



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

SAINT LOUIS UNIVERSITY,

Docket No. 99-29-SA

**Student Financial
Assistance Proceeding**

Respondent.

DECISION OF THE SECRETARY

This matter comes before me as a second appeal in the above-captioned proceeding. As a result of the first appeal, Secretary Margaret Spellings remanded this case to Chief Administrative Judge Ernest C. Canellos for further proceedings. Judge Canellos conducted further proceedings and issued a Decision on Remand on August 20, 2009. Respondent appeals the Decision on Remand and raises three core arguments regarding why Judge Canellos' decision should be reversed; specifically, Respondent argues: (1) that Judge Canellos' finding on the issue of special circumstances is erroneous, (2) that the judge adopted an incorrect calculation of liability for the 1994-95 student aid award year, and (3) that the judge did not properly address the factual question of whether adequate documentation existed to support the exercise of professional judgment.

In light of the foregoing arguments and the extensive administrative proceedings in this case, a review of the procedural history of the case is warranted. The fulcrum of the dispute between the parties concerns the statutory requirements that condition when a postsecondary institution's financial aid administrator may award Federal financial aid to a student who, due to income or other financial capacity to cover the costs of postsecondary education, would be ineligible for financial aid or for the amount of financial aid awarded absent special circumstances.¹ In an Initial Decision issued on May 25, 2000, Judge Canellos rejected the

financial need is determined by using a standard formula, established by Congress, to determine a student's eligibility for Federal financial assistance. The fundamental elements in the standard formula are the student's income (and assets if the student is independent), parent income and assets (if the student is dependent), the family's household size, and the number of family members (excluding parents) attending postsecondary institutions. On this basis, an amount of a family's expected contribution to a student's educational expenses is computed, which is the sum of: (1) a percentage of net income (remaining income after subtracting allowances for basic living expenses and

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findings of a final audit determination (FAD)² concerning Respondent's expenditure of Federal financial student aid funds for the 1994-95 and 1995-96 award years, and relieved Respondent of "liability to repay to the United States Department of Education the sum of \$2,816,029."³ In response, the office of Federal Student Aid (FSA) appealed the judge's decision and sought reversal of the judgment.

On February 23, 2007, Secretary Spellings issued an order remanding this case to Judge Canellos for additional fact-finding in light of her ruling interpreting section 479A of Title IV. After holding that section 479A "does not allow [Respondent] to define [certain] expenditures ... as per se special circumstances," Secretary Spellings instructed Judge Canellos to determine whether circumstances and documentation existed in each case "to support the financial aid administrator's...depart[ure] from the congressionally mandated formula for calculating student aid eligibility."⁴

In light of Secretary Spellings' Order of Remand, Judge Canellos ordered Respondent: (1) to identify the case-by-case analysis it used to determine whether special circumstances existed for each student at issue, and (2) to show where in the record documentation of special circumstances may be found and how this documentation constitutes adequate documentation of special circumstances. Similarly, FSA was required to file a response supporting its position regarding whether Respondent conducted the appropriate case-by-case analysis. On August 20, 2009, on the basis of the submissions as well as the preexisting record, Judge Canellos issued a Decision on Remand concluding that Respondent: 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 a form developed by Respondent and reported expenses within any of the per se categories, which Respondent then used as a basis of exercising professional judgment for making Pell Grant awards to students. On that basis, Judge Canellos held that Respondent's practice of exercising professional judgment to award Pell Grant funds violated section 479A of Title IV.

Judge Canellos declined the parties' invitations to relitigate additional issues directly decided or foreclosed by Secretary Spellings' Order of Remand; however, Judge Canellos permitted Respondent to challenge FSA's methodology of calculating Respondent's liability for the 1994-95 award year. Respondent argued that the calculation of Respondent's liability for the

taxes) and (2) a percentage of net assets (assets remaining after subtracting an asset protection allowance). *See* Federal Pell Grant Program Purpose, <http://www2.ed.gov/programs/fpg/index.html>. This formula ensures that the necessarily limited Federal student aid funds are awarded to students with the greatest financial need.

