THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

CENTRAL STATE UNIVERSITY,

Respondent.

Docket No. 11-55-SA
Federal Student Aid Proceeding

DECISION OF THE SECRETARY AND ORDER OF REMAND

This case arises from an appeal by the Office of Federal Student Aid, U.S. Department of Education (the Department or FSA), with a cross-appeal filed by Central State University (Respondent or CSU), of the Initial Decision rendered on July 18, 2011, by Administrative Judge Richard Slippen. In the appeal before Judge Slippen, Respondent requested review of one finding (Finding No. 7) from the Final Audit Determination (FAD) issued by FSA on May 29, 2011. Finding No. 7 included the charge that CSU failed to complete and properly document the verification process for 39 students during the 2008-2009 award year, and CSU challenged this finding for 10 of the 39 students.[1] Judge Slippen found that CSU had failed to properly verify income information for eight students but had completed the verifications for two.

I.

On August 26, 2012, the Department timely appealed one of the two determinations that student income information had been properly verified. On September 26, 2012, Respondent timely filed its response. In addition to responding to FSA's appeal of the one determination, however, CSU also proffered arguments urging me to overturn the hearing official's decision with regard to the determinations for four other students. Thus, Respondent's brief included an argument in response to FSA's brief and also raised new issues.

On October 2, 2012, FSA filed a "Motion to Strike Portions of Central State University's Brief to the Secretary,"[2] characterizing Respondent's arguments regarding the four students as an appeal and asserting that the appeal was untimely under the 30-day deadline imposed by 34 CFR § 668.119(a). Accordingly, FSA asked me to strike all of CSU's brief but the portion that addressed FSA's appeal. Respondent replied on October 10, 2012, that its brief was timely, in accordance with 34 CFR § 668.119(d), and appropriate -- that by filing the appeal of the Initial Decision, FSA "opened" the full decision for my review, thus allowing CSU to raise other issues

[1] Stipulation agreements and other evidence resolved the verification questions for 29 of the 39 students.
[2] Hereafter referred to as "Motion to Strike."

in its response brief. Respondent further stated that nothing in the regulations or administrative case law prohibits a party from responding to any or all of the issues decided in the Initial Decision, once the decision has been brought up on appeal, and that the only limitation found in the regulations on what can be included in the appeal and/or the response brief is that neither party may introduce new evidence.

Thus, the threshold question brought by the Motion to Strike and before me now is whether the four new issues raised in Respondent's September 26 brief are disallowed as an untimely appeal, as FSA asserts, or are they properly before me as part of the response brief, as claimed by Respondent. Stated another way, I am now being asked to determine the scope of issues that may be addressed in a filing made in accordance with 34 CFR § 668.119 subpart (d): is a response brief limited to only those issues appealed under 34 CFR § 668.119 subpart (a) or may the response also include new issues?

II.

This issue is one of first impression. I am being asked to interpret the regulatory language that provides for appeals of audit determinations and program review determinations under Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq*. The implementing regulations for appeals to the Secretary of Initial Decisions in these matters can be found at 34 CFR § 668.119. At issue here are subparts (a) and (d), which state –

> (a) Within 30 days of its receipt of the initial decision of the hearing official, a party wishing to appeal the decision shall submit a brief or other written material to the Secretary explaining why the decision of the hearing official should be overturned or modified.

And

> (d) The opposing party shall file its response to the appeal, if any, with the Secretary within 30 days of that party's receipt of the appeal to the Secretary.

As I explain below, I need not go beyond the plain reading[3] of these regulations to grant FSA's Motion to Strike and limit Respondent's filing to the facts and issues raised in FSA's appeal.

Respondent filed its reply[4] brief on September 26, 2012, thirty days after FSA filed its appeal. Respondent contends that its filing was timely, appropriate in scope and in accordance with 34 CFR § 668.119(d). Respondent is correct in its reading and application of the regulation in one respect: the response was due within 30 days of receipt of the first submission. The regulation is unambiguous, and there is no question that Respondent's brief was submitted within the 30-day time frame required by the regulation. This issue is uncontroverted.

