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

In the Matter of	**Docket No. 99-29-SA**
SAINT LOUIS UNIVERSITY,	Federal Student Aid Proceeding
Respondent.	ACN: 06-96-70003

Appearances: Leslie H Wiesenfelder, Esq., and Michael B. Goldstein, Esq., Dow Lohnes PLLC, Washington, D.C., for Saint Louis University.

Jennifer L. Woodward, Esq., of the Office of the General Counsel, United States Department of Education, Washington, D.C., for Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION ON REMAND

On February 23, 2007, the Secretary remanded the above-captioned matter to this tribunal for further proceedings.[1] In her remand, the Secretary found that a financial aid administrator (FAA) is prohibited from determining that there are automatic, per se special circumstances under 479A of 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*.

[1] In my May 25, 2000 Initial Decision, I found that Saint Louis University had met its burden of establishing its FAAs had not abused their discretionary authority in adjusting the award amount of Pell Grants based upon their professional judgment. FSA appealed the Initial Decision to the Secretary of Education, and on February 23, 2007, the Secretary remanded the matter to this tribunal for further proceedings. On March 22, 2007, I issued the Order Re Further Proceedings, consistent with the Secretary's Order of Remand.

Within the U.S. Department of Education (ED), the office of Federal Student Aid (FSA) is the organization that administers these programs.[2] Under 20 U.S.C. § 1087tt, federal Pell Grants may be awarded based upon the professional judgment of a FAA that an individual student's special circumstances warrant an adjustment of their Estimated Family Contribution (EFC). Special circumstances are those ". . . conditions that differentiate an individual student from a class of students rather than conditions that exist across a class of students."[3] Further, Title IV requires that FAAs substantiate special circumstances adjustments for individual students with "[a]dequate documentation for such adjustments."[4]

At issue is whether Saint Louis University's (Saint Louis) FAAs used professional judgment to adjust students' Pell Grant award amounts by considering certain categories, such as elementary and secondary education expenditures, medical and dental expenses, and living expenses, as per se categories of special circumstances. Another question before me is whether Saint Louis can point to adequate documentation in the record to prove that the circumstances of the students in question are in fact special circumstances, determined on an individualized basis, as defined under section 479A.

Procedural History

The genesis of this case stems from an audit conducted by ED's Office of Inspector General (OIG) to verify Saint Louis' compliance with the Title IV program regulations that delineate the Congressional scheme for awarding federal Pell Grants. After OIG's compliance audit, FSA determined that Saint Louis had improperly awarded Pell Grants during the 1994-1995, and 1995-1996 award years. On December 23, 1998, FSA issued a Final Audit Determination (FAD), finding that Saint Louis violated the Pell Grant regulations through its inappropriate exercise of professional judgment to adjust its students' Pell Grant award amounts. In the FAD, FSA assessed an extrapolated liability in the amount of $2,816,029. On March 25, 1999, Saint Louis appealed the findings of the FAD and the case was assigned to me for adjudication.

At the outset, it is important to note that the scope of my review is limited to determining from the evidence before me (1) "…whether special circumstances existed in each case" in which Saint Louis' FAAs exercised professional judgment and (2) "…whether adequate documentation existed in each case to support the [FAA]'s determinations that special circumstances warranted departing from the congressionally mandated formula for calculating student aid eligibility."[5]

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[2] At the time of my May 25, 2000 Initial Decision, the office of Student Financial Assistance Programs (SFAP) was the name of the office administering the Title IV programs; any reference herein will refer to the office under its current designation as FSA.
[3] 20 U.S.C. § 1087tt(a).
[4] *Id.*
[5] *See In re Saint Louis University*, Docket. No. 99-29-SA, U.S. Dep't of Education (February 23, 2007) (Order of Remand).