² By issuance of the FAD, FSA determined that Respondent awarded Federal Pell Grants to students in contravention of the requirements of section 479A of Title IV of the Higher Education Act. On that basis, FSA required Respondent to return \$2,816,029 in improperly disbursed Pell Grant program funds to the Department. The expenditure of federal student financial assistance funds is governed by Title IV of the Higher Education Act of 1965, as amended (Title IV). *See* 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.*

³ The Federal Pell Grant program is a need-based grant program that provides Federal funds to low-income undergraduate and certain post baccalaureate students to promote access to postsecondary education. *See* Federal Pell Grant Program Purpose, <http://www2.ed.gov/programs/fpg/index.html>.

⁴ Section 479A allows postsecondary institutions to award Federal aid to students who would be ineligible to receive Federal assistance absent special circumstances. *See* 20 U.S.C. § 1087tt.

1994-95 award year was derived by extrapolating from an invalid sample. According to Respondent, the sample was invalid because the sample size was too small to be statistically reliable and the extrapolation was based on a 90% confidence level instead of the required 95% confidence level. Opposing Respondent's position, FSA argued that the 90% confidence level is permissible and that no case law exists that requires a particular confidence level when the Federal government uses sampling to project liability for improperly expended Federal funds. In addition, FSA argues that its sample size is reliable for the particular purpose of calculating liability.

In rejecting Respondent's challenge to the validity of FSA's sampling methodology, Judge Canellos explained that the methodology employed by FSA is similar to the methodologies used in prior Department cases that have approved extrapolation and sampling methodologies as a reasonable means of calculating liability. In addition, Judge Canellos concluded that absent demonstrated error, use of sampling and extrapolation to assess liability should 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. Applying that standard to FSA's sampling methodology, Judge Canellos found that there was "no evidence in the record" to show that the methodology "was invalid or unreliable."

I. Special Circumstance and Adequate Documentation

In the matter before me, Respondent argues that Secretary Spellings' Order of Remand erred because it establishes a rule by adjudication that Congress explicitly prohibited.⁵ In addition, Respondent argues that the Order of Remand ostensibly requires the financial aid administrator to inquire why a student's family has incurred certain expenses before the administrator may conclude that special circumstances exist. These arguments not only misconstrue Secretary Spellings' Order of Remand,⁶ but these arguments simply reassert positions that were duly considered and rejected by Secretary Spellings.⁷

⁵ The crux of this argument seems focused on the financial aid administrator's decision to allow expenses such as uninsured medical and dental expenses to constitute special circumstances for any or all students who incurred such expenses. In Respondent's view, the financial aid administrator does not have discretion to treat similar students differently. This argument misses the point entirely. The exercise of professional judgment by financial aid administrators is precisely the instance when institutions *may* treat students differently -- indeed, they must -- by doing so on a "case-by-case" basis. As Judge Canellos makes clear, "the record shows that [Respondent] found special circumstances every time a student requested it," which resulted in 46% of Respondent's students receiving Pell Grant payments on the basis of special circumstances.

⁶ For example, Respondent asks: "when is a funeral or a parent's loss of employment **not** a per se category of special circumstance?" This question seems to highlight Respondent's interest in being evenhanded as noted, *supra*. However, section 479A does not preclude the use of funeral expenses or unemployment status as a basis for exercising professional judgment. What is impermissible is the use of funeral expenses of any or all students regardless of whether the incident of such expenses in a given case exemplifies the circumstances warranting a departure from the statutory formula. Clearly, for some students, perhaps many, a funeral expense in a given year would not constitute circumstances that differentiate a student's circumstances from others who incur similar expenses.

⁷ Respondent similarly argues that construing section 479A to require a financial aid administrator to evaluate the judgment of the student or family in incurring the adjusted expenses is not only a difficult task, but is inconsistent with the statute. I agree, but Respondent's view of the Order of Remand does not adhere to the order's plain

Moreover, the Order of Remand provided the parties with an additional opportunity to clarify the factual record by stipulation or submission of additional evidence regarding the circumstances of awarding Federal financial assistance to students who, because of income and/or assets, may not be eligible for Federal aid. Necessarily, the authority to award Federal financial assistance by departing from the statutory formula must be exercised in a careful and circumspect manner to avoid undermining the purpose of providing need-based Federal aid in the first place. I find that the Order of Remand established the law of this case with which I am in full accord.⁸ Section 479A expresses the unambiguous, straightforward congressional intent to create conditions precedent to the proper use of professional judgment by a financial aid administrator; these conditions are a part of the core responsibility of FSA to ensure accountability for the expenditure of Title IV funds when financial aid administrators deviate from the contributions expected in the calculation of a student's cost of attendance.

