

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

**ASHFORD UNIVERSITY, LLC and
MICHAEL BLACKWELL ,**

Petitioners,

and

**IOWA DEPARTMENT OF EDUCATION
and the IOWA STATE APPROVING
AUTHORITY,**

Respondents

Case No.: EQCE080188

**RULING ON PETITION FOR JUDICIAL
REVIEW**

On June 23, 2017, hearing was held on this petition for judicial review. Gerard Kelly and Matthew Eslick appeared for petitioners, Ashford University, LLC and Michael Blackwell. Jordan Esbrook appeared for respondents, Iowa Department of Education and the Iowa State Approving Authority (“IDOE”).

In 2016, IDOE notified Ashford University it was no longer approved for receipt of federal Veterans Administration (“VA”) education benefits for its online courses, because Ashford had moved its main campus from Iowa to California. Ashford denies it moved its main campus to California, and challenges IDOE’s decision on legal and factual grounds. IDOE asserts that California is now the state with authority under the federal regulations to consider Ashford’s eligibility to receive VA education benefits.

The central issue in this case involves interpretation of two federal regulations governing approval of online courses for students to receive VA education benefits. In general, the regulations require that in order for a state to have approval authority, the school’s “main campus” must be located in that state.

STATEMENT OF THE CASE

This is a judicial review action under Iowa Code Chapter 17A. Petitioners allege the IDOE's decision was based upon an erroneous interpretation of a provision of law; based upon a procedure or decision-making process prohibited by law; was not supported by substantial evidence in the record; is inconsistent with the IDOE's prior practice or precedents; is not required by law and its negative impact on the private rights affected is grossly disproportionate to the benefits accruing to the public interest; and is otherwise unreasonable, arbitrary, or capricious, in violation of Iowa Code Sections 17A.19(10)(c), (d), (f), (h), (k), and (n).

The United States government, through the Veterans Administration, provides financial assistance to veterans to attend colleges and universities. States must approve courses for VA benefits. 38 U.S.C. § 3672(a). Courses are approved by the state approving agency "for the State where such educational institution is located . . ." 38 U.S.C. § 3672(a). VA regulations further define the meaning of this provision, and are discussed below.

The IDOE acts as the state approving agency for courses offered by colleges and universities located in Iowa. The IDOE's decision concerning Ashford is contained in a series of letters sent to Ashford in 2016, culminating with a final letter from IDOE's director on August 19, 2016. (Joint Agency Rec., Ex. 9) IDOE informed Ashford that because it had moved its main campus to California, the Iowa Department of Education no longer had jurisdiction to approve Ashford's online courses for VA educational benefits. (IDOE's decision is stayed pending outcome of this case; thus Ashford continues to receive of VA education benefits at this time.)

There was no contested case hearing in this case, therefore the court is reviewing "other agency action" under the Iowa Administrative Procedures Act, Iowa Code Chapter 17A. The parties filed a stipulated Joint Agency Record on April 24, 2017, and an amendment on May 3, 2017. This consists of Exhibits 1 - 10, which is correspondence between IDOE and Ashford. In

addition, Ashford filed many additional documents on April 7, 2017, Exhibits A-III. Although IDOE initially resisted including these documents in the record, at hearing this objection was withdrawn. The court will consider Exhibits 1-10, and Exhibits A-III.¹

FACTS

Ashford University was formerly Mount St. Clare College in Clinton, Iowa. In 2005, Ashford took over the college, and renamed it. Third Am. Pet. (filed March 21, 2017), ¶ 15. Ashford is a private, for-profit university owned by Bridgepoint Education, Inc. Ex. HH, p. 2.² (Plaintiff Michael Bradford was a student receiving VA education benefits when the original petition was filed. He is currently “taking a break from studies.” Third Am Pet., ¶ 16.)

