IN THE MATTER of Docket No: 92-23-SP
GARCES COMMERCIAL COLLEGE
Student Financial Assistance

DECISION

Appearances: Alfredo G. Duran, Esq., Garces Commercial College, Miami, Florida.
Donald C. Philips, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C.

Before: Judge Daniel R. Shell

DECISION

Statement of the facts

Garces College (Garces) was charged by the U.S. Department of Education (Education) with using Stafford Loans and Campus-based funds (Supplemental Educational Opportunity Grant or SEOG funds) for students in an ineligible program and therefore owing a liability of $702,704 for award years 1988-89, 1989-90, and 1990-91.See footnote 1[1]

Education maintained that students enrolled in the English as a Second Language (ESL) program are eligible to receive only Pell Grant funds. Stated another way, Stafford loans (GSL), Supplemental Loans for Students (SLS) loans, or campus-based funds are not available for ESL students.

Pursuant to section 34 of the Code of Federal Regulations (C.F.R.) Part 668, Subpart H and by a timely request for a hearinq, Garces appealed the final program review. The basis for the final determination decision stem from an onsite inspection conducted December 3-7, 1990, by two Institutional Branch specialists, Philip Knight and Nancy Mapes.See footnote 2[2] In conducting the program review, Knight and Mapes sampled 21 student files from award years 1988-89 and 1989-90.See footnote 3[3] The reviewers discovered that 9 of the sampled students received Stafford loans and/or SEOG funds while enrolled in the ESL Program.See footnote 4[4]

Education exhibit 4 represents the students' receipt of Stafford loan or SEOG funds for his/her enrollment in an ESL Program. The master list is assembled from the institutional records, the individual student's record, and cover sheets which reference the dates of the program review. "Garces Commercial College" forms are attached to seven of the nine students. The forms display the students' name, social security number, address, type of student aid received, dates, account activity and the course of study.See footnote 5[5]

On page 2 of the final program review determination, the calculation of Garces' liability for ineligible Stafford (GSL) and SLS loans is discussed. Education explained the use of a formula to determine the approximate amount of loans that will result in a default. Education also explained that it must reimburse each lender holding a default. The amount of reimbursement is based on Garces current default rate.See footnote 6[6] In addition to the student identification

found in Appendix A of the program report, a multi-step process exhibits the calculation. The seven steps used are as follows: Step 1-Calculate ineligible Stafford; Step 2- Pay estimated Stafford defaults; Step 3- Pay estimated subsidies from disbursement to repayment; Step 4- Pay estimated special allowance from repayment to default or PIF ; Step 5- Pay estimated SLS defaults, and Step 6- Determine total estimated liability [add totals in Steps 2,3.4(a) 4(b) and 5]. Appendix A traces the process to reach a total liability of $681,854.

In addition to the Stafford and the SLS sum claimed, Education calculated the SEOG sum due. Education's demand for $20,850 in SEOG refunds is based upon information contained on pages 1-22 of Appendix B, a 23-page handwritten list of students submitted by Garces.See footnote 7[7] Each page contains columns of student names, social security numbers, lender name, amount of loan, check disbursement date, date of refund, amount of refund, and amount of SEOG disbursed (if any). A page-by-page summary follows: page 1 - $125 SEOG; page 2 - $100 SEOG; page 4 - $75 SEOG; page 5 - $2840 SEOG; page 7 - $1420 SEOG; page 10 - $1370 SEOG; page 14 - $660 SEOG; page 15 - $5680 SEOG; page 16 - $1320 SEOG; page 18 - $1320 SEOG; page 19 - $660; page 20 - $1320 SEOG; page 21 -$3260 SEOG and page 22 - $700 SEOG. Therefore, the $681,854 calculated in the Stafford and SLS dollar amounts, plus the $20,850 in SEOG refunds, equals the total liability of $702,704.