In this regard, section 479A sets out two (2) key requirements that govern the exercise of a financial aid administrator's professional judgment in making adjustments to a student's cost of attendance: [1] that professional judgment be exercised on the basis of adequate documentation and [2] that the professional judgment be exercised only under special circumstances as determined by the financial aid administrator on a case-by-case basis. Notably, these requirements follow from the words of the statute, which could not be clearer.⁹ Consequently, financial aid administrators are not permitted to deviate from the statutory formula in the absence of special circumstances, and the special circumstances must be substantiated by adequate documentation on a case-by-case basis. To effectuate the intent of Congress, it is the duty of the Department to ensure that these two conditions are met and that the exercise of professional judgment does not constitute an abuse of discretion.

language. In exercising professional judgment, financial aid administrators are not required to act as judges of whether prudent financial choices have been adopted by parents and/or students. Instead, the financial aid administrator need only obtain adequate documentation of the special circumstances -- whatever those circumstances may be -- that form the basis of the judgment to depart from the statutory need analysis formula.

⁸ Respondent cites a letter I issued on May 8, 2009, sent to postsecondary institutions to argue that contrary to Secretary Spellings' Order of Remand, I encouraged the use of per se categories in the exercise of professional judgment. This argument misconstrues my letter. First, the argument ignores the explicit guidance provided by the Department's April 2, 2009, Dear Colleague Letter upon which my letter is based. See *Dear Colleague Letter* GEN-09-04, and *May 8, 2009 Key Policy Letter Signed by Secretary Arne Duncan*, <http://www2.ed.gov/policy/gen/guid/secletter/090512.html>. More importantly, my letter, as well as the Dear Colleague Letter, refers to the need to "examine the totality of the family's economic situation" and the need to identify "conditions that differentiate an individual student from a class of students," respectively, regarding the exercise of professional judgment. *Id.* Consequently, my guidance allowing the use of unemployment status as a condition in assessing eligibility for Federal student aid by use of professional judgment does not establish an automatic per se category of special circumstances.

⁹ Respondent makes much of the fact that the statute expressly precludes the Department from issuing regulations directing the manner in which financial aid administrators exercise professional judgment. Of course, the Department is not seeking to enforce such. FSA has not challenged any circumstances for which Respondent exercised professional judgment on a case-by-case manner. Instead, FSA is fulfilling its core responsibility to ensure accountability for the expenditure of Federal funds by assessing compliance with the statutory conditions precedent to the proper use of professional judgment. The actual determination of what type or amount of expenses a given student should document or the circumstances surrounding the student's financial status are matters under the purview of the financial aid administrator on a case-by-case basis.

Applying the standard set forth in the Order of Remand to the facts, Judge Canellos determined, and I am persuaded that he did so correctly, that Respondent's financial aid administrator departed from the statutory formula by defining expenditures for elementary or secondary education, medical or dental expenses not covered by insurance, and most importantly "living expenses" as per se special circumstances. Moreover, Judge Canellos's fact-finding shows that contrary to the requisites of section 479A, Respondent also categorically allowed other expenses to support the source of special circumstances. In light of these conclusions by Judge Canellos, which I adopt, it is clear that Respondent's exercise of professional judgment constituted an abuse of discretion.¹⁰

Notwithstanding that an abuse of discretion standard should not take into account a consideration of whether FSA agrees with the *outcome* of the financial aid administrator's professional judgment, section 479A does require consideration of whether the exercise of professional judgment included a sufficient factual basis, akin to an evidentiary review of adequate documentation, and a consideration of whether the statutory preconditions were met.¹¹ In this respect, I am convinced that this case represents the hallmark of abuse of discretion; Respondent's failure to comply with the statutory preconditions demonstrates that Respondent exercised no discretion at all by finding special circumstances for every student who requested it. Indeed, turning the statutory provision on its head, the record reveals that Respondent departed from the statutory formula *regardless* of special circumstances, not *because* of special circumstances.

