of the Statements, that Plaintiff had not been approved to offer the Programs through distance education? As discussed below, Defendant's actions during this period indicates that Defendant must have been aware of the mode of delivery of Program content when it sent the Approval Letters—i.e. further proof that Defendant had approved Plaintiff's distance education program.

As discussed above, Plaintiff was required in 2004 to obtain reaffirmation of its institutional accreditation, the procedures for which include a detailed self-study by an applicant followed by peer evaluation through site visit. In August of 2004, Plaintiff submitted its comprehensive self-study to Defendant (the "Self-Study"). PX 10. The Self-Study is divided up into ten sections responding to the substantive "Standards" for accreditation set forth in the Handbook. *Id.* It also includes an introductory "Institutional and Community Characteristics" section, a glossary, and a list of exhibits. *Id.*

The Self-Study contains several discussions and references to Defendant's distance education programs.

The "Institutional and Community Characteristics" section of the Self-Study includes a page entitled "Institutional and Community Characteristics of Distance Education," which, among other things, states as follows:

The Division of Distance Education is currently offering classes for the electrical science program and is planning to expand to include classes for the carpentry program in the very near future. Although the distance education division was just created in April of 2004, as of July 1, 2004, its enrollment was already 293.

Id. at 13.

In the "Standard 2 Educational Programs" section of the Self-Study, Plaintiff states in the introduction to that section that "[w]e have begun offering classes through Distance Education in 2004" and that the program "is in the process of evolving and is constantly developing new and better defined methods and organizations." *Id.* at 44. Also in the "Standard 2" section, under subsection 8 entitled "Requirements for Associate Degree programs," Plaintiff provides a detailed breakdown of the weeks spent "on site," 9, and weeks spent "on line," 53, for its distance education programs, stating as follows:

The associate degree programs with some classes offered through Distance Education, in conformity with the programs described above, are 90 credit hour

programs with 24 hours of general education courses, completed in 62 weeks. The program is specifically geared to provide a combination of on-site and on-line training, which together fulfill the training and career goals of all registered students.

Id. at 58. Sub-section 9 of “Standard 2,” entitled “Consistency of Programs” makes several references to distance education and online resources, including stating that [t]he Division of Distance Education is currently formulating and refining academic procedures and policies specific to this delivery model.” *Id.* at 59-60.

In the “Standard 4 Strategic Planning” section of the Self-Study, Plaintiff includes within the “Analysis” section, a subsection entitled “1. Strategic Plan” that discusses Plaintiff’s eight long-term objectives and identifies actions (the “Goals”) to be accomplished in “the upcoming three years” to achieve those objectives. *Id.* at 280-2. Among other things, “Goal 6: Transition Programs for Distance Education” of that subsection states as follows:

Decker College has partnered with Prentice Hall, Connected Learning, IntraLearn Software and Monster.com for our distance education initiative. This is a brand new venture for us, to be built from the ground up. We will be offering the same construction crafts curricula created by NCCER as we are currently offering on our campuses. We are reviewing the Title IV regulations which concern incorporating distance education delivery modes into our program offerings. We want to ensure that qualified students electing to enroll in distance education courses will remain eligible for Title IV assistance.

Id. at 284. “Standard 4” also includes a subsection entitled “3. Evaluation of Progress” that discusses Plaintiff’s “list of accomplishments” in 2004 by reference to the “Goals.” There Plaintiff discusses in detail its progress toward implementing “Goal 6: Transition Programs for Distance Education,” including a description of administrative positions filled, current enrollment and enrollment growth rate, and program infrastructure development. *Id.* at 288-89.