Pursuant to the Secretary's remand, I issued a March 22, 2007 Order Re Further Proceedings, in which Respondent was ordered to (1) identify the "…case-by-case analysis it used to determine whether special circumstances existed for each student at issue" and (2) "[s]how where in the record documentation of special circumstances may be found and how this documentation constitutes adequate documentation of special circumstances." I further ordered FSA to file a response supporting its position regarding whether Saint Louis conducted a cases-by-case analysis to determine whether special circumstances existed for individual students and what constitutes adequate documentation of special circumstances. Despite the narrow wording of my March 22, 2007 Order, both parties submitted briefs relitigating their positions on the meaning and import of section 479A. My inquiry, however, will be limited to the questions put forward in the Secretary's remand. This is not to say that other matters, such as the calculation of any liability upheld, are necessarily excused from review in this remand decision.

Case-by-Case Analysis

Saint Louis argues that the procedures it used to determine whether special circumstances existed for the students at issue did constitute a case-by-case analysis. First, Saint Louis points to the "Professional Judgment Policies and Procedures," in place at Saint Louis and followed by the school's FAAs in making all its professional judgment adjustments. According to Saint Louis, its procedures entailed use of a form titled "Application for Consideration of Financial Aid Special Circumstances." This form asked for, among other things, medical and dental expenses, pre-school, elementary and high school tuition, any "one-time" or temporary increase in income, expenses from a natural disaster, average annual living expenses,[6] the next year's estimate of annual income, if lower, and an estimate of how much the family or student could afford to pay for school. Saint Louis maintains that its use of this form supports its FAAs use of professional judgment in adjusting its students' EFCs. Additionally, Saint Louis' contends its FAAs would engage in discussions with students about their circumstances prior to making adjustments, if needed. Finally, Saint Louis asserts its FAAs documented the actions taken in each student's respective paper and electronic files.

Saint Louis further asserts that FSA takes issue with the distinct professional judgment decisions made by the school's FAAs, not Saint Louis' lack of a case-by-case analysis. Saint Louis argues that Congress vested participating schools and their FAAs with the prerogative to utilize professional judgment under Title IV, and that the allegations advanced by FSA merely amount to an inappropriate critique of Saint Louis' use of its professional judgment discretion, beyond FSA's authority. In support of this claim, Saint Louis proffers that the OIG's compliance audit, rather than alleging Saint Louis violated the limitation on the use of professional judgment, acknowledges that the school's form gathered relevant, supplemental data of its students' special circumstances. Further, Saint Louis points to the legislative history of the Title IV amendments to argue its FAAs evaluated similarly situated students on an appropriately parallel, as well as a case-by-case basis. Saint Louis argues its FAAs simply treated students with similar special

[6] Saint Louis lists housing, food, insurance, utilities, debts, clothing, and transportation as examples of average annual living expenses for parents, students and spouses to report on the 1995-1996 supplemental form (Resp. Ex. R-4-55).

circumstances similarly, counter to FSA's accusation that Saint Louis made "blanket" professional judgment adjustments for classes of students. Moreover, Saint Louis argues that the statutory requirement of case-by-case analysis does not bar adoption of a set of criteria for consideration in determining whether special circumstances exist, notwithstanding the Secretary's determination that "section 479A prohibits a [FAA] from determining that there are automatic per se special circumstances."[7]

Finally, Saint Louis for the first time raises the argument that its "simplified formula," based upon the statutorily defined simplified needs tests,[8] was used in analyzing the situations of some of the students at issue prior to making professional judgment adjustments. Further, Saint Louis asserts that before any overall liability can be properly calculated, its "simplified formula" ought to be used retroactively for students who could have benefitted from application of the formula, but did not under Saint Louis' original analysis. Saint Louis contends that in calculating students' EFCs it should have applied the "simplified formula" to more students who met the principal criteria for automatic application of the simplified needs test, and that application to such students now is a reasonable exercise of professional judgment. Saint Louis argues that for those students and families that met fewer than all of the criteria necessary to trigger the automatic application of the simplified needs test, Congress intended FAAs to evaluate the relevant financial information and determine whether application of the test would be an appropriate use of professional judgment. According to Saint Louis many of the families of students at issue reported circumstances that, the simplified needs test was meant to address, such as incomes of less than, or much less than $50,000, multiple family members in college, or negative net values. Consequently, Saint Louis asserts such circumstances justify hindsight application of the "simplified formula" through professional judgment to students the school neglected to utilize the formula for, but should have.