Based on the evidence before him, Judge Canellos found that in no case did Respondent's exercise of professional judgment warrant departing from the congressionally mandated formula for calculating student aid eligibility. Upon his review of the record, Judge Canellos concluded that Respondent neither exercised professional judgment on a case-by-case basis nor demonstrated that adequate documentation existed in each case to support the financial aid administrator's determinations of special circumstances. This conclusion follows because Respondent executed a systematic practice of using professional judgment to override the statutory formula in any case in which a student requested a determination of special circumstances. Moreover, in his review of Respondent's evidence, Judge Canellos concluded that the evidence submitted by Respondent does not substantiate special circumstances because "the paucity of documents...significant[ly] lack [] context from which to make an appropriate case-by-case analysis of special circumstances." On the basis of these determinations, I am persuaded that Respondent did not demonstrate that its financial aid administrator exercised

¹⁰ Respondent acknowledges that section 479A prohibits the exercise of professional judgment based on conditions that exist across a class of students, but identifies examples of such impermissible conditions as "all married independent students or all dependent female students." Certainly, postsecondary institutions cannot award Federal financial aid on the basis of gender or marital status and the exercise of professional judgment provides no exception. More directly, as this decision makes clear, section 479A not only prohibits awarding Federal funds to groups, classes, or categories of students, but specifically requires the financial aid administrator to affirmatively exercise professional judgment on a case-by-case basis.

¹¹ See, e.g., *Cooter & Gell v. Hartmarx*, 496 U.S. 384 (1990), *United States v. Abel*, 469 U.S. 45 (1984) (abuse of discretion is the proper standard of review of manifestly erroneous fact-finding).

professional judgment using adequate documentation. Therefore, Respondent abused its discretion in violation of section 479A of Title IV of the Higher Education Act.

II. Calculation of Liability for 1994-95 Award Year

As noted above, Respondent takes issue with the statistical validity of the sample used to calculate its liability. On this basis, Respondent seeks reversal of Judge Canellos's ruling on the methodology of calculating Respondent's liability for the 1994-95 award year. Judge Canellos upheld FSA's \$781,337 calculation of liability for the 1994-95 award year.

Instead of determining the amount Respondent must repay the Department for each instance in which Federal financial assistance was improperly awarded to a student during the 1994-95 award year, FSA used sampling and extrapolation to determine the amount of Respondent's liability. In doing so, according to FSA, it drew a sample of 50 students from which to extrapolate a calculation of liability for the universe of 779 students -- the total number of students in which professional judgment was used to depart from the statutory formula. Respondent argues that the minimal sample size that could be used for a statistically valid sample is 51, not 50. Although Respondent argues that 51 is the minimally valid sample size, Respondent does not specifically support an alternative calculation of liability; rather, Respondent argues that FSA's error is fatal, and that "no assessment of liability based on an extrapolation can be considered fair and accurate" because FSA's methodology is not statistically valid. Respondent also argues that the calculation of liability is flawed because the extrapolation was based on a 90% confidence level instead of a required 95% confidence level.

For its part, FSA argues that its extrapolated method of calculating Respondent's liability is legally supportable. According to FSA, it arrived at a total liability for both award years at issue of \$2,816,029 by projecting a total repayment liability based on a sample of 139¹² student files derived from a total of 2,220 students who received Federal financial assistance based on Respondent's departure from the statutory formula in the exercise of professional judgment. In making its projection, FSA concedes that it used a 90% confidence level instead of 95%, but argues that the 90% level of confidence is permitted by Office of Inspector General audit guidelines. Moreover, in FSA's view, a sample size need not comport with any particular sampling methodology. To bolster its point, FSA notes that Judge Canellos found persuasive a statement submitted by FSA from one of its auditors who identified the sample size of 50 as appropriate.

Judge Canellos found that the failure by FSA to use a 95% confidence level is "not dispositive in determining whether FSA's calculation of liability was appropriate." Citing a Sixth Circuit ruling,¹³ Judge Canellos concluded that "[a]bsent 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

¹² To arrive at 139, FSA added its sample of 50 student files for 1994-95 to the sample of 89 student files for 1995-96.

¹³ *Michigan Dep't of Educ. v. U.S. Dep't of Educ.*, 875 F.2d 1196 (6th Cir. 1989)

opportunity to rebut the findings and technique of an audit.” Judge Canellos also notes that although offered an opportunity to challenge FSA’s audit method by introducing rebuttal evidence, Respondent offered no credible evidence that reliance on extrapolation is inappropriate.

