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

In the Matter of

Docket No. 08-19-SP

ST. PETERSBURG COLLEGE

Student Financial Assistance Proceeding

Respondent.

Appearances:

Leslie H. Wiesenfelder, Esq., Dow Lohnes PLLC, Washington, D.C., for St. Petersburg College

Russell B. Wolff, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Federal Student Aid.

Before:

Richard I. Slippen, Administrative Judge

DECISION

St. Petersburg College (College) is a fully integrated, multi-campus, two-year/four-year public institution with eleven sites located across Pinellas County, Florida educating approximately 60,000 students each year. The College is accredited to award Associate and Bachelor Degrees by the Commission on Colleges of the Southern Association of Colleges and Schools.

On March 24, 2008, the Office of Federal Student Aid (FSA) of the United States Department of Education (Department) issued a final program review determination (FPRD)

containing four findings. Finding 1 is not before me because the College did not appeal this finding, but rather paid the liability assessed. Likewise, Findings 2 and 4 are not before me because FSA did not assess a liability for those actions and therefore the findings were not appealed. Therefore, only Finding 3 is before me in this proceeding.

Finding No. 3: Discrepant Verification Items

Title IV requires schools to periodically verify that student applicants are receiving the correct amount of financial assistance. *See* 34 C.F.R. §§ 668.16(f), 668.51 through 668.61. For students receiving Title IV funds, schools are required to verify, among other things, the following; (1) household size, (2) number enrolled in college, (3) adjusted gross income, (4) U.S. income taxes paid, and (5) other untaxed income and benefits.

The FPRD charges that the College failed to accurately verify financial aid information for numerous students selected for verification. On November 8, 2007, FSA issued a Program Review Report (PRR), in which FSA determined that, because of the high percentage of errors discovered from the sample group selected, additional verification was required. FSA gave the College two options. The College could either verify the information for all students selected for verification and determine the actual liability owed to the Department, or the College could verify the remaining students in the sample selected and project the liabilities for the entire population through extrapolation. The College chose to verify the remaining students in the sample and use extrapolation. After verifying the remaining students in the sample, on March 24, 2008, FSA issued the FPRD. In the FPRD, the Department found nine student files which contained overawards. Those overawards totaled $7,760. When FSA extrapolated those errors, the Department determined that the College owed a liability of $217,217.

In its August 6, 2008 brief filed with this Tribunal, the College disputed the liability assessed by FSA for three reasons. The College first claims that, because it was able to resolve all except one of the errors discovered in the PRR, FSA did not have a sufficient basis to require a file review. Secondly, the College presents three arguments for why the extrapolated liability was overstated: (1) FSA assessed liabilities for a student not found in the first 30% of files reviewed; (2) subsequent information indicated that three of the overawards were overstated, and (3) FSA did not offset the overawards with the underawards. Finally, the College argues that the extrapolated liability is invalid because FSA did not use the 95% confidence level that is recommended in FSA's Program Review Guide.

Initially, the College contends that there never should have been a larger file review after the PRR because the error rate was less than 10% at the time the FPRD was issued. Both parties agree that after the PRR the error rate was above 10%. The College argues that because it was able to resolve or recalculate the errors with respect to four out of the five students noted in the PRR, the level of errors fell below 10% and therefore, no additional file review should have been required.

As the College notes, FSA's published policy dictates that if the error rate from a sample

is less than 10% of the sample, the school is not required to conduct a full file review. Instead, liabilities should only be assessed for the specific errors found in the initial sample. However, FSA argues in the initial finding of the PRR, the College's verification was incorrect for 16.67% of the student files in the sample. FSA had established that the College was in violation of the requirements of Title IV, and FSA properly ordered a full file review. While the College resolved the errors for all except one of the student files after the initial finding in the PRR, the violation had already prompted the full file review. By resolving some of the established errors, the College is not released from its responsibility to perform further verifications.