FSA does not dispute that Saint Louis used its supplemental form to collect and review the financial information reported by the students at issue. Rather, FSA contends that Saint Louis did not engage in the proper analysis of individual students' circumstances, even if the forms submitted by each student were reviewed one by one. Consequently, FSA argues Saint Louis disregarded the statutory requirements of Title IV in making professional judgment adjustments, resulting in the use of per se categories of special circumstances, a practice already rejected by the Secretary. FSA contends that Saint Louis considered one student's circumstances as representative of a particular type of special circumstance, thereby finding it determinative of whether other students had such special circumstances. Consequently, FSA argues that this unacceptably circumvents section 479A's requirement of case-by-case analysis of individual students' circumstances. FSA asserts Saint Louis' FAAs deducted entire categories of expenses

[7] *In re Saint Louis University*, Docket No. 99-29-SA, U.S. Dep't of Education (February 23, 2007) (Order of Remand).

[8] The simplified needs test is a means for very low income families to have financial aid eligibility calculated automatically. The test facilitates expedited eligibility determinations by requiring families with adjusted gross incomes of less than $50,000 who do not file 1040 tax forms to answer fewer financial questions, and by allowing these families to have certain asset information excluded from the standard needs analysis formula. *See* 20 U.S.C. §1087ss.

from the family incomes of all students applying for special circumstances financial aid, illustrating the absence of the statutorily required case-by-case analysis. Since it was the practice of Saint Louis' FAAs to consider every living expense in excess of the statutory income protection allowance (IPA),[9] and all medical and dental expenses, irrespective of insurance coverage, as special circumstances, FSA argues this practice amounted to a de facto designation of per se categories of special circumstances. Therefore, if all such expenses were considered special circumstances, there could be no opportunity for FAAs to employ discretion, and no case-by-case analysis. Accordingly, FSA contends Saint Louis' procedure essentially amounted to labeling students' situations as constituting a special circumstance whenever an FAA identified that a student reported to have one of a number of categories of circumstances designated by Saint Louis as a special circumstances on Saint Louis' supplemental form. FSA maintains that because Saint Louis exercised no discretion in considering whether individual students' circumstances in fact constituted special circumstances, the proper case-by-case analysis mandated by section 479A in the use of professional judgment to adjust a student's EFC could not have occurred.

Finally, FSA argues that Saint Louis now cannot invoke use of the simplified needs test to justify the shortcomings of the original analyses of students' and their families' financial situations. FSA argues that Title IV in no way grants FAAs the authority to further extend use of professional judgment so as to modify the explicit requirements, already established by law, which students must meet to qualify for application of the simplified needs test. FSA contends Saint Louis' intended, retroactive use of its own "simplified formula" unacceptably amounts to a "double dip" in federal aid; because students not qualifying for use of the simplified needs test already have certain assets shielded in EFC calculations, the additional exclusion of all assets of such students through Saint Louis' use of its "simplified formula" acts to grant a duplicate asset exception, unauthorized by Title IV.[10]

The record before me indicates that Saint Louis 1) created per se categories of special circumstances for all medical and dental expenses, elementary and secondary tuition, and normal living expenses, and 2) found special circumstances for any student who completed Saint Louis' supplemental form and reported expenses within any of these per se categories, to justify adjustment of Pell Grant awards through professional judgment.