In 2015, Ashford announced it would be closing its campus in Clinton, Iowa, and that all its classes would be offered online. *See* Ex. RR; Third Am. Pet, ¶¶ 24, 31. Currently the vast majority of Ashford’s students are enrolled in online courses. These include approximately 6,250 military veterans enrolled in classes through online classes at Ashford. These students are located all over the country and outside the U.S., and have been entitled to GI Bill educational benefits. As of July 2016, only 40 online Ashford students were located in Iowa, and only 25 students were residential students located in Iowa completing student teaching through a “teach-out” program. Joint Agency Rec., Ex. 10, p. 2; Ex. TT. The students in the teach-out program were scheduled to complete their coursework by June 1, 2017. Joint Agency Rec., Ex. 10, p. 2; Ex. E; *see also* Third Am. Pet, ¶ 15.

These were Ashford’s only remaining residential students; all other courses were being offered online. Any students at the Clinton, Iowa campus who did not complete their degrees by June 1, 2017, would do their remaining coursework online. Third Am. Pet, ¶¶ 15, 25. Ashford

¹ The court does not consider other documents cited by IDOE in its brief.

² All lettered exhibits are found in Plaintiffs’ Amended Additional Designations to the Agency Record, filed April 7, 2017.

also moved its Iowa administrative offices from the former campus location to a different location in Clinton. Ex. E, p. 2.

The federal Department of Veterans Affairs delegates to state approving agencies the approval of courses offered by colleges and universities for receipt of GI Bill educational benefits. The Iowa Department of Education is the designated state approving agency for colleges and universities located in Iowa to receive VA educational benefits.

Since 2005, IDOE approved the online courses taught by Ashford for receipt of VA benefits. The most recent approval was on March 8, 2016. Joint Agency Rec., Ex. 1. That IDOE approval states, “Locations outside the State of Iowa may require approval from the state where the campus/branch/operations are/is located.” *Id.*, p. 3.

On March 17, 2016, Bill Spruce, a VA representative, contacted Tom Beasley, Education Program Consultant with the IDOE’s State Approving Authority. *See* Ex G. The VA email informed IDOE that Ashford’s website lists its address as San Diego, California, and that the web site states Ashford’s “main campus” is in San Diego. Ex. G, pp. 3-4. Spruce asks, “Are you aware of this situation because WEAMS³ shows that this institution is located in Clinton Iowa?? Please advise.” *Id.* Beasley responded that day, stating Iowa was aware of the situation, and had been in contact with the California approving authority. Ex. G, p. 3. Beasley’s email states that Iowa’s approval is contingent upon Ashford having a residential campus in Iowa. *Id.* It also states, “We (Iowa) continue to believe that because Ashford operates a residential campus in Iowa the school is an Iowa school for GI Bill purposes. We are not sure what our position will be when the residential campus closes.” *Id.*

On May 2, 2016, Beasley notified Ashford that IDOE would no longer be the state approving agency for Ashford, because Ashford had announced that it would be closing its Clinton, Iowa campus and moving its main campus to California. Joint Agency Rec. Ex. 2.

³ WEAMS is a VA report available online. Ex. ZZZ, Dommer Dep., p. 47.

“Iowa will no longer approve academic programs for GI Bill benefits after June 30, 2016 for Ashford University online students.” *Id.* On that same day, Beasley sent an email to Ashford’s Vickie Schray, Ashford’s Senior Vice President for Regulatory Affairs and Public Policy, acknowledging that this decision “contradicts what we’ve discussed before concerning approval authority of the online center.” Ex. L.

On May 4, 2016, Bill Spruce of the VA sent an email to Beasley stating the Iowa SAA does not have authority to approve Ashford’s online program effective June 30, 2016. Ex. N. It cites, among other things, Ashford’s designation of San Diego as the location of its “main campus,” and Ashford’s website with a San Diego, California address. *Id.*

On May 10, 2016, Ashford responded to IDOE in a letter from Vickie Schray. Joint Agency Rec. Ex. 3. This letter states, “Iowa was the original home for Ashford University and *although the main campus has relocated to California*, the University will maintain a material presence in the state after the residential classroom activities conclude on June 30, including the planned retention of the online service center . . .” *Id.*, p. 1 (emphasis added). This letter also states that the planned “teach-out” program to allow some remaining students to complete student teaching programs would be in existence for a year, and that after that “Ashford will provide only online educational programs available to students across the country and therefore the University will not be providing residential instruction at any physical “campus” in any state.” *Id.*, p. 1 (emphasis in original). It states that Ashford would continue to maintain a site in Iowa “after the cessation of residential instruction,” which would consist of 150 administrative employees. *Id.*, pp. 2-3.