The College then argues that the liability calculated through the extrapolation was overstated. In the College's initial brief, it argued that the liability should be lowered for three reasons.

First, the College stated that schools are only required to verify 30% of Title IV applicants. Of the 370 students selected as the sample for verification, only 121 were eligible for verification because their files were among the first 30% of the College's Title IV applicants selected for verification. One of the nine verification errors that FSA used to extrapolate the College's total assessed liabilities in the FPRD came from a student file that was verified after the 30% limit had been reached. Therefore, the College argued that the $7,760 of errors used to extrapolate the College's liabilities should be reduced by the $900 error found in the ineligible student file. In its reply brief, FSA agreed with this argument. Therefore, this Tribunal accepts the reduction in liabilities with respect to the ineligible student file.

Additionally, the College acquired additional information which showed that for three of the nine student files that contained errors, the overawards were overstated. The College was able to obtain a copy of the tax return for one student's parents, which showed that based on the newly calculated Expected Family Contribution (EFC), the overaward assessed should be reduced by $1,200. For another student, the College determined that the student incorrectly filed as an independent student when she was a dependent of her mother. The College argued that the change in EFC reduced the overpayment by $84. Finally, a third student did not report that her sister was also attending college during the award year. The change in the EFC for that student meant that rather than there being an overpayment of $175 to the student, there was an underpayment. FSA agreed that the original liability of $7,760 used for extrapolation should be reduced by $1,459 ($1,200 + $84 + $175 = $1,459) as a result of the three changes. Because both parties have agreed, this Tribunal accepts these reductions.

Finally, the College contends that the extrapolated liabilities were overstated because FSA refused to offset the underawards found within the sample against the overawards used to determine the liability. The College found that four students within the sample were underawarded by $1,149. The College argues that in addition to reducing the $7,760 by the overstated overawards from above, FSA should also reduce it by the $1,149 for underawards.

While the College argues that common sense dictates that underawards should offset overawards, FSA argues that overawards and underawards are two separate and distinct

processes. FSA responds that while underawards are funds that a student may not have received, overawards are funds that they did improperly receive. Therefore, the regulations dictate that for overawards given to students, the school is required to reimburse the Department. 34 C.F.R. § 690.79(a)(2). As to underawards, FSA contends that the school needs to reimburse the student, and once the school reimburses the student, the College can request that money from the Department. But, FSA states that, because of the time lapse, the underawards in this case cannot be remedied.

The College responded to FSA's argument by claiming that ignoring underawards violates 34 C.F.R. § 690.80. The College asserts the regulation dictates that when a correction is made as a result of new information acquired through the verification process, an adjustment must be made to the student's award "to correct any overpayment or underpayment."[1] The College is correct in that the regulation applies to changes in EFC, and in all four underawards identified by the College, the underpayments were a result of a change in the EFC. However, 34 C.F.R. § 690.80 does not apply in this case because the regulation applies only to adjusting the liability of an individual student. The regulation requires FSA to offset any overawards provided to the specific student against any underawards that same student did not receive.

The language of 34 C.F.R. § 690.80(a) dictates that changes should be made to the individual "student's," not the collective "students'," awards for underawards and overawards. In *In re Mountain States Technical Institute*, Dkt. No. 93-60-SP, U.S. Dep't. of Education (September 16, 1993), this Tribunal noted that 690.80(a) provided guidance for recalculating EFC for individual students, but did not make any reference to extrapolation. The regulation is inapplicable to offsetting the overawards of one student against the underawards of another student within an extrapolation sample.