The crux of Saint Louis' argument is that its procedure unavoidably amounts to a case-by-case analysis of special circumstances. Since every award at issue entailed students submitting their individual circumstances on Saint Louis' form, and every student's form was then reviewed one by one by an FAA before any professional judgment adjustments were ever made, the school

[9] Under Title IV, Congress authorized specific deductions to be made from students' and students' parents' incomes when calculating EFCs. These deductions are used to determine the amount of available income students' and students' parents' are expected to contribute from overall income. One of the deductions granted by Congress is known as an income protection allowance, which shields a specific portion of individuals' incomes to provide for living expenses. *See* 20 U.S.C. §§ 1087oo-1087qq.

[10] *See* 20 U.S.C. § 1087oo(d) for the relevant asset protection allowances.

argues that its procedure necessitates the requisite case-by-case analysis. It is certainly possible that within Saint Louis' student files, some students' reported circumstances may have constituted special circumstances; however, Saint Louis' practice was to consider any and all instances where a student's family incurred expenses within a designated category as special circumstances. Special circumstances, by its very definition, has to be something that justifies deviating from the needs analysis used to award federal student aid funds. While the Title IV section relevant to FAA discretion does indeed state that special circumstances may include "tuition expenses at an elementary or secondary school, medical, [or] dental . . . expenses not covered by insurance, [or] unusually high child care or dependent care costs," such expenditures must stem from "conditions that differentiate an individual student."[11] To determine whether a condition differentiates an individual student, so as to constitute a special circumstance, FAAs must actually analyze each individual situation reported by a student applying for aid. Saint Louis' FAAs found special circumstances for all everyday living expense reported by students on Saint Louis' form, and, accordingly, reduced those students AGIs by whatever amount the students reported. Including everyday living expenses as a category of special circumstances that then was used in every determination Saint Louis made demonstrates that the school neither conducted a case-by-case analysis nor considered only "special" circumstances. Further, Saint Louis found any and all medical and dental expenses to constitute special circumstances, without any context or evaluation of students' or families' particular expenses, showing theses expenses also were used as a per se category of special circumstances irrespective of the exceptional or commonplace nature of the expense. The record shows that Saint Louis found special circumstances every time a student requested it, which resulted in 46% of the student population receiving Pell Grants having adjustments based on special circumstances.

Although the policies and procedures in place at Saint Louis apparently were followed for every student reviewed by Saint Louis, the school's review does not amount to appropriate analyses of students' circumstances. Saint Louis finds significant the Congressional observation that "although adjustments must be made on an individual case-by-case basis, students may have similar circumstances which make similar adjustments appropriate."[12] However, simply observing a student has similar circumstances to another student who was previously found to have special circumstances does not mean the students' similar circumstances necessarily constitute special circumstance in both instances. For the aforementioned reasons, Saint Louis did not adequately analyze the students' specific situations to see if special circumstances actually existed. Reviewing students' circumstances in a strictly pro forma manner does not demonstrate an analysis sufficient to meet the statutory standard as articulated by the Secretary.

Further, Saint Louis' attempt at lessening liability through the proposed, post hoc application of its own "simplified formula" to the students at issue whose financial situations met some of the principal criteria for automatic use of the statutorily defined simplified needs test is untenable. Under 20 U.S.C. § 1087ss, the simplified needs test permits applicants for Title IV aid to have financial assets normally accounted for in a needs analysis formula ignored only if the applicant meets specific, statutory requirements. To meet these requirements students or

[11] 20 U.S.C. § 1087tt(a).

[12] H.R. Rep. No. 102-447, at 72, *reprinted in* 1992 U.S.C.C.A.N. at 405.

students' parents must file an appropriate 1040 tax form,[13] and the total adjusted gross income of the student or family must be less than $50,000. While this tribunal is not seeking to proscribe an institution's appropriate use of its congressionally authorized discretion, Saint Louis' argument that the "simplified formula" was a reasonable part of its professional judgment is without merit. Saint Louis' arguments that its "simplified formula" was used under the aegis of professional judgment for some of the students at issue, and that the formula should be further applied in calculating the correct amounts of aid for students eligible for Saint Louis' formula, but whom did not benefit from its application, are unconvincing. The record contains nothing to substantiate the claims that Saint Louis' "simplified formula" was utilized in the original analysis of any of the students at issue. Saint Louis cannot now use a justification for the analysis it completed through a means it did not use originally. Moreover, even if Saint Louis had applied such a means of analysis, the simplified needs test is not meant for the use Saint Louis now proposes. The simplified needs test is meant to exclude the assets of families meeting the eligibility requirements set down in 20 U.S.C. §1087(b)(3). Any arguments proffered by Saint Louis to the contrary are immaterial and have no bearing on the force of the eligibility requirements mandated by the statute.

