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

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

Appearances: Leslie H. Wiesenfelder, Esq., and Blain B. Butler, Esq., Dow, Lohnes & Albertson, Washington, D.C., for Saint Louis University.

Howard D. Sorensen, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs

Before: Judge Ernest C. Canellos

DECISION

Saint Louis University (Saint Louis) is a church-affiliated, degree-granting institution of higher education located in Saint Louis, Missouri. It is accredited by the North Central Association of Colleges and Secondary Schools and it participates in the various federal student assistance programs which are authorized under the provisions of Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. ' 1070 *et seq.* and 42 U.S.C. ' 2751 *et seq.* The office of Student Financial Assistance Programs (SFAP) is the cognizant office within the United States Department of Education (ED) administering these programs.

ED's Office of Inspector General (OIG) conducted an audit at Saint Louis to verify its compliance with Title IV requirements for Pell Grant funding for the 1994-95, and 1995-96 award years. SFAP issued a final audit determination (FAD) on December 23, 1998, finding that Saint Louis violated the Pell Grant regulations by the manner in which it applied its authority under 20 U.S.C. § 1087tt to use professional judgement in the calculation of the awards of Pell Grants.[1] SFAP demanded that Saint Louis return $2,816,029 to ED for this violation. By letter dated March 25, 1999, Saint Louis filed an appeal.

In the course of its on-site inquiry, OIG auditors selected a sample of 139 student files, out of a universe of 2,220 students in whose cases professional judgement had been utilized to calculate awards of Pell Grants, to review for Title IV compliance. These 2,220 students made up 46 percent of all Saint Louis' Pell Grant recipients during the audited period. The auditors found that Saint Louis had made Pell Grant overawards totaling $175,797 to 126 of the 139 sampled students through the misuse of the authority to exercise professional judgement. SFAP extrapolated this figure to the universe of the 2,220 students where professional judgement was utilized, resulting in a demand for the return of

$2,816,029 for improperly awarded Pell Grants.

20 U.S.C. § 1087tt. provides, in pertinent part:

> Nothing in this part . . . shall be interpreted as limiting the authority of the financial aid administrator, on the basis of adequate documentation, to make adjustments on a case-by-case basis to the cost of attendance or values of the data items required to calculate the expected student or parent contributions . . . to allow for treatment of an individual eligible applicant with special circumstances. . . . Special circumstances may include tuition expenses at an elementary or secondary school, medical or dental expenses not covered by insurance, unusually high child care costs, . . . Special circumstances shall be conditions that differentiate an individual student from a class of students rather than conditions that exist across a class of students. . . .

It is quite clear from a reading of this statutory provision that an institution's financial aid administrator has the discretion to adjust, on a case-by-case basis, one or more of the financial elements which are utilized to calculate a student's Estimated Family Contribution (EFC).[2] It is also clear, however, that the exercise of professional judgement must be documented and must establish the special circumstances that differentiate the individual student from a class of students. It is important to note at the outset that the statutory formula mandated for determining EFC takes into account the student family's annual basic living expenses, including taxes. Even so, SFAP alleges that Saint Louis erroneously allowed an additional deduction for living expenses when those living expenses exceeded the statutory allowance. Also, SFAP alleges that Saint Louis erroneously allowed deductions for medical and dental expenses and elementary and secondary school tuition expenses without first requiring documentary support and without performing any further analysis. In order to prevail in this appeal of a FAD, Saint Louis has the burden of proving that the students at issue were entitled to receive the Pell Grants they were awarded. 34 C.F.R.§668.116(d).

As its initial position in its brief, the Respondent argued that, as a matter of law, its actions under the authority of professional judgement must be upheld if they represent a permissible construction of the statute. Saint Louis emphasizes that this is especially so because Congress expressly withheld from ED the power to regulate, in any way, the exercise of professional judgements, thereby giving financial aid administrators wide discretion in "filling the gaps" in the statutory language. 20 U.S.C.§1087rr. (a)(1).[3] Further, it points out that OIG recommended to Congress during the 1998 Reauthorization of Title IV that 20 U.S.C.§1087tt should be amended to proscribe the specific activities which are currently before me and, yet, Congress chose not do so. Finally, Saint Louis objected to the extrapolation methodology for determining the losses as flawed for two reasons: the sample size (6.3%) was too small, and Saint Louis was not afforded the opportunity to do a full-file review.