Garces does not challenge Education's use of the formula set forth. In the parties Joint Stipulation of May 8, 1992, the relevant language provides:

There is no dispute concerning the calculation of the liability. The dispute concerns the existence of the liability and Respondent does not admit to the liability by stipulating to the calculation. In the event this tribunal determines that Respondent violated ED statutes and regulations, and must repay the liability, the parties agree that the liability is appropriately set at $702,704. This determination reflects actual loss formulation based on $2,532,508 that Respondent drew and obligated in GSL and SEOG funds.See footnote 8[8]

Significant regulatory authority

Education refers to the relevant statutory authority in the Higher Education Act (HEA) regarding ESL funds at § 411(c)(2) (codified at 20 U.S.C. 1070a(c)(2)). Basic grants made under this section are known as "Pell Grants." Under subsection (c)(2), "Period of eligibility for grants," it states:

Nothing in this section shall exclude from eligibility courses of study which are noncredit or remedial in nature (including courses in English language instruction) which are determined by the institution to be necessary to help the student be prepared for the pursuit of a first undergraduate baccalaureate degree or certificate or, in the case of courses in English language instruction, to be necessary to enable a student to utilize already existing knowledge, training, or skills.

The regulations at 34 C.F.R. § 668.8 define the subject eligible program. Subsection (a) of section 668.8 covers, in general, Title IV eligible programs. Section 668.8(b) is a program-

specific subpart which refers only to the Pell Grant Program. Under (b)(2), English as a second language is discussed. The provision at § 668.8(b)(2)(i) provides:

The Secretary considers a program that consists solely of instruction in ESL to be an eligible program if the program meets the requirements of paragraph (a) of this section and admits only students who the institution determines to [sic] need to ESL instruction to use already existing knowledge, training, or skills.

In a discussion of the purpose of the final regulation's extension of Pell Grant program eligibility to include English as a second language, the following explanation of 34 C.F.R. § 668.8 at 52 Fed. Reg. 4512, 4517 (1987) is given:

To conform these regulations to a new provision in section 411 of the HEA, the term "eligible program," for purposes of the Pell Grant Program, is extended to include programs consisting solely of instruction in English as a second language. Under [section] 668.8, a student is considered to be enrolled in an eligible program, for purposes of the Pell Grant Program, if the program consists solely of instruction in English as a second language,... (emphasis added).

For additional support, Education relies on, a "Dear Colleague" letter issued by the Department of Education on November 1986 (GEN-86-35).See footnote 9[9] The discussion of the ESL program appears under the Pell Grant Program at page 7: "A program of instruction in English as a second language (ESL), that the institution determines is necessary to enable a student to use already existing knowledge, training, or skills, may qualify as an eligible program." The "Dear Colleague" letter contains the following representation:

As with any major new student aid legislation, questions will arise about various provisions of these Amendments during the course of their implementation.

We will be in contact with you frequently via Dear Colleague letters to provide guidance on self-implementing provisions and via notices of proposed rulemaking to solicit your views on forthcoming regulation changes necessitated by the new law.

The contents of the "Dear Colleague" letter contain no reference to ESL in terms of the GSL, SLS or campus-based programs. Whether GSL, SLS, or campus-based funds could be applied to ESL training was, however the subject of an internal Education memorandum of May 4, 1987.See footnote 10[10] The question of the extension to other programs was answered in the negative. In a May 4, 1987 Memorandum from Bill Moran to Lawrence Mersmann, Moran answered the question of simultaneous or overlapping enrollment in eligible programs. He restated that ESL is not an eligible program for purposes of the campus-based and GSL programs.See footnote 11[11] The relevant portion of Bill Moran's response states that:

The Higher Education Act of 1965, as amended by the Higher Education Amendments of 1986, provides that instruction in English as a second language (ESL) may qualify as an eligible program only for purposes of the Pell Grant Program, and only if an institution determines that the ESL is necessary to enable the students enrolled in the ESL program to use already existing knowledge, training, or skills.See footnote 12[12]

Issues for resolution

The parties agreed there are no issues of fact in dispute and identified the issues of law in their May 8, 1992 Stipulation as follows:

I. Can an institution obligate student financial assistance funds authorized under Title IV of the Higher Education Act of 1965, as amended (SFA), to students enrolled in an English as a second language-only (ESL) course from SFA programs other than the Pell Grant Program?