Adequate Documentation

Saint Louis argues that both the OIG and FSA accepted the documentation provided by 11 students in the FAD as adequate documentation, but that the same kind of documentation existing for the remaining students was deemed unacceptable. According to Saint Louis, its practice of accepting as truthful the self-reported information of students or families, in whatever form it is provided, is an accepted and established practice of universities. Consequently, Saint Louis asserts that the situations self-reported by students or families claiming specific amounts of incurred expenses, either on the school's supplemental forms, or in individual notes or letters, constitutes adequate documentation without any further documentation supporting those claims. Saint Louis proffers such self-reporting amounts to adequate documentation under Title IV in light of prior decisions by this tribunal. In support of this assertion, Saint Louis points to *In re Davenport Barber Styling College*, Docket. No. 04-26-SP, U.S. Dep't of Education (Oct. 25, 2005). Saint Louis asserts that in *Davenport* a note from a student was accepted in support of the student's lowered income. Saint Louis further asserts that the documentation it accepted for the students at issue necessarily constitutes adequate documentation because such documentation exceeds the verification requirements contained in 34 C.F.R. § 668.57, which Saint Louis argues is a higher standard of substantiating documentation than adequate documentation, and which was the relevant standard in *Davenport*.

Additionally, Saint Louis asserts that FSA mistakenly disputes that Saint Louis did not substantiate the special circumstances of students with adequate documentation because FSA is confusing documentation with verification. Therefore, Saint Louis argues, there is no statutory

[13] Under 20 U.S.C. § 1087ss(b)(3), to be eligible for the simplified needs test, among other requirements, an independent student, or a dependent student's family, must file either a 1040A or 1040EZ tax form, or file a 1040 tax form if the student or family files the form in order to take a tax credit under § 25A of the Internal Revenue Code of 1986.

requirement to acquire other, additional documentation or to cross-examine students or families regarding their submitted applications. Saint Louis claims that the record shows the documentation it accepted as adequate documentation matched or exceeded the documentation the Department considered adequate documentation when it reviewed and adjusted students' EFCs due to special circumstances through the use of a "Special Condition Form."[14] According to Saint Louis, the concept of equating self-certification to adequate documentation was, and is, a common and accepted practice in the administration of federal student financial aid. Since the only documentation of students' special circumstances considered by the Department were the expenses for situations reported by students on this "Special Condition Form," Saint Louis contends its method of documentation on its supplemental form, with certification language very similar to that of the "Special Condition Form," must also constitute adequate documentation. Saint Louis further argues that because its forms self-certification is also very similar to the educational affidavit statement that students sign at the end of the FAFSA, to attest that the information provided is true and accurate, and that the Department considers the FAFSA affidavit to provide adequate documentation, Saint Louis' documentation is also adequate.

FSA contends that the structure of Saint Louis' professed procedures demonstrate that the school did not obtain documentation sufficient to satisfy the Title IV requirements of adequate documentation for the purpose of substantiating special circumstances. Even if some of the students at issue had expenditures that could qualify as special circumstances, FSA argues that Saint Louis had no documentation to support any self-reported amounts. Thus, FSA contends the school could not substantiate that any special circumstances existed for any of the students who benefitted from the school's adjustments. FSA further asserts that, counter to Saint Louis' claims regarding *Davenport*, this tribunal has not found that self-reported documentation constitutes adequate documentation. FSA argues this tribunal acknowledged that self-serving statements from a student or a student's family cannot serve as adequate documentation.[15]