On August 23, 2004, Defendant sent an eight-member site visit team to Plaintiff. *See* PX 40 at cover page. Defendant has published formal “Guidelines for Accreditation Visiting Teams” (as in effect in 2004, the “Visiting Team Guidelines”). PX 74. According to the Visiting Team Guidelines, the visiting teams are responsible for determining “if the institution is in compliance with the policies, rules, standards and criteria of the Commission.” *Id.* at 1. Team members “are evaluators and not inspectors” and are charged with evaluating an institution “in the light of its stated mission using the policies, rules, standards, and criteria as the evaluation criteria.” *Id.*

According to the Visiting Team Guidelines, “[t]he Self-Study Report is a primary source of information, but the team also examines the supporting documents used in compiling the Self-Study Report.” *Id.* Under the “Team Member Procedures” section of the Visiting Team Guidelines, are directed as follows:

Before arriving at the campus, members of the team should read the total Self-Study Report, other information provided by the institution, the *Handbook of Accreditation*, and the *Guidelines for Accreditation Visiting Teams*. Team members should give special attention to their specific assignments made in advance by the Commission staff or team leader and corresponding sections of the standards of the Commission.

Id. at 2 (italics original). The Visiting Team Guidelines also include “Team Leader Procedures” for the team member given overall responsibility for coordinating the site visit and subsequent report to Defendant, which, among other things, directs the team leader to “remind team members to review all materials; such as ... Institution’s Self-Study....” *Id.* at 10.

Responsibility for evaluating various aspects of an institution is divided up among site visit team members. 3/29/12 Tr. at 40-43. In practice, despite the express language of the Visiting Team Guidelines directing *all* team members to review *all* of the materials provided by an institution, visiting team members typically read the portion(s) of the self-study concerning their specific assignment and perhaps the introductory materials. 3/29/12 Tr. at 44. A team leader would typically read the entire self-study at least once, and perhaps more than once. 3/29/12 Tr. at 62. Thus, each section of the self-study would normally be read by at least one member of the site visit team.

In the case of the Self-Study, one or more members of the site visit team must have reviewed the portions of the Self-Study discussed above. First, as discussed above, site visit teams were expected to evaluate compliance with all of the Standards, even if responsibility for particular Standards was divided up among team members. Second, as discussed further below, the notes and reports of the site visit team as well as testimony by Plaintiff representatives who interacted with members of the site visit team indicates awareness of Plaintiff’s distance learning programs.

On the first page of the “COE APPROVED PROGRAM VERIFICATION” (the “Verification Report”)⁶ signed and sent to Defendant by Lee Chayes (“Ms. Chayes”), the site visit

⁶The Verification Form is used by Defendant to verify that programs being taught at an institution match those listed as approved in Defendant’s records. 3/29/12 Tr. at 155-56.

team leader, someone from the site visit team hand-wrote “Electrical Science Carpentry Science Dist Ed” at the bottom of the form. PX 83, unnumbered first page, underlining original. No evidence was submitted concerning who wrote this note, although it does not appear to be Ms. Chayes’ handwriting. The handwriting appears to be that of site visit team member Danny Lemoine (“Mr. Lemoine”) based on the handwritten report apparently written by Mr. Lemoine as part of personnel interviews conducted by Mr. Lemoine during the site visit. See PX 83 at COE00017745. In any event, given that the form was prepared by the site visit team, *someone* from the site visit team must have written the note.

Ms. Schooler testified that the Verification Report would have come to her desk, although she also indicated that she would not necessarily review the Verification Report unless the site team leader had telephoned her to advise that there was “something new.” 3/29/12 Tr. at 155-56.

In the hand-written reports of personnel interviews by site visit team members (the “Personnel Interview Reports”), there are several notations of interviews of Plaintiff personnel who have “Dist Ed” or “Distance Learning” in their job titles. PX 83 at COE00017739, 45. One of the author’s of those notations, site visit team member Carol Snoddy (“Ms. Snoddy”), denied in her testimony that she became aware of Plaintiff’s distance education program during the site visit. 3/29/12 Tr. at 79-80. Her demeanor in this portion of her testimony, however, was defensive and her testimony was evasive—i.e. not particularly credible, especially in light of her own notes, which show that she spoke with *four* persons who at least identified their job titles as related to “Dist Ed.” PX 83 at COE00017739. The Court finds it incredible that Ms. Snoddy would not have at least asked about the reference to “Dist Ed,” especially given her claimed diligence in other aspects of site team visits and her admitted familiarity with distance education.⁷ 3/29/12 Tr. at 49-50, 56. Defendant did not call the other author of the notations, Mr. Lemoine, to testify even though, as discussed above, it appears that Mr. Lemoine was perhaps the author of the handwritten reference

⁷Ms. Snoddy’s diligence in other areas is illustrated by the following exchange with the Court:

THE COURT: Did you review the self-studies in detail as team leader?