II. Has an institution that has obligated Guaranteed Student Loan (GSL) and Supplemental Educational Opportunity Grant (SEOG) funds for its ESL-only program been afforded constitutional due process when its only notification of this policy is Dear Colleague Letter GEN-86-35 and the appropriate portions of the Federal Register and the Code of Federal Regulations?

Arguments
Education's Arguments

Education argued there is no dispute as to what the statute and regulations intended with regard to ESL participation in the HEA, Title IV Programs. It asserted that the applicable language limits ESL courses to Pell Grant funds only. Education pointed out that the only statutory discussion regarding ESL funds is found in the Pell Grant program statutes. Specifically, HEA Section 411(c)(2) (codified at 20 U.S.C. 1070a(c)(2)) permits Pell Grant funds to be used for ESL study. Section 411 allows Pell funds, "in the case of courses in English language instruction, . . . necessary to enable the student to utilize already existing knowledge, training, or skills." Id. Education pointed out there is no parallel SEOG or GSL statute in the Higher Education Act of 1965. Education argued that the use of the ESL language exclusively in the Pell Grant Program statute excludes the ESL program from participation in the other programs, here GSL and SEOG.See footnote 13[13]

Education's final program review at page 2 discussed the meaning of eligible program for Pell Grant purposes and argued in part that 34 C.F.R. § 668.8(b) means:

[T]hat to be an eligible program, instruction in an ESL Program must be at least a six month training program leading to a certificate, degree, or other recognized educational credential that prepares a student for gainful employment in a recognized occupation. The ESL program alone does not offer training that leads to gainful employment in a recognized occupation. The institution is, therefore, liable for the GSL and SEOG funds it disbursed to students enrolled in the ESL program.

Education cited the above as authority that students enrolled in ESL-only programs are ineligible to receive Stafford Loans, SLS Loans or campus-based funds.See footnote 14[14]

Garces' Arguments

Garces argued the position that the legislative history of the ESL provision in the HEA Amendments of 1986 does not indicate congressional intent to restrict ESL student assistance exclusively to Pell Grants. The school offered one congressional explanation of the ESL provision from the legislative history of the 1987 Amendments. In the House of Representatives Committee Report, H.R. Rep. No. 383, 99th Cong., 1st Sess. 29, reprinted in 1986 U.S.Code Cong. & Admin. News 2572, 2600, the Committee provides the following explanation:

The Committee has amended the law to ensure and to reemphasize its long-standing intent that Pell Grant eligibility should always have been available under the existing language for a person already possessing vocational knowledge, training or skills in a recognized occupational [sic] but who cannot obtain gainful employment in that occupation for lack of skill in English. The Committee would remind the Department of Education that under a current law the definition of six-month program of training aims at preparing students for gainful employment. Gainful employment is the intent of the committee. The definition of both a postsecondary (public) vocational institution and a proprietary institution of higher education have never required a program of training in a recognized occupation to prepare students for gainful employment. Indeed it would be a waste of funds to require someone with demonstrable vocational skills in a recognized occupation but needing only English language instructions [sic] to obtain gainful employment to enroll in a program for new occupational skills in order to get English language instruction when English language instruction is all they need in the first place to obtain gainful employment. It is, of course, the responsibility of institutions offering English instruction to persons purporting to possess presently the skills of a recognized occupation to make such a determination. (emphasis added).

Garces interpreted the above-statement of the Committee as express authorization to extend Pell Grant eligibility to ESL programs in order to carry out long-standing Pell Grant intent, and not as a restriction of ESL to that form of student assistance alone. Further, Garces contended that the Committee was explicitly imposing a Pell Grant responsibility upon Education that the Committee had presumed was implicit in the then-effective version of the statute.