On May 12, 2017, Bill Spruce of the VA sent an email to Ashford Vice President Vickie Schray, stating it would be prudent for Ashford to seek approval from the California State Approving Authority, “regardless of Iowa’s views on the matter.” Joint Agency Rec., Att. to Ex. 6. This email states that Ashford’s “main campus” and corporate home are in California. *Id.* On

May 17, 2016, Spruce sent another email to Vickie Schray, again urging Ashford to seek approval for VA benefits from the California State Approving Authority. *Id.* It states, “it is the view of the VA that, based on the information contained in your letter, Ashford University would no longer be eligible for approval through the State of Iowa due to failure to meet the definition of a “main campus” or “branch campus” as defined in § 21.4267 of title 38, Code of Federal Regulations. Without a valid approval by a State Approving Agency, VA would be required to discontinue benefit payments for enrollment in terms beginning after June 30, 2016.” *Id.*

On May 19, 2016, the IDOE’s legal counsel, Nicole Proesch, responded to Vickie Schray. Joint Agency Rec. Ex. 4. This letter attaches the two emails from the VA referenced in the preceding paragraph. This letter states:

Ashford University has announced that it is closing the Clinton, Iowa residential campus on July 1, 2016. The Clinton residential campus is the campus which ISAA recognized and approved as the institution’s main campus in Iowa. While we recognize that Ashford will continue to have an online servicing center in Iowa after that date, the main campus of Ashford University and the Chief Executive Officer are now both physically located in California. Under 38 C.F.R. § 21.4250(a)(3) if an educational institution offers a course by correspondence or independent study, rather than a resident course, only the State approving agency for the state where the educational institutions [sic] main campus is located may approve the course for VA training. Thus, Ashford should seek approval of these programs through the California State Approving Agency.

Joint Agency Rec., Ex. 4, p. 1.

On May 23, 2016, Ashford responded to IDOE. This letter states, in part:

[T]he teach out of residential students from the Iowa campus will not be complete by June 30, 2016. . . . Although the campus closure will be effective in June 2016, Ashford has utilized its approved teach out plan to ensure a smooth transition for all students. This long-standing teach out plan was created in 2015, and has been reviewed and approved by both the Iowa Department of Education and our accreditor to educate residential students in their programs through June 1, 2017. Residential students will be enrolled in their programs through June 1, 2017, and graduating no sooner than this date. Furthermore, there are approximately 150 staff members who will remain in the state [of Iowa] and who are scheduled to remain in the online center to continue support for the education of our residential students in Iowa.

Ashford letter, Joint Agency Rec., Ex. 5, p. 2.

On May 24, 2016, IDOE's legal counsel, Nicole Proesch, responded to Ashford's May 23, 2016 letter. Joint Agency Rec., Ex. 6. It quotes an email from Bill Spruce of the federal Department of Veterans Affairs, stating that the VA would only pay benefits until the completion of any term which begins June 30, 2016 or before. *Id.*

In late May 2016, Ashford applied for approval of its online program with the California State Approving Authority. *See* Exs. EE-OO. California did not immediately approve Ashford's online program, and Ashford withdrew its application. *See Id.*

On June 11, 2016, Ashford notified students that the Iowa State Approving Agency was withdrawing its approval of VA benefits. Ex. RR. This notice states, "Ashford will be closing its campus in Clinton, Iowa." *Id.*

On July 27, 2016, IDOE officials met with representatives of Ashford in Des Moines. *See* Joint Agency Rec., Exs. 9, 10. Ashford provided additional information to IDOE about its Clinton, Iowa operation, and again requested that IDOE approve Ashford for GI Bill educational benefits. *See* Joint Agency Rec., Ex. 10; Ex. TT.

On August 19, 2016, IDOE Director Ryan Wise denied Ashford's renewed request for approval. Joint Agency Rec., Ex. 9. This letter states that the program is governed by federal Department of Veterans Affairs' regulations, citing 38 C.F.R. § 21.4250(a)(3): "If an educational institution offers a course by independent study or correspondence, only the State approving agency for the State where the educational institution's main campus is located may approve the course for VA training." *Id.* Director Wise's letter also cites 38 C.F.R. § 21.4266(a)(3), which defines "main campus" as:

the location where the primary teaching facilities of an educational institution are located. If an educational institution has only one teaching location, that location is its main campus. If it is unclear which of the educational institution's teaching facilities is primary, the main campus is the location of the primary office of its Chief Executive Officer."