THE WITNESS: As a team leader I did, every word, more than once.

THE COURT: Of the self-study?

THE WITNESS: Of the self-study, more than once.... Usually twice and three times. 3/29/12 Tr. at 56.

to “Dist Ed” on the first page of the Verification Report.

Two of Plaintiff’s witnesses, Jeffery Woodcox, then shareholder and member of Plaintiff’s Board of Directors (“Mr. Woodcox”), and Mr. Weld, testified that two members of the site visit team, one of whom was Mr. Lemoine,⁸ were given a tour and demonstration of the distance education facilities. 3/26/12 Tr. at 71-72, 138-39. Mr. Weld further testified that Mr. Lemoine was so impressed that he wanted Plaintiff to send someone down to his own school in New Orleans to work with them. 3/26/12 Tr. at 72. Mr. Woodcox testified that after the site visit, Defendant sent other schools accredited by Defendant to view Plaintiff’s distance education facilities. 3/26/12 Tr. at 142. Mr. Woodcox’s and Mr. Weld’s testimony here was consistent and credible, at least with respect to the site visit team members viewing Plaintiff’s distance education facilities. Defendant did not offer Mr. Lemoine’s testimony to refute that of Mr. Woodcox and Mr. Weld.

Upon completion of the site visit, the site visit team prepared and delivered to Defendant its formal Visiting Team Report (the “Visiting Team Report”), which, among other things, attached the Verification Report and Personnel Interview Reports and reported that “[t]he institution has informed the Commission of all planned and unplanned substantive changes.” PX 40 at 2. Although the Visiting Team Report identified several areas of deficiency to be addressed by Plaintiff, none of those implicated Plaintiff’s distance education.

From February 12-15, 2005, Defendant’s “Commission” (“Defendant’s Commission”), comprised of representatives of member institutions and Mr. Puckett, met to consider, among other things, Plaintiff’s reaffirmation of accreditation. 3/29/12 Tr. at 11. At this meeting, Defendant’s Commission reviewed the Self-Study, Visiting Team Report, Plaintiff’s response to the Visiting Team Report, and “other supporting documentation for reaffirmation of accreditation.” *See* PX 46. Defendant’s Commission decided at the meeting to defer reaffirmation of Plaintiff’s accreditation and send another site visit team to conduct a “focused review” to verify whether Plaintiff was now in compliance in the areas of deficiency identified in the Visiting Team Report.⁹ *Id.* Defendant’s

⁸The witnesses could not recall the name of the other site visit team member.

⁹The “focused review” site visit did not take place until June 22-23, 2005, after Defendant began making the Statements. Nevertheless, as with the first site visit team, the focused review site visit team concluded that “[t]he institution has informed the Commission of all planned and unplanned substantive changes.” PX 26 at COE0088. The team came to this

communication to Plaintiff of the decision of Defendant's Commission made no mention of Plaintiff's distance education program.

On April 25, 2005, Plaintiff sent a letter to Defendant, to Mr. Wittig's attention, advising Defendant that Plaintiff had "received approval from the Kentucky State Board for Proprietary Education to add the Associate of Applied Science HVAC Science program to the current curriculum that is offered with a distance education component." PX 19. As admitted by Mr. Wittig in his testimony, the letter enclosed, among other things, documentation identifying instructors in the "division of distance education" who would be teaching "things like carpentry and electrical within the construction crafts." 3/29/12 Tr. at 214. Defendant took no action in response to this letter.