Garces next argued that the linkage of ESL to Pell Grants in the regulation does not require exclusion of ESL students from other forms of student financial assistance. The use of statutory language in the regulation at § 668.8 as part of the eligibility standards is intended to apply to more than just Pell Grant programs. Garces concluded that the placement of the ESL reference in the eligibility standard portion of the regulation strengthened the argument that Congressional intent was merely an effort to individually link the ESL to the Pell Grant program; it was not meant to be read as a limitation which would exclude ESL students from other forms of assistance such as GSL and SEOG.

Finally, Garces argued that Education failed to provide ordinary due process in disseminating specific ESL program guidance that was available as early as May 1987 in internal memoranda.See footnote 15[15]

Discussion
Issue I.

I. What SFA program funds may be used for ESL training? The issue is whether an institution can pay for ESL training from SFA programs other than Pell Grant funds.

The Secretary as the final adjudicator of the agency must set aside other roles in providing the final decision of the agency. The Secretary must make policy, create rules, enforce and prosecute the rules, and adjudicate disputes generated from the creation and enforcement of the rules. The Secretary must wear many hats to execute his varied responsibilities. The secretary, in his role as the final adjudicator of the disputes that arise within the administrative process, must exercise deference to the reasonable interpretations of the agency. To that end, the Secretary has delegated the adjudicatory responsibility to an independent adjudicator who happens to be an employee of the Department of Education. It is by design that an dministrative Law Judge is independent from the prosecutorial arm of the Department. It is also by design that the Secretary separates the prosecutorial and adjudicatorial functions.

In the preamble to the regulations establishing the procedures for review of final program review and audit determinations, 34 C.F.R. Part 668, Subpart H, the Secretary expounded upon the standard that must be used in providing deference to agency interpretations: "The Secretary intends for the ALJ to apply the same rule of deference to agency interpretations of its statutes and regulations that is observed by the Federal Courts."

In terms of this issue, the first consideration is the institutional compliance with the requirements of applicable statutes and regulations. As Education highlights, do the federal regulations specifically limit ESL programs to the Pell Grant program? What does the statute mean? Does the regulation follow from the statute? Does the statute lack clarity? Is Education's interpretation of the statute proper? To determine institutional compliance, it is necessary to look at the meaning of the statute or regulation.

Neither the statute nor the regulations are altogether clear. The congressional statement on the issue of what type of funds are available for ESL use is not clearly stated. There is no clear concise statement that only Pell Grant program funds may be used for ESL courses. Therefore, it is necessary to proceed with the process of statutory construction. The process of statutory construction is defined by Black's Law Dictionary, in part, as follows:

That branch of the law dealing with the interpretation of laws enacted by a legislature. A judicial function required when a statute is invoked and different interpretations are in contention. See footnote 16[16]

The term "construction" is also defined by Black's Law Dictionary to mean:

The process, or the art, of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms or provisions in a statute, written instrument, or oral agreement, or the application of such subject to the case in question, by reasoning in the light derived from extraneous connected circumstances or laws or writings bearing upon the same or a connected matter, or by seeking and applying the probable aim and purpose of the provision. Drawing conclusions respecting subjects that lie beyond the direct expression of the term. See footnote 17[17]

In the construction of statutes, it is the duty of the courts to ascertain the clear intention of the legislature. As stated by the Supreme Court in Philbrook v. Glodgett, 421 U.S. 707 (1975):

In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy [citations omitted]. Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will.

As stated in Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984):

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Does Congress provide any additional information in its comments on the legislation? The relevant part of the House Committee Report, No. 99-383, which discusses the ESL provision, is quoted in the arguments, supra, at 8. The Committee pointed out:
Gainful employment is the intent of the committee. . . . [I]ndeed, it would be a waste of funds to require someone with demonstrable vocational skills in a recognized occupation but needing only English language instructions [sic] to obtain gainful employment to enroll in a program for new occupational skills in order to get English language instruction when English language is all they need in the first place to obtain gainful employment.