Id.

The Department's August 19, 2016 letter goes through the facts presented by Ashford, and concludes that the "main campus" is located in San Diego, California, not in Iowa. "We note that Ashford University's online programming is accredited out of California. Moreover, all of the degrees awarded by Ashford are conferred in California." *Id.*, p. 2. This letter states that the Clinton online processing center does not confer degrees, and is not the primary office of Ashford's CEO. "Furthermore, none of the students currently enrolled in the residential Teach Out program are veterans or active duty military who would qualify for VA benefits and less than 1% of Ashford's online students are Iowa residents." *Id.*, p. 2. The letter concludes that California is the only state with authority to approve Ashford for VA benefits. *Id.*, p. 3.

On August 26, 2016, Ashford responded through a letter from Charlie Minnick, Ashford University Clinton Campus President. Joint Agency Rec., Ex. 10. This letter states that 40 Ashford online students are located in Iowa, and 25 residential students remain at the Clinton, Iowa campus. *Id.*, p. 2. This letter states there is no dispute that 38 C.F.R. § 21.4250(a)(3) requires that online courses be approved by the state where a university's "main campus" is located. *Id.*, p. 3. This letter states that there is only one campus where Ashford has a residential instruction program, and that is in Clinton, Iowa. *Id.*, p. 4. It states, "Therefore, based on Ashford's current plans, originally announced in 2015, to transition to an entirely on-line educational model, at least through June 1, 2017, Ashford's main campus for GI Bill approval is in Clinton, Iowa. Because Ashford has only one 'teaching facility' as described in the regulation, the location of the primary office of its Chief Executive Officer is irrelevant." *Id.*, p. 4.

Ashford filed the petition in this case June 14, 2016. Judge Robert Hanson issued a stay of agency action. Thus Ashford students continue to be eligible for VA educational benefits at this time.

Additional facts will be set forth in the discussion below.

STANDARD OF REVIEW

This is a judicial review action under the Iowa Administrative Procedures Act, Iowa Code Chapter 17A. A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by final agency action may seek judicial review. Iowa Code § 17A.19(1). Judicial review actions are appellate in nature. The court shall reverse, modify or grant other appropriate relief from final agency action if it determines the substantial rights of petitioner have been prejudiced by any of the means set forth in Iowa Code Sections 17A.19(10)(a)-(n). The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity. Iowa Code § 17A.19(8)(a). The court shall make a separate and distinct ruling on each material issue on which the court's decision is based. Iowa Code § 17A.19(9).

Ashford alleges that IDOE's action violates the following provisions of Section 17A.19(10):

(c) it is based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency;

(d) it is based upon a procedure or decision-making process prohibited by law or was taken without following the prescribed procedure or decision-making process;

(f) it is based on a determination of fact that is not supported by substantial evidence in the record when the record is viewed as a whole;

(h) it inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency;

(k) it is not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy;

(n) is otherwise arbitrary, capricious, or an abuse of discretion.

An initial question in a judicial review action is normally whether the agency's interpretation of law is entitled to deference. *See* Iowa Code § 17A.19(10)(c). In this case the parties agree that the agency's interpretation of federal statutes and regulations is not entitled to deference. The legal issue involves interpretation of federal regulations, and IDOE agrees it has not been vested by a provision of law with authority to interpret these regulations. *See* Iowa Code § 17A.19(10)(c); *see also American Eyecare v Dep't. of Human Services*, 770 N.W.2d 832, 835-36 (Iowa 2009).

DISCUSSION AND ANALYSIS

Withdrawal of Approval. Ashford first argues that IDOE failed to follow federal regulations concerning withdrawal of approval of its online courses, and that this failure is an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency, in violation of Iowa Code Section 17A.19(10)(c). Ashford also argues IDOE failed to follow the prescribed procedure in said regulations, in violation of Iowa Code Section 17A.19(10)(d).

