UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

In the Matter of **Docket No. 02-62-SA**

LIVINGSTONE COLLEGE,

Student Financial

Assistance Proceeding

Respondent. ACN: 04-1999-18827

Appearances: Algeania W. Freeman, PhD, Salisbury, North Carolina, for Livingstone College.

Stephen M. Kraut, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Office of Federal Student Aid.

Before: Richard F. O'Hair, Administrative Judge

DECISION

Livingstone College (Livingstone), the Respondent in this proceeding, participates in the federal student aid programs authorized under Title IV of the Higher Education Act of 1965 (Title IV), as amended. 20 U.S.C. §§1070 *et seq.* and 42U.S.C. §§2751 *et seq.* These programs are administered by the Office of Federal Student Aid (FSA), U.S. Department of Education (Department). Following a review of Livingstone's compliance audit of its administration of the Title IV programs for the award year covering July 1, 1998, through June 30, 1999, FSA found a number of discrepancies. All but one of those discrepancies was resolved. The remaining item in dispute addresses Livingstone's failure to verify the eligibility of a specified number of its students to receive Title IV funds during that award year. As a result of this failure, FSA ascertained that Livingstone improperly disbursed $481,031 in Title IV funds. Livingstone has appealed this assessment and both parties have filed briefs in support of their opposing positions.

As pertinent to the issue in dispute, in one segment of FSA's audit review, FSA requested that Livingstone verify data in the applications for Title IV aid submitted by 328 of its students. The purpose of these verifications is to ensure that the applicants' files contain appropriate, signed information regarding adjusted gross income, taxes paid, untaxed income statements, size of family, number of family members enrolled in postsecondary institutions, and other data indicative of the applicant's financial need.[1] Occasionally this verification process requires the institution to contact the applicants for the files selected and request those applicants to supplement their files with the required information. If the applicants cannot be located, the institution normally is unable to complete the verification process. Apparently this was a problem encountered by Livingstone, because it could provide verification for only 154 applicants, leaving 174 applicants' files unverified. For the 154 files that were verified, FSA determined that Livingstone had overpaid $8500 in Pell Grant funds. For the remaining 174 files that Livingstone could not verify, FSA computed an overpayment liability of $473,398. When combined with the $8500 overpayment, Livingstone's liability was assessed at $481,898.

Livingstone, in its submissions to this tribunal, clearly recognizes that by regulation (34 C.F.R. §668.54) it can be required to verify the applications of no more than 30 percent of its total number of applicants for assistance under the Title IV programs in an award year. Therefore, it concurred with the $8500 assessment for overpayments discovered in the group of 154 verified applications. It disagreed, however, that it was responsible for verifying an additional 174 applications for two reasons. First, Livingstone denied that it disbursed Title IV aid to 1,310 students during the 1998-1999 award year, the number of students FSA alleged were subject to verification. Rather, Livingstone maintains that the proper student figure is 811. Livingstone asserts that 30 percent of this reduced figure results in a fewer number of uncompleted verifications and this significantly lowers its liability.

Livingstone's second defense theory is that it used an even smaller pool of students for whom it believed verification must be completed. It argues that the regulation authorizes the Department to require that schools perform verification of no more than "30% of its total number of applicants for assistance under the Federal Pell Grant, Federal Direct Student Loan, campus-based, and Federal Stafford Loan programs."[2] Continuing, Livingstone says that in the absence of a definition of the word "applicant" in either the regulations or the combination of handbooks and guides issued by the Department, schools are authorized to develop their own meaning of this term. Accordingly, for the purposes of conducting verifications, Livingstone decided to limit the term "applicant" to only those applicants who were "eligible Pell recipients enrolled", to the exclusion of all other Title IV funds recipients. Livingstone's rationale

for selecting this limited pool is that it reflected a more accurate representation of its financial aid recipients because "most of its students receive this form of Title IV, HEA funding." Utilizing this methodology, Livingstone determined that during the 1998-1999 award year it had to verify only 30 percent of the 673 eligible Pell recipients enrolled, which is 202 applicants. As it had already verified 154 files, it admitted it was deficient by only 48 files. Of these 48 applicants, Livingstone pointed out that five of these students were enrolled during the subsequent award year and upon verification of those applicants during that year it was clearly shown that they were eligible for Title IV aid. In conclusion, the school acknowledges its failure to verify the files of 48 applicants, but requests there be either a reduction of its liability because the students in question "were enrolled and received an education," or that there be a complete waiver of liability because it was unaware it could not adopt its own policy to determine the verification pool.[3]

FSA admits it initially used incorrect data to compute the number of applications Livingstone was required to verify. After it received Livingstone's initial brief, FSA contacted the National Student Loan Data System and received corrected data indicating that Livingstone disbursed Title IV aid to 890 of its students during the 1998-1999 award year. Livingstone does not challenge this revised figure. In fact, in a report to the Department that had to be filed by October 1, 1999, Livingstone reported that it had 891 eligible Title IV program aid applicants for the 1998-1999 award year. Using the school's number, FSA reports that the school needed to verify 267 applications (30 percent of 891). Since it had verified 154, this left an unverified balance of 113, and FSA reduced its assessment of a financially liability accordingly.

FSA vehemently disagrees with Livingstone's method of arriving at a verification pool consisting of recipients of only Pell Grants, while ignoring recipients of funds from any of the other Title IV programs. To condone this practice would, in FSA's opinion, authorize a school to select as a verification pool, a Title IV program with the least number of recipients, thus potentially drastically reducing the total number of verifications that would have to be performed and significantly diminishing the value of the verification process.