What is significant is the Committee's statement that "[G]ainful employment is the intent of the committee." (emphasis added). The congressional focus was on gainful employment. The comment does not direct the ESL program to a particular program area or source of funding. Congress has not directly addressed the precise issue, therefore, absent a specific congressional intent to exclude ESL from non-Pell funding, the task here becomes an exercise to decide if Education's construction of the congressional intent - that ESL training is limited to Pell Grant program funds - is a reasonable interpretation of the statutory scheme.

The Supreme Court, in terms of reasonable construction of the language of the statute, identified the goal of "reasonable accommodation of conflicting policies" as a measure of acceptance of an agency's interpretation of the ambiguity in the statute. In United States v. Shiner, 367 U.S. 374, 382,383 (1961), the Court said:

If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

In a later Supreme Court case, Udall v. Tallman, 380 U.S. 1, 16 (1965), the Court even went on to say that it did not have to find that the agency's construction was the only reasonable one. Specifically, the Court said: "[W]e need not find that [the agency's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Substantial weight and deference is given to the statutory and regulatory interpretations of officials who are charged with administering those statutes and regulations. See Chevron U.S.A., Inc. v. Natural Resources Defense Council. Inc., 467 U.S. 837 (1984), and Red Lion Broadcasting v. F.C.C.., 395 U.S. 367 (1969). Thus, such an interpretation will be followed "unless there are compelling indications that it is wrong." Red Lion

Broadcasting v. F.C.C., 395 U.S. at 381.

In applying the proper deference to the statute, one must look to the relevant statutory language set forth in section 411(c)(2) of the Higher Education Act of 1965, Period of Eligibility for Grants. The section, as codified at 20 U.S.C. 1070a(c)(2), provides:

Nothing in this section shall exclude from eligibility courses of study which are noncredit or remedial in nature (including courses in English language instruction) which are determined by the institution to be necessary to help the student be prepared for the pursuit of a first undergraduate baccalaureate degree or certificate or, in the case of courses in English language instruction, to be necessary to enable the student to utilize already existing knowledge, training, or skills.

Preceding this subsection, in 411(a)(3), it states: "Basic grants made under this subpart shall be known as Pell Grants." See also 1070a(a)(3) for the same qualifying language. Implementation of the HEA statute follows under the regulations at 34 C.F.R. § 668.8. As stated earlier, the final regulations in 34 C.F.R. § 668.8 at 52 Fed. Reg. 4512, 4517 (1987) discusses the purpose of the regulation:

To conform these regulations to a new provision in section 411 of the HEA, the term "eligible program," for purposes of the Pell Grant Program, is extended to include programs consisting solely of instruction in English as a second language. Under [Section] 668.8, a student is considered to be enrolled in an eligible program, for purposes of the Pell Grant Program, if the program consists solely of instruction in English as a second language,... (emphasis added).

The pertinent reference, in 34 C.F.R. § 668.8, to ESL instruction is in the general Title IV section which details "eligible program[s]", but it is further limited to the Pell Grant program in § 668.8(b)(2). Subsection (b)(2) provides:

English as a second language (ESL). (i) The Secretary considers a program that consists solely of instruction in ESL to be an eligible program if the program meets the requirements of paragraph (a) of this section and admits only students who the institution determines to need ESL instruction to use already existing knowledge, training, or skills.

The discussion of Pell Grant Programs under § 668.8(b) provides:

Pell Grant Program-(1) Study by correspondence. For purposes of the Pell Grant Program, an eligible program of study by correspondence is an undergraduate program of education or training that meets the criteria for an eligible program in paragraph (a) of this section and that is designed to require at least 12 hours of preparation per week.