Under 20 U.S.C. § 1087tt, adequate documentation is documentation which substantiates a student's special circumstances. Saint Louis has failed to identify documentation in the record that constitutes adequate documentation of students' special circumstances. While some of the documents presented by Saint Louis may document students' expenses, such as medical or living costs, these documents do not necessarily constitute adequate documentation. From the paucity of documents collected by Saint Louis, there exists a significant lack of context from which to make determinations that special circumstances were present, even if the school had conducted an appropriate case-by-case analysis of special circumstances. Although a listing of expenses and supporting statements from a student or a student's family may be sufficient to document certain information, without a context in which to examine the totality of a student's purported special circumstances and associated expenses, there cannot exist adequate documentation to substantiate special circumstances.

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[14] Prior to the 1988-1989 award year, the Department and not institutions' FAAs had the authority to exercise professional judgment.

[15] *See In re College America, Portland*, Docket No. 97-82-SP, U.S. Dep't of Education (Sept. 21, 1998); *In re Dean's Westside Beauty College*, Docket No. 95-73-ST, U.S. Dep't of Education (Nov. 8, 1995).

Although Saint Louis argued that its documentation of special circumstances exceeds the requirement demanded for verification, whether or not the two standards may be equated is outside the scope of the Secretary's remand. The Secretary remanded this matter to determine "whether adequate documentation existed in each case to support the [FAA]'s determinations [regarding] special circumstances."[16] Arguments that the documentation Saint Louis presented may or may not constitute adequate documentation in light of some correlation to documentation sufficient in verification matters are extraneous, and do not resolve the issue before me. Accordingly, Saint Louis' related assertion, that *Davenport* supports a finding that the documentation at issue constitutes adequate documentation, is not persuasive. In *Davenport*, the tribunal found that the school's FAA appropriately exercised professional judgment after a case-by-case analysis, which was supported by adequate documentation. In this case, the record reflects that Saint Louis did not appropriately exercise professional judgment because it created per se categories of special circumstances, without any individualized analysis as to whether or not a student's particular conditions differentiated that individual student. Correspondingly, Saint Louis has failed to show that there is adequate documentation in the record to substantiate the special circumstances of the students at issue or to show that any of the requisite analysis took place. The claims alternatively put forward by Saint Louis and FSA, in regard to whether the school's documentation practices exceeded or fell short of the documentation standard from *Davenport*, are beside the point. Saint Louis has not met its burden showing where and how documentation in the record constitutes adequate documentation.

Liability

Saint Louis contests the validity of the liability assessed for the 1994-1995 award year due to FSA's methodology for calculating this liability. FSA argues Saint Louis only now takes issue with the underlying methodology used to calculate liability, and the school's failure to raise such an objection when the case was originally before the tribunal means that Saint Louis has waived its opportunity to raise this argument. As an initial matter, I must rule on whether Saint Louis may challenge FSA's calculation of liability. In reviewing the prior pleadings in this case, I find that Saint Louis did challenge FSA's methodology for calculating liability. In fact, Saint Louis' objection was noted in my Initial Decision.[17]

Saint Louis' argument regarding the validity of FSA's sampling methodology and extrapolation of liability is unconvincing. Despite Saint Louis' protest regarding FSA's reliance upon OIG's initial audit, which carried a 90% confidence level,[18] the methodology employed by

[16] *In re Saint Louis University*, Docket No. 99-29-SA, U.S. Dep't of Education (February 23, 2007) (Order of Remand).

[17] *See In re Saint Louis University*, Docket No. 99-29-SA, U.S. Dep't of Education (May 25, 2000) (Initial Decision) ("Saint Louis objected to the extrapolation methodology . . . for two reasons: the sample size (6.3%) was too small, and Saint Louis was not afforded the opportunity to do a full-file review.").