In its initial brief, FSA computed Livingstone's liability based on the amount of Pell Grant funds, Federal Direct Student Loan Program loans, Federal Supplemental Education Opportunity Grant funds, and Federal Family Education Loan Program loans disbursed to the 174 students whose applications were not verified. Using various formulae, FSA assessed a liability of $473,398. After reducing the number of unverified applications to 113, a figure that is 65 percent of 174, FSA used this same percentage to project a new, lower liability figure for Livingstone. This new amount is $307,709. Livingstone did not specifically challenge the methodology used to calculate liability, other than to generally request a gross reduction, if not a waiver, of this liability.

There have been a number of cases decided by this tribunal upholding the prerogative of the U.S. Secretary of Education (Secretary) to direct participating institutions to verify no more than 30 percent of its applicants for Title IV funds. In the absence of compliance with these directions, the institutions have been ordered to reimburse the Department for those disbursements.[4] Although the Secretary does not specifically define the term "applicant" or "applicant pool" in its regulation or the several handbooks designed to assist Title IV program administrators at the schools, the interpretation adopted by Livingstone in which it selected exclusively eligible Pell Grant applicants as its verification pool is not supported by any of these sources. Institutions are afforded some latitude in their establishment of written policies for verifying information in student aid applications, but their policies must be in accordance with the provisions of the regulations.[5] Looking first at the applicable paragraphs of the regulation, 34 C.F.R. §§668.54(a)(2)(i) and (ii), cited in part previously, they provide:

(2)(i) An institution shall require each applicant whose application is selected for verification on the basis of edits [defined below] specified by the Secretary, to verify all of the applicable items specified in § 668.56, except that no institution is required to verify the applications of more than 30 percent of its total number of applicants for assistance under the Federal Pell Grant, Federal Direct Student Loan, campus-based, and Federal Stafford Loan programs in an award year.

(2)(ii) An institution may only include those applicants selected for verification by the Secretary in its calculation of 30 percent of total applicants.

In an earlier section, the regulation defines the term edits as:

> …a set of pre-established factors for identifying-
>
> (a) Student aid applications that may contain incorrect, missing, illogical, or inconsistent information; and
>
> (b) Randomly selected student aid applications.
>
> 34 C.F.R. §668.52.

Taken as a whole, these two paragraphs inform the school that the Secretary has the authority to direct a school to conduct a verification of any of its financial aid applications, which contain incorrect, missing, illogical or inconsistent information, as well as a verification of randomly selected applicants. A school is afforded some protection in that it need not verify more than 30 percent of the total number of all applications for the various Title IV programs during one award year. *See In re Matter of Fisk University*, Dkt. No. 94-216-SP, U.S. Dep't of Educ. (Oct. 5, 1995). From my examination of the regulations and the evidence submitted by the parties, the only options available to an institution in controlling the size of this pool of applicants is one which authorizes the school to define the pool as either "all applicants" for Title IV aid, or only "eligible applicants who have enrolled." [6] Clearly, using the latter category would be more expedient because it presumably would result in a smaller pool of applicants and one in which the applicants potentially would be more accessible to the school if they needed to be contacted to obtain supplemental information.

Livingstone has the burden of persuasion in this proceeding.[7] The only justification it has submitted to support its selection of only eligible, enrolled Pell Grant applicants for its verification pool, is the proposition that the Department has opted not to define the term, thus giving discretion to the schools to define the parameters of its verification pool. If regulatory authority existed to support the procedures Livingstone has adopted, there is no doubt that the Department would be flooded with verification results which would be based on the particular Title IV programs administered by the schools which had the fewest applicants, thus greatly reducing the workload of those schools when conducting verifications. That does not appear to be the case here. The regulation is sufficiently clear to convince me that the verification pool must include all applicants for all Title IV programs for an award year; a school cannot single out applicants from just one of the Title IV programs in which it participates.

Livingstone had an obligation to verify the applications of up to no more than 30 percent of 891 applications for

its 1998-1999 award year, that being 267 applications. It verified 154 and this left a balance of 113. FSA has computed a school liability for these unverified applications which is based on the amounts of Title IV grants given these students, plus the estimated loss for Title IV loans extended to these students. FSA's calculation is reasonable and consistent with the facts. In the absence of any probative evidence to the contrary from Livingstone, I find the assessment of liability of $307,709 to be supportable.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Livingstone College pay the United States Department of Education $307,709.

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Judge Richard F. O'Hair

Dated: March 7, 2003

SERVICE

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

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[1] 34 C.F.R. §668.56(a).

[2] 34 C.F.R. §668.54.

[3] Equitable relief in the form of a waiver of liability is outside the scope of my authority and may be exercised only by the U.S. Secretary of Education. *See* 34 C.F.R. §668.117(d) and §668.120.

[4] *In re Texas College*, Dkt. No. 98-21-SP, U.S. Dep't of Educ. (July 30, 1998); *In re Leonard's Hollywood Beauty School*, Dkt. No. 95-131-SA, U.S. Dep't of Educ. (March 19, 1996); *In re Monmouth County Vocational School District*, Dkt. No. 94-144-SP, U.S. Dep't of Educ. (April 21, 1995). In *In re Neosho County Community College*, Dkt. No. 97-158-SF, U.S. Dep't of Educ. (Jan. 12, 1999), a fine was found to be an appropriate recourse by the Department for a failure to conduct the required verification.

[5] 34 C.F.R. §668.53(a).

[6] 34 C.F.R. §§668.52; 668.54(a)(2).

[7] 34 C.F.R. §668.116(d).