



THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

AMERICAN BUSINESS COLLEGE,

Docket No. 03-100-SP
Federal Student Aid Proceeding

Respondent.

DECISION ON REMAND

This matter comes before the Secretary on appeal by the office of Federal Student Aid (FSA) of the Initial Decision issued by Chief Administrative Judge Ernest C. Canellos on March 24, 2005. FSA requests that I reverse the Initial Decision, which reduced the liability of Respondent, American Business College, from \$2,026,590 to \$545,981.

According to FSA, the Initial Decision erred in reducing Respondent's liability by improperly shifting the "burden of proof to the Department when [the judge] addressed the liability portion" of the case. In FSA's view, questions such as whether Respondent is liable for misspent funds¹ and, if so, to what extent Respondent must repay the funds, are largely evidentiary issues for which Respondent carries the burden of proof. Opposing FSA's appeal, Respondent argues that the Initial Decision should be upheld because the record included "evidence sufficient to persuade Judge Canellos that [FSA's] allegations and assessed liabilities were unreasonable and unwarranted."²

¹ FSA alleged Respondent misspent funds in violation of the Department's regulations issued pursuant to Title IV of the Higher Education Act of 1965 ("HEA") 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.*

² For its part, Respondent requests that I reconsider Judge Canellos's "procedural" finding that Respondent was provided adequate notice of the allegations at issue. I find no reason to take exception to Judge Canellos's finding that Respondent's argument is "without merit." Other than to assert that a "preliminary report" was not issued, Respondent makes no showing of insufficiency of notice. The record makes it apparent that Respondent demonstrated its ability to vigorously defend itself by challenging FSA's allegations -- except when conceding to them -- throughout the proceedings. Moreover, issuance of a preliminary report was not required at the time FSA issued its final program review determination. *But see*, Higher Education Opportunity Act, Pub. L. No. 110-315, § 497, 122 Stat. 3078 (2008) (reauthorizing the Higher Education Act of 1965 and imposing a requirement to "provide to an institution of higher education an adequate opportunity to review and respond to any program review report and relevant materials related to the report before any final program review report is issued").

Judge Canellos ruled in FSA's favor by finding Respondent liable for statutory and regulatory violations applicable to student financial assistance programs. Broadly speaking, these violations were manifest in two respects: the improper administration of an ability-to-benefit exam and the failure to comply with student aid program refund requirements.³ In resolving the question of what Respondent must pay as a result of its liability for the improper administration of an ability-to-benefit exam, Judge Canellos adopted an "error rate" calculation proposed by Respondent. In doing so, the judge reduced FSA's recovery from \$1,458,107 to \$186,148. Similarly, to resolve the question of what Respondent must pay as a result of its liability for the failure to comply with student aid program refund requirements, Judge Canellos adopted Respondent's sampling formula, thus ultimately reducing FSA's recovery from \$568,483 to \$359,833.⁴

In applying the burden of proof to Respondent's evidence, Judge Canellos concluded that Respondent had not met its burden. The judge's conclusion was based, in part, on the evidence in the record showing that "it is unquestionable that violations did occur." This finding -- which I do not disturb -- reflects the judge's certainty that Respondent failed to fully account for the proper expenditure of HEA funds during the years at issue.

To resolve the question of what Respondent must pay as a result of its liability for its failure to comply with refund requirements, the judge reviewed error rate calculations submitted by each party. The judge's finding on the error rate calculation for the refund issue is straightforward. The judge concluded that the correct calculation should be based on a projection of the sample error rate to the universe of all students who withdrew. Refunds are required, when applicable, for students who withdraw from a school before completing the program. As such, I find that Judge Canellos correctly determined the liability regarding Respondent's failure to properly calculate and issue refunds; the appropriate measure of recovery is established by Judge Canellos in the amount of \$359,833.⁵

With regard to the issue concerning Respondent's improper administration of an ability-to-benefit exam, Judge Canellos concluded that some of the evidence in the record demonstrated that not *all* ability-to-benefit exams were falsified or otherwise improperly administered. To account for the properly administered ability-to-benefit exams, the judge reviewed a sample of student files and adopted an "error rate" calculation proposed by Respondent. On appeal, FSA ostensibly argues that under the circumstances of this case, it was improper for the judge to reject

³ To be eligible to receive student financial assistance under the HEA, a student attending an eligible postsecondary institution must have a high school diploma, its equivalent, or a demonstrated "ability to benefit" from a program of study offered by the institution. What is more, to qualify for eligibility by proof of a demonstrated ability to benefit, a student must be administered a standardized or industry-developed test measuring the prospective student's aptitude to complete successfully the program of study to which the student has applied. 20 U.S.C. §§ 1088(b) & 1091(d).

⁴ Judge Canellos made these reductions in light of his findings that some Title IV funds were expended properly, and that FSA's proposed liability does not account for such.

⁵ The use of error rate projections as a reasonable basis for calculating recovery in a Subpart H proceeding has been sustained in the Department's cases and approved by the courts. See, e.g., *Chauffeur's Training School v. Riley*, 967 F.Supp. 719 (N.D.N.Y. 1997).

FSA's calculation of recovery without first providing FSA with an opportunity to submit an alternative calculation of recovery that would be consistent with the tribunal's findings on the merits.⁶ In FSA's view, the judge should have held further proceedings on the calculation of liability consistent with the tribunal's rulings on the falsification of ability-to-benefit exams. I agree that the context of this case warranted further proceedings.

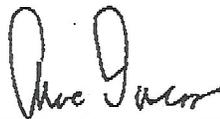
There are at least two factors that strongly support allowing FSA an opportunity to respond to the issue of the calculation of recovery. First, the judge's calculation of recovery on the ability-to-benefit finding represents a considerable departure from FSA's calculation of recovery. It is doubtful that FSA anticipated that the tribunal would reduce FSA's damages using a projection rate; hence, the use of an error rate is likely to be a valid reason to allow FSA an opportunity to respond. In addition, the decision, on its face, reveals that the calculation adopted was based on a record wherein Judge Canellos was "unable to determine in any precise way how much [Respondent] must return to ED for the ATB violation." This factor also provides a valid reason to allow FSA an opportunity to respond. Accordingly, this matter is remanded to the tribunal for further proceedings. I am mindful that this case has been on the administrative docket of the Department for a number of years; therefore, this case should be resolved expeditiously. Toward that end, the briefing schedule is set forth herein.

On or before **May 11, 2009**, FSA shall file the original and one copy of a brief setting forth the basis for its position on the proper error rate. Upon receipt of FSA's brief, Respondent shall file by **June 10, 2009**, the original and one copy of a brief setting forth the basis of its position on the proper error rate. Thereafter, the tribunal below should issue a decision determining the precise amount Respondent must pay to the Department for its violation of the regulatory requirements governing the ability-to-benefit exam.

ORDER

ACCORDINGLY, I HEREBY ORDER American Business College to repay the U.S. Department of Education \$3,9,833 for the refund violation. IT IS FURTHER ORDERED that this matter be REMANDED for further proceedings consistent with this order.

So ordered this 8th day of April 2009.



Arne Duncan

Washington, D.C.

⁶ FSA also challenges the judge's fact-finding on the allegation that Respondent falsified the test results of the ability-to-benefit exam. Although the judge's decision does not draw a precise reticulation of the facts relied upon to resolve the falsification allegations, I accept the judge's conclusion that his finding that Respondent did not meet its burden of proof left for him only a determination of "the amount of recovery that is due FSA." In this regard, I reject FSA's invitation to reassess whether the record supports FSA's position that all of the test results were falsified.

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