[18] In audits conducted using a sampling methodology, a confidence level represents the level of precision or reliability for a statistical projection of liability from a sample of reviewed files. Confidence levels take into account how many sample files are reviewed, the total number of

FSA to assess Saint Louis' liability in its FAD is valid. In my May 25, 2000 Initial Decision, I determined that, although a point I considered moot, extrapolation as part of FSA's methodology was an appropriate means of calculating liability and that Saint Louis itself could have negated the need for such extrapolation.[19] I did not, however, rule on whether the specific calculation of liability in this case was appropriate. Upon remand, Saint Louis continues in its opposition to the methodology FSA used to assess and extrapolate liability.

Saint Louis first argues that the liability assessed for the 1994-1995 award year is flawed because FSA failed to meet its own audit requirement of a 95% confidence level.[20] Saint Louis claims such a confidence level minimum is a required minimum for FSA audits as established in Departmental publications, including FSA's audit guides. Because FSA failed to use a 95% confidence level in the FAD, Saint Louis contends the liability for the 1994-1995 award year should be limited to the specific liabilities of the individually identified students for that year. Next, Saint Louis argues that the confidence level of sample sizes must be established independently for each of award years in question, and FSA failed to do this. Even if a 90% confidence level for the FAD is sufficient, Saint Louis maintains FSA failed in doing this for the 1994-1995 award year. Saint Louis asserts that the 1994-1995 liability calculation dealing with the professional judgment regarding 779 students requires a minimum sample size of 51 students to reach a 90% confidence level. As FSA's 1994-1995 sample size includes only 50 students, Saint Louis contends this liability calculation is invalid.

FSA first asserts that a valid sampling methodology was used in assessing Saint Louis' liability since FSA employed a statistically reliable method of data analysis. FSA argues its failure to adhere to FSA audit guidelines calling for a 95% confidence level is immaterial because such guidelines do not apply to OIG audits. Since the OIG audit was employed to calculate Saint Louis' liability in the FAD, FSA argues it was proper to follow the OIG's longstanding policy of using 90% confidence levels for audits. Consequently, the methodology used in the FAD was valid and reliable. FSA also contends the declaration of the OIG's expert, who calculated the OIG audit extrapolation for Saint Louis, supports that the 90% confidence level of the FAD is valid and reliable.[21] Furthermore, FSA argues extrapolation was appropriate in calculating liability given that Saint Louis failed to provide its own accounting, consistent with the school's fiduciary obligations. Next, FSA maintains combining the student sample sizes of both the 1994-1995 and 1995-1996 award years to extrapolate liability, and using the sum of both samples in reaching a 90% confidence level was valid. FSA avers the extrapolated liability in the FAD, including that from 1994-1995, is appropriate based upon it being statistically valid and consistent with accepted rules and conventions. Finally, FSA argues that the general judicial

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files the sample is taken from, and the rate of errors in the sample.

[19] *In re Saint Louis University*, Docket No. 99-29-SA, U.S. Dep't of Education (May 25, 2000) (Initial Decision) ("[E]xtrapolation would be appropriate in this case . . . [and] Saint Louis could have, if it wished, performed a full-file review to potentially establish lesser damages . . . .").

[20] Saint Louis did not contest the methodology and extrapolation of liability for the 1995-1996 award year.

[21] *See* Declaration of Zachary Sudiak, at ED Ex. 8.

approval of sampling and extrapolation in assessing liability, and the lack of precedent for any explicit, judicially-mandated sample size minimum support its calculation of liability.[22]