Ashford asserts that IDOE was required to follow 38 C.F.R. 21.4259, titled "Suspension or disapproval." That rule states, in relevant part:

- (a) The appropriate State approving agency, after approving any course or licensing or certification test:
- (1) May suspend the approval of a course for new enrollments, or approval of a licensing or certification test, for a period not to exceed 60 days to allow the institution to correct any deficiencies, if the evidence of record establishes that the course or licensing or certification test fails to meet any of the requirements for approval.
 - (2) Will immediately disapprove the course or licensing or certification test, if any of the requirements for approval are not being met and the deficiency cannot be corrected within a period of 60 days.
 - (3) Upon suspension or disapproval, the State approving agency will notify the educational institution by certified or registered letter with a return receipt secured (**38 U.S.C. 3679**). It is incumbent upon the State approving agency to determine the conduct of courses and to take immediate appropriate action in each case in which it is found that the conduct of a course in any manner fails to comply with the requirements for approval.
- (b) Each State approving agency will immediately notify VA of each course, or licensing or certification test, that it has suspended or disapproved. . . .

38 C.F.R. § 21.4259.

Ashford did not raise this issue before the IDOE. This regulation is not cited in its correspondence or emails with the Department. Before it can raise an issue on judicial review, a party must exhaust adequate administrative remedies. Iowa Code § 17A.19(1). The exhaustion requirement applies to “other agency action” as well as to review of contested case proceedings. *Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 326, 328-29 (Iowa 2015). Ashford did not raise this issue before the IDOE, therefore, it has failed to exhaust administrative remedies with regard to the applicability of this “withdrawal” regulation. Ashford cannot raise this issue here.

Even if the court were to consider the issue, it would conclude that this rule is not applicable. The rule by its terms applies to suspension or disapproval of a course or licensing certification test for deficiencies in the course or test. IDOE did not withdraw approval of any

course or licensing test offered by Ashford based on deficiencies. Indeed, IDOE's representative testified that there was no issue with the quality of Ashford's online programs. Ex. ZZZ, Donner Dep., p. 45. Rather IDOE informed Ashford that it lacked authority to approve online courses offered by Ashford for receipt of VA benefits based on Ashford's announced closing of its Iowa residential campus. This rule does not apply to the situation presented in this case, and Ashford has not proven that IDOE's interpretation of this regulation is erroneous or that IDOE failed to follow prescribed procedures or decision-making process, in violation of Code Sections 17A.19(10)(c) or (d).

Whether IDOE's Interpretation of Statute and Regulations is Erroneous.

Ashford next argues that, even if the regulations relied upon by IDOE were the applicable regulations, IDOE's interpretation is erroneous.

There are two primary federal regulations that form the basis for IDOE's decision that it lacked authority to approve Ashford's online courses for VA benefits. See Ex. 9 (IDOE letter from Director Wise). The first is 38 C.F.R. § 21.4250(1)(3). This regulation states, "If an educational institution offers a course by independent study or by correspondence, only the State approving agency for the State where the education institution's main campus is located may approve the course for VA training." 38 C.F.R. § 21.4250(1)(3). See Joint Agency Rec., Ex. 9..

The second is the definition of "main campus:"

the location where the primary teaching facilities of an educational institution are located. If an educational institution has only one teaching location, that location is its main campus. If it is unclear which of the educational institution's teaching facilities is primary, the main campus is the location of the primary office of its Chief Executive Officer.

38 C.F.R. § 21.4266(a)(3).

Ashford argues that IDOE erroneously interpreted the above-cited regulations for two reasons. First, Ashford argues there were students enrolled in the teach-out program in 2016, so Clinton remained Ashford's only residential campus at that time. Second, Ashford argues it has recently started a "hybrid MBA program" that will have residential students at the Clinton campus. The IDOE argues Ashford failed to exhaust administrative remedies with respect to the second argument.

Exhaustion of Remedies – Hybrid MBA Program.

Ashford argues that it has started a "hybrid MBA program" with residential students at the Clinton campus. This program apparently started after IDOE's decision under review here. *See* Third Am. Pet, ¶ 27. The facts concerning this program were not presented to IDOE in connection with the 2016 decision challenged here.