Finally, according to Mr. Weld's credible testimony, Mr. Puckett requested that Mr. Weld arrange a meeting with U.S. Congressman John A. Boehner ("Mr. Boehner"), then Chairman of the Committee on Education and the Workforce of the U.S. House of Representatives, which took place on May 11, 2005. 3/26/12 Tr. at 75. Mr. Weld further testified that at the meeting, attended by representatives of several educational institutions, he "glowingly" described the nature, structure, and majority on-line component of Plaintiff's distance education programs and that Mr. Boehner applauded Plaintiff's efforts. *Id.* at 76. Dr. Puckett sat next to Mr. Boehner at a "small table" with Mr. Weld but testified that he does not recall such discussion. *Id.*; 3/28/12 Tr. at 108. The Court finds Mr. Puckett's lack of recollection somewhat incredible given the detail of Mr. Weld's testimony.

During the period between Defendant's approval of the Programs and making of the Statements, Defendant must have been aware of Plaintiff's distance education program. Given the evidence discussed above, the Court finds that Plaintiff discussed the program in some detail in the Self-Study, which at least one or two members of the site visit team would have reviewed as part of their mandated duties. The Court also finds that the Visiting Team Report refers to Plaintiff's distance education program in several places, demonstrating knowledge of the same by the site visit

conclusion despite Mr. Puckett having informed them about Plaintiff's distance education programs and Mr. LoBosco's inquiry concerning the same and despite having reviewed, and commented on, Plaintiff's "distance learning program." 3/28/12 Tr. at 63-64; PX 26 at COE0100.

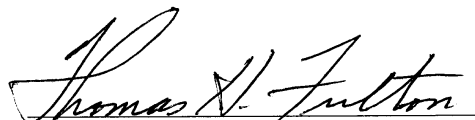
team, yet also includes a finding of no undisclosed substantive changes in Plaintiff's programs. The Court finds that representatives of Defendant received and reviewed the Visiting Team Report. Other instances of Plaintiff communicating information about its distance education programs—the report of approval of one of its programs by Kentucky regulators and the discussion of the distance education programs at the meeting with Mr. Boehner and Mr. Puckett—also lead the Court to find that Defendant was aware of Plaintiff's distance education efforts.

Defendant took no action during this period despite such knowledge. If Defendant only became aware of the distance education when Plaintiff completed the Self-Study or because of the Site Visit, it surely would have raised the issue with Plaintiff at that time. From its failure to do so, the Court must infer that Defendant had previously been aware of and approved Plaintiff's offering of the Programs through distance education.

CONCLUSION

Based on the foregoing findings, the Court finds that the Statements were factually erroneous. The Handbook and Application Form did not expressly require Plaintiff to submit detailed information regarding its intention to offer the Programs using distance education. Plaintiff disclosed to Defendant its intention to offer the Programs through distance education during the Pre-Application Meetings. It further disclosed its intention in its applications by indicating that its programs would be taught through distance education in response to Questions 9, 14 and 22 of the Application Form. These disclosures put Defendant on notice of Plaintiff's general intention and made it incumbent upon Defendant to inquire further if Defendant was indeed concerned about the details of Plaintiff's online delivery of course content. Defendant did not formally request further information but instead issued the Approval Letters, which did not contain any restrictions as to method of delivery of course content. Following approval of the Programs, prior to making the Statements, Defendant expressed no concern about Plaintiff's use of distance education despite Plaintiff's substantial discussion of the same in the Self-Study and other written and verbal communications, and despite Defendant's opportunity to observe the same during its site visit. This belies Defendant's assertion that it was not aware of Plaintiff's use of distance education. For all of these reasons the Court must find that Defendant in fact approved delivery of the Programs through distance education and that, therefore, the Statements were false insofar as they asserted that

Plaintiff had not been approved to offer the Programs through distance education.

A handwritten signature in black ink, reading "Thomas H. Fulton". The signature is written in a cursive style with a horizontal line underneath the name.

Thomas H. Fulton
United States Bankruptcy Judge

Dated: July 10, 2012