The College argues that not offsetting the underawards against the overawards would give the Department a "windfall." The College then contends that this windfall would violate this Tribunal's holding in *In re Roxborough Memorial Hospital of Nursing*, Dkt. No. 98-131-SP, Dep't of Education (January 20, 2000), that stated that "I [the Judge] have an obligation to determine the loss suffered by ED so as to fully compensate it, but not to enrich it." But, refusing to offset liabilities with underpayments would not create an unjust windfall. Either, as FSA indicated, it is too late for the students to receive underawarded funds, or if it is not too late, the students who were underawarded can request the funds and the school can request reimbursement from the Department. If it is too late for the underawarded students to receive the additional funds, then offsetting overawards would enrich the College for its own mistake. If it is not too late, then the College can fully reimburse the Department for overawards, pay students for underawards, and then apply for reimbursement from the Department.

Furthermore, previous decisions where this Tribunal determined that the Department would be unjustly enriched are distinct from this case. In *In re Emperor's College of Traditional Oriental Medicine*, Dkt. No. 96-48-SP, U.S. Department of Education (July 12, 1996), it was determined that it would unjustly enrich the Department to collect money that it had not yet paid

[1] *See* Reply Brief of Respondent, at 3 (citing 34 C.F.R. § 690.80(a)(2)(i)).

out. In that case, the Department acted only as the guarantor of the loan, and the Department was prohibited from collecting funds when it had not "suffered any damage," because it had not dispersed any money yet, and if the loan was repaid, the Department would never be liable for any part of the loan. In this case, St. Petersburg College is being held liable for funds that it has already distributed to students that it has no hope of the students repaying.

Then, in *In re Cabot Colleges*, 97-15-SP, U.S. Dep't of Education (October 30, 1998), this Tribunal concluded that the Department would be unjustly enriched if it collected funds from loans that "have been or will be repaid." There is no evidence in this case that students have returned or will return to the Department any of the overawards improperly given by the College.

Finally, in *In re Stage One: The Hair School*, Dkt. Nos. 03-06-SA and 03-07-SP, U.S. Dep't of Education (March 14, 2004), FSA reduced the liabilities owed by the institution to avoid unjust enrichment that would result from "double recovery." In this case, some of the same liabilities were being assessed in both a Final Audit Determination, issued November 7, 2002, and a Final Program Review Determination, issued November 15, 2002. However, FSA has assessed liabilities only once, in the FPRD, so there was no risk of double recovery.

FSA has assessed liabilities against St. Petersburg College for overawards that (1) were actually given to students, (2) when there is no evidence that the students have or will repay the funds, and (3) FSA does not seek "double recovery." Therefore, in this case, there is no issue of unjust enrichment by the Department.

At issue here are the liabilities owed by the College for overawards. The reimbursement of students for underawards is a distinct process. Therefore, the liabilities cannot be reduced by $1,149 for the four underawards. However, the reductions in liabilities for the student who was not within the 30% cap and for the three students whose overawards were overstated have been agreed to by FSA and are hereby adopted by this Tribunal.

Finally, the College contends that the extrapolation should be rejected because FSA failed to use the 95% confidence level explained below. The College contends that, because the extrapolation was not above 95%, the College should only be held liable for the specific errors found, which would be $3,157.

FSA's 1994 and 2001 Program Review Guides recommended that reviewers include in their reports certain language. Included in that language was the sentence, "The files were selected randomly from a statistical sample of the total population receiving Title IV student financial assistance for each award year, valid to a 95 percent confidence level with a plus or minus five percent confidence interval." The College argues that this establishes a minimum for assessing liability extrapolated from a sample. The College then supports its argument by emphasizing that in *In re Health Care Training Institute*, Dkt. No. 92-42-ST, U.S. Dep't of Education (April 13, 1995), the Department used an extrapolation formula that reflected a 95% confidence level. The College concluded that, therefore, when FSA extrapolates liability, it is required to use the 95% confidence level.