In its response brief, SFAP first pointed out that Saint Louis used professional judgement in 46 percent of its Pell Grant recipients while the average for all other participating institutions is 4 percent. Also, it argues that while the discretion afforded to financial aid administrators to utilize professional judgement is considerable, it is not unlimited and certainly it is reviewable. More specifically, SFAP takes issue with Saint Louis for the manner in which the discretion was applied. Rather than making decisions in individual cases, Saint Louis apparently created its own formula for expenses and, as a result, pre-determined to reduce the EFC by all living expenses that exceeded the statutory allowance and all medical and tuition expenses claimed. Finally, SFAP argues that the sample examined by OIG was statistically significant to support extrapolation and, if Saint Louis wished to present evidence that a full-file review would have reduced the liability, it was certainly free to do so.[4]

In its reply, Saint Louis asserts that it complied with the statute by defining elementary tuition, medical and dental expenses, and living expenses above the statutory allowance levels as a *per se* special circumstance. In addition, in every case where the claims of students relative to these expenditures were subject to verification, the figures were determined to be correct. The crux of Saint Louis' argument is that Title IV vests the financial aid administrator with great discretion; SFAP is barred from regulating in the area which is what it is attempting to do in this proceeding; and the financial aid administrator's decisions relative to professional judgement were reasonable and should be given deference. As a consequence, there should be no liability imposed. SFAP has argued that such decisions were unreasonable and, therefore, improper.

I find that, based on the totality of the evidence, Saint Louis has met its burden of establishing that the students at issue were eligible for the Pell Grant funding that they were awarded. By virtue of the fact that the actions complained of by SFAP involve an area of discretion on the part of Saint Louis' financial aid administrator, the most appropriate standard of review in this case is the abuse of discretion standard. In other words, although, by amending Title IV, Congress clearly intended to preclude ED from implementing regulatory standards governing the exercise of professional judgement by financial aid administrators, ED may review such determinations under an abuse of discretion standard. In this regard, I find that Saint Louis met its burden of showing that the determinations complained of by SFAP are not abuses of discretion. It is clear that the party exercising the discretion is owed a high degree of deference and that the party reviewing that act must be careful to avoid intrusion upon that authority. *See, e.g. Calderan v. Thompson*, 523 U.S. 538 (1998).

The July 1997, OIG recommendations to Congress for the amendment of Title IV are most enlightening as they pertain to the issue before me. These recommendations were, in the words of the OIG, "based on audits . . . and [are] intended to address weaknesses and problems that we have identified." As pertinent to this discussion, OIG recommended to Congress that they engraft a requirement that any additional expenses should be limited to those which are essential and incurred out of necessity and that such expenses should not include expenses which are already provided for under the standard allowances. It is interesting to note that this recommendation parallels SFAP's argument before me. The marked difference, however, is that OIG's recommendation is an attempt to correct a perceived failing in the statutory scheme. SFAP, however, utilizes this argument as if it were currently the law. Although SFAP attempts to disassociate itself from OIG's action, ED cannot have it both ways. It cannot argue, as it did before me, that the law proscribes the actions taken by Saint Louis and, at the same time, argue to Congress that it needs to change the law to make such actions illegal.

The statutory provision in issue, 20 U.S.C.§ 1087tt is, at best, susceptible to varied interpretation. On the one hand, Saint Louis interprets the language broadly so as to fulfill its stated obligation to assure that its students are awarded all the federal aid to which they are entitled. On the other hand, SFAP interprets the same language more restrictively and argues that the more expansive interpretation is unreasonable and results in misspending of federal funds. With the law in such a state, it does no good for SFAP to argue that I should sanction Saint Louis' actions because they could result in some "wealthy" people becoming eligible for a Pell Grant when the original purpose of the Pell Grant Program was to provide funds to "needy" students. If that is the case, I am not the proper authority to resolve the issue; the solution to this conundrum is left solely within the jurisdiction of Congress, as the promulgator of the law in this case.

FINDINGS

I FIND that Saint Louis has met its burden of establishing that the Pell Grants in question were not erroneously awarded. Under the circumstances, the financial aid administrators did not abuse their discretionary authority in utilizing the provisions regarding professional judgement in making the awards in question.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Saint Louis University be relieved of liability to repay to the United States Department of Education the sum of $2,816,029.

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Ernest C. Canellos
Chief Judge

Dated: May 25, 2000

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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[1] Since some of the attachments to the FAD were not provided to Saint Louis, SFAP reissued the FAD on February 2, 1999.

[2] EFC is determined by first performing a Needs Analysis to calculate how much a family can reasonably be expected to contribute toward meeting the student's cost of attendance at the institution. The Needs Analysis methodology mandates the use of a uniform set of formulas established by federal statute to determine EFC. Despite the mandatory nature of this activity, in the 1992 Amendments to Title IV, Congress granted authority to financial aid administrators to make adjustments to the elements of the Needs Analysis.

[3] Prior to Congress' imposition of this limitation, SFAP had promulgated regulations that circumscribed the use of professional judgement by financial aid administrators.

[4] Since the violations are based on a review of a statistically significant sample, the amount that should be returned must be based on the entire universe of students. Extrapolation of losses on the basis of findings relative to a statistically valid sample has been well recognized. *Chauffeur's Training School v. Riley*, No. 95 Civ. 1082 (N.D.N.Y. June 19, 1997). Although moot, I find that extrapolation would be appropriate in this case. I further find that Saint Louis could have, if it wished, performed a full-file review to potentially establish lesser damages and that SFAP's action in not specifically making that option available did not vitiate against its use.