In cases involving assessment of liability to institutions participating in federal student aid programs authorized under Title IV, this tribunal has prior found extrapolation as a reasonable means of calculating liability.[23] Although FSA guidelines call for a 95% confidence level in audits performed solely by FSA, this fact is not dispositive in determining whether FSA's calculation of liability was appropriate. Absent demonstrated error, use of sampling and extrapolation to assess liability will be upheld so long as a statistically reliable method of data analysis is employed and the institution being assessed liability is afforded an opportunity to rebut the findings and technique of an audit.[24] Expert testimony on statistical sampling that supports the methodology used may further bolster an agency's use of such a technique.[25] In the instant case, the OIG conducted the initial audit, and followed its protocol of using a 90 % confidence level. There is no evidence in the record that the OIG failed to follow its audit guidelines, nor is there evidence that the OIG's calculation was invalid or unreliable. Moreover, there is ample support that employing a mathematically and statistically valid methodology, including extrapolation, is a valid and reasonable means of establishing legal findings such as liability.[26] Additionally, Saint Louis' contention that FSA's use of a 50 student sample invalidates the liability assessed for the 1994-1995 award year falls short in light of the assertions from FSA and the OIG that the 1994-1995 sample used is simply part of a valid and larger overall sample size. The absence of a judicially-mandated sample size floor, combined with the declaration provided by FSA of a statistical expert confirming the aggregation of the award year

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[22] *See Ratanasen v. California Dep't of Health Serv.*, 11 F.3d 1467, 1472 (9th Cir. 1993) ("[Prior sampling cases] make no mention of a statistical 'floor' which auditors must exceed . . ."); *Michigan Dep't of Educ. v. United States Dep't of Educ.*, 875 F.2d 1196, 1206 (6th Cir. 1989) ("There is no case law that states how large a percentage of the entire universe must be sampled.").

[23] *See In re Hamilton Professional Schools*, Docket No. 02-49-SP, U.S. Dep't of Education (June 11, 2003); *In re Bryant & Stratton Business Institute*, Docket No. 94-190-SA, U.S. Dep't of Education (September 16, 1996; *In re L'esthetique Cosmetology Corporation*, Docket No. 96-12-SA, U.S. Dep't of Education (July 1, 1996).

[24] *See Michigan*, 875 F.2d at 1206 (6th Cir. 1989) ("[W]hen . . . the state is given every opportunity to challenge each disallowance as well as the audit technique itself, it appears the state has been treated as fairly as is practicable under the circumstances."); *See also*, *Ratanasen*, 11 F.3d at 1472 (9th Cir. 1993) (Finding sampling and extrapolation appropriate, so long as there is an "opportunity to rebut the initial determination of overpayments."); *Chaves County Home Health Serv., Inc. v. Sullivan*, 931 F.2d 914, 923 (D.C. Cir. 1991).

[25] *See, e.g.*, *Ratanasen*, 11 F.3d at 1472 (Concluding that the testimony of a research specialist at trial, as to the appropriateness and reliability of a sampling methodology, could support the validity of the methodology at issue); *Webb v. Shalala*, 49 F. Supp. 2d 1114, 1118 (W.D. Ark. 1999) (Noting the approval of an agency expert of the sampling and extrapolation methodology employed by the agency corroborates the methodology's validity).

[26] *See, e.g.*, *Ratanasen* 11 F.3d at 1470 ("[M]athematical and statistical methods are well recognized as reliable and acceptable evidence in determining adjudicative facts.").

sample sizes used overcomes Saint Louis' sample size contentions. Finally, Saint Louis had the opportunity to choose an alternate method of calculating liability had it performed a full-file review. For the aforementioned reasons, I find calculation of liability utilizing a 90% confidence level, including the use of a 50 student sample from the 1994-1995 award year, acceptable.

Conclusion

Consistent with the narrow issues on which this case was remanded, I find that Saint Louis has failed both to demonstrate that it exercised the appropriate case-by-case analysis to determine whether special circumstances existed for the students in question, and to identify where in the record adequate documentation of such special circumstances is found and how that documentation constitutes adequate documentation. Further, as FSA calculated the liability for this matter using a reasonable, statistically valid methodology and extrapolation technique, I find the amount of liability assessed in FSA's FAD proper.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Saint Louis University, pay to the United States Department of Education the sum of **$2,816,029** in the manner as required by law.

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Ernest C. Canellos
Chief Judge

Dated: August 20, 2009

SERVICE

A copy of the attached document was sent to the following:

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