Petitioners have not exhausted administrative remedies with regard to the existence of a hybrid MBA program and whether it provides a basis for IDOE to determine there is a main campus in Iowa. *See* Iowa Code § 17A.19(10)(1); *Ghost Player, L.L.C. v. State*, 860 N.W.2d at 328-29. Thus the court cannot consider this argument. (Of course Ashford can present the facts relevant to this new program to IDOE and ask IDOE to determine whether it is a basis to find that Ashford's "main campus" is in Iowa. The court is not aware whether it has done so.)

Teach-out Program

Ashford told IDOE in May 2016 that its main campus had moved to California, and that it would be teaching only online classes without a residential teaching facility in any state. Joint Agency Rec., Ex. 3. Ashford had informed IDOE that it would have a teach-out program for current students who needed to complete student teaching. This program was slated to be completed June 1, 2017. Joint Agency Rec., Ex. 5, p. 2. In December 2015, IDOE had approved

the teach-out program at the Clinton campus. Ex. E. This approval states that all Clinton campus students would complete student teaching by the end of December 2016, and that Ashford would ensure all candidates complete the program by June 1, 2017. *Id.*

Ashford asserts that the existence of this teach-out program means that Ashford had its primary teaching location in Clinton, Iowa, within the meaning of the definition of “main campus.”

Whether this Issue is Moot. IDOE argues that even if the teach-out program constituted a “main campus” for Ashford University in Clinton, Iowa, this issue is moot because the residential teach-out program has ended. Ashford resists, asking the court to apply the public interest exception to the mootness doctrine. *See City of Dubuque v. Public Emp’t. Relations Bd.*, 339 N.W.2d 827, 831 (Iowa 1983); *Rush v. Ray*, 332 N.W.2d 325, 326 (Iowa 1983).

The court finds that because the residential teach-out program ended June 1, 2017, this issue is moot. In addition, IDOE agreed to a stay of its decision pending resolution of this case, so Ashford’s students have been eligible to receive VA benefits through June 1, 2017 (and to the present). The court has considered the elements of the public interest exception, but cannot find a likelihood of future occurrence of the same or similar problem involving a former residential campus that has become part of a private, for-profit corporation and has moved away from residential instruction to go entirely online, with a short-term program to allow a relatively small number of existing students to complete student teaching. The court will nevertheless address the merits of Ashford’s arguments on this point.

Whether IDOE's Interpretation of Statute is Erroneous

IDOE, based on the information provided by Ashford, noted that the residential campus located in Clinton, Iowa, had closed in the spring of 2016, “leaving only an online processing center and a temporary location for Ashford’s residential Teach Out program in Clinton, Iowa.” Joint Agency Rec., Ex. 9, p. 2. IDOE concluded the online processing center was not a “main campus” within the definition of the regulation.

The Department reasoned there would be no “primary teaching facility” in Iowa after the teach-out program concluded, because all students would be taking their courses online. IDOE then looked to the location of Ashford’s CEO, whose primary office is in San Diego, California. IDOE found that Ashford needed to obtain approval from that state. Ashford did submit an application to the California state approving agency for approval of its online courses.

IDOE was well aware of the teach-out program when it issued its decision. IDOE found that the existence of this teach-out program, which was slated to end in the near future, does not cause Clinton, Iowa to be Ashford’s main campus. The IDOE did not err when it found unclear which of Ashford’s teaching facilities is primary within the meaning of 38 C.F.R. 21. 4266(a)(3). Thus it was not error to look to the location of Ashford’s CEO.

Even if this issue were not moot, petitioners have not proven IDOE’s interpretation of the applicable federal regulations is erroneous.

Whether IDOE's Factual Determinations are Supported by Substantial Evidence.

Ashford next argues that IDOE’s fact findings are not supported by substantial evidence in the record when viewed as a whole, in violation of Iowa Code Section 17A.19(10)(f). Specifically, Ashford challenges IDOE’s factual determination that its main campus is located in San Diego California.