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[3] According to the plain meaning rule, absent a contrary definition within the statute or regulations, words must be given their plain, ordinary and literal meaning. If the words are clear, they must be applied.

[4] "Response" and "reply" are used interchangeably in this decision when describing filings submitted in accordance with 34 C.F.R. § 668.119(d).

However, Respondent's next assertion in support of its response brief is at controversy. Respondent states that "By filing the initial appeal, FSA opened the Hearing Official's decision for review by the Secretary."[5] Thus, Respondent argues that a response brief may address any issue contemplated in the Initial Decision. Respondent's argument is not based in a plain reading of the regulations, but rather in an interpretation of their silence. Indeed, Respondent acknowledges that the regulations do not speak to this matter, nor does case law: "Nothing in the regulations or past precedent limits CSU from responding to any or all of the issues decided in the Hearing Official's Initial Decision after FSA opened the decision for review by the Secretary."[6] Respondent cites no legal precept in support of its position. Instead, Respondent's argument seems to be based in the proposition that silence on the matter may be construed as authorization, permitting an opposing party to submit anything (except new evidence) through the response brief. In this manner, Respondent invites me to find authorization for an expansive reading of subpart (d) from a lack of textual limitations or specific prohibitions in the regulations. I decline to do so.

III.

Respondent's September 26 filing was a response brief under 34 C.F.R. § 668.119(d). Indeed, Respondent acknowledges as much by citing the regulation.[7] However, in making its filing, Respondent exercises selective compliance, adhering to the timeliness mandate in the regulation but ignoring the meaning of the text. Specifically, Respondent ignores the language "response to the appeal" when asserting that there is no textual limitation on what may be filed. Although the regulations do not define the term "response," a response is generally understood to be an answer, a reaction to something, or, in the instant case, a second filing. A "response" is never understood to be the first action.

Subpart (d) further states that the "opposing party shall file its response to the appeal...within 30 days...." This language clearly anticipates that any filing under this provision is an *answer* to the *appeal* filed 30 days prior. An answer is limited to a question raised, so a response brief cannot incorporate issues unrelated to the original filing. In using the term "response," the phrase "response to the appeal," and referencing the appeal filed 30 days prior, the language in subpart (d) specifically and unambiguously limits the filing described under subpart (d) to the facts and law raised by the first filing under subpart (a). Both the text and the context of this provision support this conclusion. Indeed, the plain reading of this text allows for no other interpretation.

Respondent's assertion that FSA's appeal "opened" the Initial Decision to my full review is simply without basis. As stated above, Respondent cites no case law or regulatory authority in support of its claim. Further, I disagree with Respondent's contention that regulatory silence grants an opposing party the opportunity to bootstrap new arguments into a reply brief filed

[5] *Motion to Strike*, p. 1.
[6] *Id.* at 2.
[7] The brief filed was titled "Central State University's Brief to the Secretary." Thus, Respondent refrained from labeling the filing as a "response." However, Respondent also stated: "CSU submits this brief in response to the Department's appeal, in accordance with 34 C.F.R. § 668.119(d)(1992)." In this manner, CSU acknowledged that its brief was indeed a response, in accordance with the procedures defining the opposing party's reply.

under subpart (d). Respondent chooses to adopt a reading of the regulation that does not comport with the plain meaning of the text, and I find that a plain reading of the regulations is more appropriate. Where the regulations are clear, they must be taken on their face. The regulations here are clear. Subpart (a) outlines the steps necessary to appeal findings of the Initial Decision. Subpart (d) allows for a response, and that response is limited to the issues raised by the appeal made under subpart (a). Any party wishing to appeal a finding in the Initial Decision must comply with the requirements laid out in 34 CFR § 668.119(a).

To be clear, I hereby find that the scope of any response filed under 34 CFR § 668.119(d) is limited to the issues raised in the first filing, which is the appeal, and any appeal of issues decided in the Initial Decision must be filed in accordance with 34 CFR § 668.119(a). For these reasons, FSA's Motion to Strike is hereby granted. Those portions of Respondent's brief that were not in response to FSA's single-issue appeal are hereby stricken.