The eligibility criteria of paragraph (a) cannot be ignored. The criteria for an eligible program in § 668.8(a) is followed by reference to the administration of the Pell Grant program. However, reference back to § 668.8(a) does not mean that ESL is an eligible program for non-Pell programs or that such an expansive reading is supportable. On the contrary, a provision at § 668.8(a)(vi)(B)(4) qualifies that For the purposes of the Pell Grant Program, may consist of instruction in English as a second language (ESL) in accordance with paragraph (b)(2) of this section. (emphasis added).

As in any case involving statutory interpretation, if the statute or regulation is silent or ambiguous on the question, the Administrative Law Judge then must determine whether the agency's construction is a "permissible" one. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). In such a case, the tribunal must defer to the agency's interpretation so long as it is reasonable and consistent with the statutory purposes. Id. at 292. Garces failed to show that Education's interpretation was unreasonable. It merely insists that it was. Insistence is not proof and Garces' position is unsupported. Garces failed to prove that Education ever applied its regulations on the ESL inconsistently. To accept Garces' argument is to accept the premise that Education's interpretation as set forth by its regulations was unreasonable. As Garces strenuously argued, Education could have provided clarification to the ESL and identified what Title IV funds could be used by making an internal memorandum available to the public, but that argument is not well taken. While that approach may be reasonable, it is not the only reasonable method of disseminating information. The question is, however, whether the interpretation, as argued by Education, that ESL is limited to Pell Grant funds is a reasonable one.

After careful consideration of all available information, it is concluded that Education's interpretation of the statute is reasonable.See footnote 18[18] Education's interpretation is supported by reading the regulation at § 668.8 in context. Clearly, there are well defined parts to the regulation with subpart (a) discussing general eligibility standards for all three programs involved in this case and subpart (b) which deals with a specific program area, the Pell Grant program. It is only in the context of subpart (b) that the ESL program is discussed. The language of the statute is such that the ESL instruction is linked to Pell Grants with no mention of the GSL, SLS or SEOG programs. Rather than being included in all three programs as Garces argues the ESL should be, the explicit reference to ESL in (b), the Pell Grant context, automatically defeats such a broad interpretation. Meanwhile, there is no mention of the ESL program in the regulations which pertain specifically to the SLS, SEOG, or campus-based programs.See footnote 19[19]

In conclusion, Education has established that its construction of the statutory language was reasonable and its enforcement of the regulation at § 668.8 is consistent with that interpretation to only permit payment of ESL training under the Pell Grant Program.

Issue II.

II. Was Garces deprived of due process notice that its use of GSL and SEOG funds for its ESL-only program was improper? Was Garces denied any rights by the issuance of the Dear Colleague letter or the internal memorandum from Moran to Mersmann?

The critical determination for this tribunal is whether an institution can obligate only Title IV, Pell Grant funds to students enrolled in an ESL course. Next, whether such a rule merely states what Education thinks the statute means or does such a rule create new law, rights, or duties.

In terms of the second issue, a ruling that no due process violation occurred is warranted. The Administrative Procedure Act (APA), 5 U.S.C. § 551 et. seq., does not require administrative agencies to follow notice and comment procedures in all situations. Section 553(b)(3)(A) specifically excludes interpretative rules, general statements of policy, or rules of agency organization procedure, or practice, from the notice and comment procedures.[See footnote 20](#)[20]

The starting point in determining whether a rule is interpretative, and, therefore, exempt from APA's notice and comment requirements, is the agency's characterization of the rule. If it is a clarification of an existing regulation, then it is still interpretative, not legislative. An interpretative rule simply states what the administrative agency thinks the underlying statute means, and only reminds affected parties of existing duties. See United Technologies Corp. v. United States Environmental Protection Agency, 821 F.2d 714, 718 (D.C. Cir. 1987). It is noteworthy that all agencies charged with enforcing and administering a statute have inherent authority to issue interpretative rules; By such rules, an agency informs the public of the procedures and standards it intends to apply in exercising its discretion. Production Tool v. Employment & Training Administration, 688 F.2d 1161, 1166 (7th Cir. 1982).