“Substantial evidence” means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. IOWA CODE § 17A.19(10)(f)(1). The adequacy of the evidence in the record to support a particular finding of fact must be judged in light of all the relevant evidence in the record that detracts from the finding as well as the evidence that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency’s explanation of why the relevant evidence in the record supports its material findings of fact. IOWA CODE § 17A.19(10)(f)(3). The determinative factor is not whether evidence supports a different finding, but whether the evidence supports the finding actually made. *IBP v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000). Evidence is not insubstantial merely because it would have supported a contrary inference. *Id.*

The factual determination that Ashford’s main campus is located in California is supported by information provided by Ashford. In Ashford’s formal response to IDOE’s initial notification, Ashford’s Senior Vice President for Regulatory Affairs and Public Policy, Vickie Schray, stated that the “main campus has relocated to California.” Joint Agency Rec., Ex. 3. She states that after the teach-out program is completed in Iowa, “Ashford will provide only online educational programs available to students across the country and therefore the University will not be providing residential instruction at any physical “campus” in any state.” *Id.* In addition, Ashford’s own website stated Ashford’s “main campus” was in San Diego. Ex. G, pp. 3-4.

In addition, there is substantial evidence to support IDOE’s finding in 2016 that Ashford would not be conducting student instruction at a campus in Clinton, Iowa. Ashford announced it

would close the Clinton campus after that school year. Ashford said it had a teach-out program for education students to complete student teaching, which would be complete by December 31, 2016, and all their coursework would be completed by June 1, 2017. After that, the students would have to complete coursework online.

The court has considered all the evidence in the record, including the teach-out program and that Ashford will maintain 150 administrative employees in Clinton, Iowa, but concludes that IDOE's finding is supported by substantial evidence under Iowa Code Section 17A.19(10)(f).

Whether IDOE's Decision is Unreasonable, Arbitrary, Capricious, or an Abuse of Discretion. Ashford next argues that IDOE's decision is unreasonable, arbitrary, capricious, or an abuse of discretion, in violation of Section 17A.19(10)(n). Agency action is unreasonable, arbitrary, capricious, or an abuse of discretion under Section 17A.19(10)(n) when the agency's exercise of discretion is based on untenable grounds or is clearly erroneous. *IBP, Inc. v Al-Gharib*, 604 N.W.2d at 630. It is synonymous with unreasonableness and involves lack of rationality, focusing on whether the agency had made a decision clearly against reason and evidence. *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997). Agency action is arbitrary and capricious when it is taken without regard to law or facts of the case, and it is unreasonable when it is clearly against reason and evidence. *Dico, Inc. v Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998).

Ashford also argues the decision is inconsistent with prior agency practice, and is not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public that it must be deemed to lack any foundation in rational agency policy, in violation of Sections 17A.19(10)(h) and (k). These

sections are elaborations of agency action that is arbitrary, capricious or an abuse of discretion. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions*, May 1998, p. 69; *see also, Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005); *Office of Consumer Advocate v. Iowa Utilities Bd.*, 770 N.W.2d 334, 341-42 (Iowa 2009).

Ashford first reiterates its argument that IDOE's interpretation of the applicable federal regulations is erroneous. For the reasons set forth above, the court rejects this argument. IDOE did not erroneously interpret the regulations when it determined Ashford's "main campus" was not located in Iowa. This decision is not in violation of Section 17A.19(10)(n).

Next Ashford argues that IDOE merely "followed the VA and California's instructions" and did not consider the relevant facts and perform an analysis using the correct legal standard. Pl. Brief, pp. 31-32. The record does show communication between IDOE employees and employees of the VA and the California State Approving Authority. However, the record does not support a finding that IDOE merely followed instructions from either of those entities. In early May 2016, IDOE notified Ashford, based on information publically available on Ashford's web site, that IDOE could no longer approve Ashford's online program because it had relocated its main campus to California. Joint Agency Rec., Ex. 2. Following that, Ashford provided information to IDOE confirming its main campus had relocated to California, and stating that after the teach-out program concluded in one year, Ashford would not have a residential instruction program in any state. Joint Agency Rec., Ex. 3. Several letters and emails followed, culminating in an in-person meeting in Des Moines between Ashford representatives and IDOE. Following that meeting, IDOE sent a three-page letter on August 19, 2016, outlining information provided by Ashford, and stating IDOE's reasoning why it lacked authority to approve Ashford

for VA benefits. Joint Agency Rec., Ex. 9. The record does not support a finding that IDOE failed to consider the relevant facts and regulations, or that it merely “rubber-stamped” a decision of another entity. Petitioners have not proven IDOE’s decision was unreasonable, arbitrary, capricious, or an abuse of discretion.