IV.

Turning to the merits of FSA's appeal, the sole issue now before me pertains to the allegation that CSU failed to complete the verification of one student's eligibility for aid because it left an unresolved discrepancy in the student's file. Although the student was deemed independent, which was determined by the student's service in the Ohio Army National Guard and other records, his tax return indicated that he might have been claimed as someone else's dependent.[8] FSA asserted in the initial appeal that CSU ignored this discrepancy and thus failed in its obligation under 34 C.F.R. § 668.82(b)(1) to act in a fiduciary capacity and exercise the highest standard of care and diligence. CSU argued that the student was independent, so no further documentation of his status was necessary to complete the verification process. In the Initial Decision, the hearing official agreed with CSU, determined that the student in question was considered "independent" and therefore found that Respondent had no responsibility to obtain that student's parental tax information. Ending the inquiry there, the hearing official found in favor of Respondent, that the verification process for Student #33 was complete.

In the appeal now before me, FSA contends that the hearing official made an error of law by ending the inquiry with the determination that the student was independent and finding that nothing further was necessary to satisfy the eligibility verification requirements. Specifically, FSA argues that CSU had the additional obligation of resolving discrepancies in the information that it received from different sources with respect to a student's application for financial aid.[9] Absent the resolution of discrepancies, FSA asserts that verification for this student remains unperformed. FSA further clarifies that it neither disputes the broad principle that parental tax information is only required when a student selected for verification is found to be dependent, nor appeals the hearing official's finding that Student #33 was independent.

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[8] On his tax return, the student did not claim an exemption for himself by checking item 6a, the instructions for which read "[i]f someone can claim you as a dependent, do not check box 6a." Thus, the inference and implication is that someone else did claim the student. This information is in discord with the student's independent status, and the discrepancy requires resolution.

[9] *See*, 34 C.F.R.§ 668.16(f)(2).

In response, CSU reiterates its arguments that parental tax information is not required under the regulations for students who are deemed "independent" and that it correctly determined that Student #33 was independent. Respondent does not extend its reply beyond the issue of the student's status and the lack of any requirement for verification of independent status. Respondent concludes that the hearing official correctly found that CSU completed the verification process by reviewing only the student's tax return.

The resolution of discrepancies in students' files is a requirement placed on an institution serving as a fiduciary of Federal funds and is essential to the verification process. Upon review of the record, it is clear that the issue of discrepancies in Student #33's file was properly before the hearing official. Despite this, the Initial Decision fails to mention the requirement that discrepancies be reconciled and finds in favor of CSU without discussion of Respondent's obligations under 34 C.F.R. § 668.16(f)(2). As a result of this omission, I cannot conclude that the issue was properly reviewed. Because the resolution of any discrepancies is a necessary step in the verification process, the verification cannot be properly performed where discrepancies remain. For this reason, I remand the decision for a determination as to whether CSU resolved the discrepancy found in Student #33's file and thus completed the verification process, consistent with its obligations under 34 C.F.R. § 668.16(f)(2) and 34 C.F.R. § 668.82(b)(1), and, if not, what liability attaches.

The hearing official, after making the determination described above, shall calculate the full amount of the liabilities owed to the Department by CSU.

ORDER

Accordingly, I ORDER that Federal Student Aid's Motion to Strike Portions of Central State University's Brief to the Secretary is hereby GRANTED.

It is FURTHER ORDERED that this matter is REMANDED to the tribunal below with the instructions that the administrative judge determine whether Respondent resolved discrepancies in Student #33's file and if not, what liabilities attach. In all other respects, the remainder of the judge's Initial Decision is hereby AFFIRMED.

It is FURTHER ORDERED that the administrative judge shall determine the full amount of liabilities owed to the Department, consistent with this decision and the findings on remand.

So ordered this 23rd day of July 2014.

Arne Duncan

Washington, D.C.

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