The reasonableness of Education's interpretation of the regulatory provisions on ESL, and the way § 668.8 subpart (b) addresses only the Pell Grant Program, means that Garces had actual notice, from the signing of a participation agreement with Education as to how ESL instruction should be funded. In the end, Garces' argument here ignores the wording of the regulation at §668.8 which shifts from general eligibility matters under subsection (a) to a discussion of a specific program, the Pell Grant Program, under Subsection (b).

Furthermore, there is guidance in cursory form in Education's Dear Colleague letter, GEN-86-35 (Nov. 1986) and additional guidance in Education's comments on the final regulations in 34 C.F.R. § 668.8 at 52 Fed. Reg. 4512, 4517 (1987).

Garces' argument that Education failed to provide ordinary due process in disseminating specific [ESL program] guidance that was available as early as May 1987 in internal memorandum is not enough to make Garces case. Even though Garces did not see Education's internal "guidance" memorandum until April 1992 (the Moran to Mersmann letter), Garces was not denied due process notice because it never knew of Education's internal guidance memorandum. The internal memorandum which Garces criticizes is a good example of Education providing clarification on an "as needed" basis.

Finally, Garces raised the argument whether its liability should be reduced based on mitigating circumstances. Garces services a large Hispanic population and the need for ESL training is

particularly acute due to Dade County's large Hispanic and Haitian populations. It claims the ESL need in Dade County is massive. Under such circumstances, Garces asserted that this case does not represent a diversion of GSL and SEOG funds to marginal or unnecessary ESL training given Dade County's special needs.See footnote 21[21] Mitigating circumstances, however, do not apply when there is no basis upon which to allow ESL training to be funded by GSL or SEOG program funds.

In conclusion, there is no failure of due process. Garces' due process argument fails in light of Education's reasonable interpretation that ESL courses could only be funded through Pell Grant program funds. While not required to do so, Education did give guidance through its comments on the final regulation at Section 668.8 which specified that ESL was an eligible program for purposes of the Pell Grant program. No other programs were discussed as a basis for ESL instruction. In addition, the "Dear Colleague Letter" provided guidance as to Education's interpretation of the statute and the regulation. The "Dear Colleague Letter" did not create new law or obligations; it merely clarified the rights and obligations that existed. The mitigating circumstances argument is not applicable here.

It is the determination of this tribunal that Garces use of non-Pell Grant, Title IV funds for ESL courses is a violation of the statute and regulations. Therefore, Garces is liable to Education for the improperly expended funds. The parties have stipulated that the liability is appropriately set at $702,704 .See footnote 22[22]

Order

Based upon the foregoing analysis and conclusions, Garces improperly funded its ESL Program through use of GSL, SLS, and SEOG funds and must, therefore, refund the amount of $702,704. This amount reflects the actual loss formulation of the GSL, SLS and SEOG funds which Garces drew down.

Daniel R Shell
Administrative Law Judge

Issued: Nov 25, 1992
Washington, D.C.

Footnote: 1 [1] *See Final Program Review Determination dated January 13, 1992.*

Footnote: 2 [2] *The program review determination is found at Education Ex-2. Education Ex-2 is based upon an underlying program report which covered Garces' administration of Title IV, HEA programs for the period July 1, 1988 to December 7, 1990, dated March 11, 1991, which is found at Education Ex-1.*

Footnote: 3 [3] *A handwritten master list of the 21 students with the applicable award year is contained in Education Ex-4. Garces stated in a letter dated August 8, 1991, that only award years 1988-89 and 1989-90 are relevant to the proceeding. Garces President's letter of clarification to Institutional Review Specialist Philip Knight states: "Please note that our institution did not offer ESL for the award years 1986-1987 and 1987-1988, that you have requested. .(Finding #1)"*