The fact that IDOE SAA employees consulted with the VA and with their counterparts in California is not surprising, and does not prove that IDOE acted in an unreasonable, arbitrary, or capricious manner. Indeed, federal regulations state that cooperation between the VA and the state approving agencies is essential. 38 C.F.R. § 21.4151. Nor is there any impropriety in communication between IDOE SAAs and California SAAs, especially under the circumstances of this case. Both IDOE and the VA were urging Ashford to seek approval in California so that its online students could continue to receive VA benefits for online classes. Had Ashford been able to secure such approval, it would have benefitted Ashford and its students.

The court has also considered a number of emails written by IDOE consultant Thomas Beasley. Although Beasley signed the May 2, 2016 letter to Ashford (Joint Agency Rec., Ex. 2), he apparently did not agree with IDOE’s decision that Iowa lacked authority to approve Ashford’s online programs. However, the court must review the final agency decision in this case, which is contained in the August 19, 2016 letter from IDOE Director Ryan Wise, Joint Agency Rec., Ex. 9. Mr. Beasley’s opinions are just that, and do not prove the agency acted in violation of Iowa Code Sections 17A.19(10)(n), (h) or (k).

Third, Ashford argues that IDOE’s decision is inconsistent with prior agency practice, in violation of Iowa Code Section 17A19(10)(h). Guidance for judicial review under section 17A.19(10)(h) is provided by the Iowa Supreme Court:

The intent of paragraph (*h*) is not to prohibit any change in practice or procedure, but rather, the rule requires consistency in reasoning and weighing of factors

leading to a decision tailored to fit the particular facts of the case. Thus, an agency's failure to conform to its prior decisions, or furnish sufficient reasoning from which to distinguish them, may give rise to a reversal under chapter 17A. Iowa Code section 17A.19(10)(h) is intended to address inconsistencies in agency decisions for individual cases; it does not provide a vehicle to challenge changes in agency procedure that are applicable to all cases that come before the agency.

Office of Consumer Advocate v. Iowa Utilities Bd., 770 N.W.2d at 341-42. (internal citations, quotations, and brackets omitted).

Ashford argues that two other online, for-profit universities – University of Phoenix and Kaplan University – were treated differently than Ashford by IDOE. The record shows that in February 2017, IDOE informed the University of Phoenix that it could no longer approve its online courses. Ex. ZZZ, Dommer Dep. Exs. 42, 43. The reason was the same as for Ashford - because the main campus was located in another state and not in Iowa. *Id.* Therefore IDOE applied consistent reasoning with regard to approval of University of Phoenix online classes.

IDOE has also approved Kaplan University's online courses for VA benefits, based on a determination that its main campus is in Davenport, Iowa. Ex. ZZZ, Dommer Dep., p. 19; Dep. Ex. 44. Florida had previously been designated as Kaplan's main campus, but subsequently withdrew its approval for VA benefits after the main campus moved to Iowa. *Id.* Ashford presented aerial photos that Kaplan's Davenport campus is located in a strip mall, and IDOE SAA consultant Michal Dommer testified that it is not a campus in style of the University of Iowa. However, he also testified that he had visited this facility, and that it did contain classrooms for instruction of students and was not merely an online processing center. Ex. ZZZ, Dommer Dep., pp. 30-31. Ashford has not proven that IDOE is treating Ashford in an inconsistent manner. IDOE's rationale appears consistent for all three online universities.

For the reasons stated above, the petition for judicial review should be denied.

IT IS ORDERED that the petition is dismissed and court costs are taxed to petitioners.



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
EQCE080188 ASHFORD UNIVERSITY LLC ET AL VS IOWA DEPT OF
EDUCATION ET AL

So Ordered

A handwritten signature in black ink, appearing to read "Eliza Ovrom". The signature is written in a cursive, flowing style.

Eliza Ovrom, District Court Judge,
Fifth Judicial District of Iowa