In 2009, this Tribunal held that the 95% confidence level is not the controlling standard for extrapolation. *See In re Saint Louis University*, Dkt. No. 99-29-SA, U.S. Dep't of Education (August 20, 2009) (On Remand from Secretary). In this case, this Tribunal stated;

> Although FSA guidelines call for a 95% confidence level in audits performed solely by FSA, this fact is not dispositive in determining whether FSA's calculation of liability was appropriate. Absent demonstrated error, use of sampling and extrapolation to assess liability will be upheld so long as a statistically reliable method of data analysis is employed and the institution being assessed liability is afforded an opportunity to rebut the findings and technique of the audit.[2]

There is not a best method. As long as FSA both (1) uses a statistically reliable method of data analysis, and (2) provides the institution with the opportunity to challenge the findings, the extrapolation will be upheld.

FSA's October 20, 2008 reply to the College's Initial Brief, adopted a statistically reliable method. In fact, it adopted the College's method of calculating the extrapolated liability. With the exception of offsetting underpayments against the overpayments, FSA adopted the exact calculation that the College used in its initial brief. Both parties having agreed on that method of calculating liabilities, this Tribunal accepts it as a statistically reliable method for this case.

In its Reply Brief, the College argued that because FSA did not limit the sample for verification to 30% of students receiving Title IV funds in the FPRD, the entire extrapolation is "fatally flawed." The College asserted that therefore, the extrapolation should be voided and the College should be liable only for the specific errors found in the sample, or $3,157. The College itself determined that even if this Tribunal allowed the underpayments to offset the overpayments the extrapolated liability would be $109,251.50. While there may have been an initial error on the part of FSA, this Tribunal will not void over $100,000 of liability when both parties now agree on the extrapolation method used in both of the College's briefs and FSA's October 2008 brief. The extrapolation methodology used by the College and adopted by FSA utilizes a statistically reliable method.

Similarly, because FSA provided the College with the opportunity to challenge the findings and the method of the findings in the FPRD, the extrapolation is upheld. The College was given the opportunity to challenge FSA's findings from the PRR and the FPRD. In fact, on May 9, 2008, the College challenged FSA's findings. And in FSA's October 2008 brief, the Department even reduced the College's liability of $78,431, from $217,217 to $138,786, in response to the College's challenges to the FPRD.

FSA used a statistically reliable method of calculation in its October 2008 reply brief. Furthermore the Department not only gave the College an opportunity to challenge the FPRD, it

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[2] *In re Saint Louis University*, at 11.

reduced the liability in response to some of the College's challenges. Therefore, FSA's October 2008 extrapolation is upheld.

Finally, as the College argued in its Initial Brief, this Tribunal held in *In re Roxbury Community College*, Dkt. 98-145-SA, U.S. Dep't of Education (May 10, 2000), that extrapolations must be based on a "statistically valid sample."[3] In that case, it was determined that 414 student files out of 1,063 students awarded Pell Grants, or 38.95%, qualified as a statistically valid sample. FSA's sample, in this case, of 121 students out of a possible 3,109 students eligible for verification, or 3.9%, is less than the percentage in *Roxbury*. Again, the College was given the option of verifying all eligible students or only the remaining students in the sample and extrapolating the liabilities. The College cannot choose to extrapolate liability from a sample rather than complete the verification for all eligible students, and then use that choice to invalidate the liability.

FINDINGS

1. Because more than 10% of the files in the initial sample contained errors, the file review was appropriate.
2. The liability assessed is reduced for the student whose file was reviewed after the 30% cap had been reached.
3. The liability assessed is reduced for the three students for whom, the College found new information which reduced the EFC, and, therefore, reduced the amount of the overawards for those three students.
4. The liabilities assessed for the overawards are not offset by the underawards found within the sample.
5. The extrapolation used a statistically reliable method and afforded the College a chance to rebut the findings, therefore, the extrapolated liabilities are upheld.

ORDER

On the basis of the foregoing, it is hereby ORDERED that St. Petersburg College pay to the U.S. Department of Education the sum of $138,786, plus interest.

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Judge Richard I. Slippen

Dated: July 9, 2010

[3] *See* Brief of Respondent, at 13.

SERVICE

A copy of the attached document was sent by mail to the following:

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