Footnote: 4 [4] *Attached to the program report is Appendix A which identifies the 21 students in the specified sample and they are divided according to award year, either 1988-89 or 1989-90. Students #2,#3,#5,#7,#8,#9,#13, #17 and #18 were identified as the ones who received Stafford loans and SEOG funds enrolled in the ESL program. The students are identified by name and Social Security number as follows: [student name], #267-89-8212; [student name], #26575-5564; [student name], #595-05-3466; [student name], #592-24-4776; [student name], #127-70-8705; [student name], #264-95-2105; [student name], #264-97-9008; [student name], #266-17-0539; and [student name], #265-97-3433.*

Footnote: 5 [5] *The exceptions without supporting data were #13, [student name] and #18, [student name].*

Footnote: 6 [6] *Education explained it used a formula to calculate Garces liability instead of following its general practice of requiring an institution to repay all ineligible loans plus interest and special allowance on Stafford loans from date of disbursement. See p.2 final program review determination.*

Footnote: 7 [7] *The dollar amounts are reflected in the bottom right hand corner of each page.*

Footnote: 8 [8] *In Appendix A at 3 of its February 10, 1992, Request for Hearing, in Education Ex-3, the default rate is identified as 10%. Garces agrees the 10% default rate is accurate. Garces discusses the low default rate in terms of its "Program Success." It explains its program success as follows:*

The success of the ESL program can best be measured by the number of students employed and repaying their student loans. Ninety (90) percent of the students who received loans through Garces Commercial College are meeting their financial responsibility. As evident by the institution's current default rate of ten (10) percent, down from thirteen point three (13.3) percent from the previous year, a figure well below the national average.

Footnote: 9 [9] *That letter with excerpts on the Pell Grant Program, the Supplemental Educational Opportunity Grants, the Work-Study and Direct Loans Programs was submitted by Garces. Garces Ex. R-1, 14. A complete copy of the letter with program attachments was submitted by Education on March 12, 1992.*

Footnote: 10 [10] *The memorandum and the underlying request for clarification, dated January 15, 1987, are both contained in Education Ex-4. See the Request for clarification by an*

Education Region IX official, Lawrence Mersmann to Bill Moran, Director of the Division of Policy and Program Development, dated January 15, 1987.

Footnote: 11 [11] *Id. at 2.*

Footnote: 12 [12] *ED Ex. 4, Education Memorandum dated May 4, 1987.*

Footnote: 13 [13] *Education's Brief filed April 6, 1992, at 3.*

Footnote: 14 [14] *See final program review determination of January 13, 1992, at 2.*

Footnote: 15 [15] *See Garces Brief at 11, April 23, 1992.*

Footnote: 16 [16] *Black's Law Dictionary, 5th ed. at 1266 (1979).*

Footnote: 17 [17] *Black's Law Dictionary at 283.*

Footnote: 18 [18] *In determining whether an agency has reasonably interpreted a governing statute, courts should "consider the consistency with which an agency interpretation has been applied." NLRB v. United Food & Commercial Workers Union, 484 U.S. 112 (1987). In a recent case which involved the court's assessment of the reasonableness of EPA's interpretation of its own rule, the court pointed out that the consistency with which that interpretation was applied in the past weighs in favor of the agency. Chemical Waste Management. Inc. v. EPA, 869 F.2d 1526, 1540 (D.C.Cir. 1989).*

Footnote: 19 [19] *See 34 C.F.R. Part 682 for GSL and SLS; 34 C.F.R. Part 676 for SEOG; and 34 C.F.R. Part 675 for the campus-based programs.*

Footnote: 20 [20] *See Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565 (1980) which discussed "information letters" containing statements which begin with "...the staff's position is . . . ."*

Footnote: 21 [21] *Garces submitted its Exhibit, Ex. R-2, a Census form for Dade County, Fla. for the purpose of arguing that mitigating circumstances apply inasmuch as the school's ESL training fills an important gap.*

Footnote: 22 [22] *See the parties Joint Stipulation of May 8, 1992 and Supplemental Joint Stipulation of August 6, 1992 for the agreement on liability.*