To begin with, certainly, a calculation of liability by FSA is vulnerable to challenge, and it is appropriate to allow Respondent an opportunity to challenge FSA’s calculation of liability. Even so, simple assertions that a calculation of liability is unfair or unacceptable, without the presentation of evidence identifying the appropriate calculation or evidence showing the error in FSA’s calculation, is insufficient to rebut FSA’s straightforward calculation. Consequently, I agree with Judge Canellos’s finding that failure to offer any credible evidence supporting a challenge to FSA’s calculation is insufficient to rebut a reasonable calculation of liability by FSA. More importantly, however, I find the parties’ arguments regarding sampling irrelevant to the calculation of liability in this case.

The parties devote considerable, if not excessive, effort to arguing whether FSA’s initial sampling methodology is sufficiently valid for extrapolating a calculation of liability, but the record reveals that FSA did not derive its calculation of liability from the sample. The sample was used to determine whether Respondent’s use of professional judgment systematically lacked statutory compliance.¹⁴ The calculation of liability, however, was derived from a projection of improper Pell Grant awards, which I find reliable and acceptable as a method of calculating liability.

The extrapolation calculation does not hinge on the statistical validity of the student sample.¹⁵ Instead, for purposes of calculating liability, the sample was disregarded, and the extrapolation of liability was computed using the entire universe of 2,220 Federal Pell Grant recipients for whom professional judgment was performed. Apparently, this method was used because of the audit finding that in *all* cases for whom professional judgment was performed during the award years at issue, Respondent’s professional judgment determinations were improper. Consequently, the calculation is based on the sum of the actual number of students awarded Federal Pell Grant funds by the exercise of professional judgment during the 1994-95 and 1995-96 award years multiplied by the average Pell Grant awarded: 779 x \$1,003 plus 1441 x \$1,412, respectively, which yields, \$2,816,029. The use of projections is a methodology that is not only consistent with the Department’s long-standing and reasonable practice of calculating liability to determine the amount of a postsecondary institution’s liability, but has been

¹⁴ FSA may have used inartful phrasing when FSA identified in the FAD that the calculation of liability was derived by extrapolating from “a random sample of 139 students [derived] from a universe of 2,220 Federal Pell Grant recipients for whom professional judgment was performed” during the award years at issue. Random sampling is a form of statistical sampling that selects individual claims from a universe of claims in a manner that ensures that each claim in the universe has the same chance of being selected as any other. Sampling designed to exclude any particular type of claim is not random and, therefore, is not statistically valid. *See generally*, Jack R. Bierig, *Methodological Challenges to Government Sampling Techniques in Civil Fraud and Abuse Cases*, 32 *Journal of Health Law* 339 (1999).

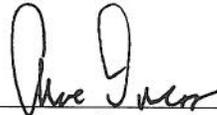
¹⁵ For a general discussion of statistical sampling in the legal realm, *see* Robert Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 *VAND. L. REV.* 561, 1993.

authorized by a wide-ranging number of courts as a reasonable method of calculating liability by Federal agencies.¹⁶ Accordingly, I am persuaded by Judge Canellos's determination that the record reveals that in violation of 20 U.S.C. § 1087tt, Respondent exercised professional judgment by using per se categories of special circumstances and without a case-by-case determination that a student's individual circumstance differentiated that student from other students.

ORDER

ACCORDINGLY, I HEREBY ORDER Saint Louis University to repay the U.S. Department of Education the sum of \$2,816,029.

So ordered this 12th day of November 2010.



Arne Duncan

Washington, D.C.

¹⁶ See, e.g., *In the Matter of Chauffeur's Training School*, Dkt. No. 92-113-SP, U.S. Dep't of Educ. (November 23, 1999); *Chaves County Home Health Serv. v. Sullivan*, 931 F.2d. 914 (D.C. Cir. 1991) (courts have recognized that sampling creates only a presumption of validity). Moreover, the Department has long recognized that a postsecondary institution is the party that has at its disposal the files and records to justify its expenditure of Title IV funds. See *In re Belzer Yeshiva*, Dkt. No. 95-55-SP, U.S. Dep't of Educ. (June 19, 1996); *In re National Broadcasting School*, Dkt. No. 94-98-SP, U.S. Dep't of Educ. (December 12, 1994).

SERVICE LIST

Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Jennifer L. Woodward, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110

Michael B. Goldstein, Esq.
Leslie H. Wiesenfelder, Esq.
Blain B. Butner, Esq.
Dow, Lohnes, & Albertson, PLLC
Suite 800
1200 New Hampshire Avenue, NW
Washington, D.C. 20036