UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the matter of:	Docket No. 89-21-S
SINCLAIR COMMUNITY COLLEGE,	Student Financial Assistance Proceeding
Respondent	

DECISION OF THE SECRETARY

Pursuant to 34 C.F.R. § 668.119, the Office of Student Financial Assistance (OSFA) of the United States Department of Education and Sinclair Community College (Sinclair) have cross-petitioned for review of the May 31, 1991 Decision of John F. Cook, Administrative Law Judge (ALJ Decision) issued in the above-cited matter. Both parties have responded to the other's Appeal Brief. I have reviewed the record of the case, the ALJ Decision, and the above submissions.

On July 8, 1991, Sinclair through counsel submitted a motion to strike Sections I, III, and V of OSFA's Brief in Response on the grounds that those sections were not in response to items already at issue. Because this decision does not rely upon the sections in question, I find Sinclair's motion to strike moot.

On appeal, Sinclair argues the ALJ erred in finding that Sinclair's Probation & Dismissal policy did not satisfy the satisfactory progress requirement of 34 C.F.R. § 668.16 (e) for the 1984-85 academic year. On appeal, OSFA argues that the ALJ erred in several material respects. Although all the issues raised by both parties on appeal were considered, I believe the relevant issues on appeal may be summarized as follows:

1. Whether to apply Sinclair's Probation & Dismissal policy or Sinclair's Standards of Satisfactory Progress policy to determine and quantify any liability of Sinclair for failure to comply with the required finding of satisfactory progress before dispensing student financial aid under 34 C.F.R. § 668.16 during the audit period?

2. Whether OSFA met its burden of production and established a prima facie case by introducing into evidence the audit report prepared by the Inspector General of the United States Department of Education?

3. If OSFA met its burden of production, whether Sinclair met its burden of persuasion?

4. Whether there is substantial evidence to support the ALJ finding that a certain group of 51 students were "regular students enrolled in eligible programs" as required by the Pell Grant and Campus-based student financial aid programs?

Discussion and Findings:

1. Whether to apply Sinclair's Probation & Dismissal policy or Sinclair's Standards of Satisfactory Progress policy to determine and quantify any liability of Sinclair for failure to comply with the required finding of satisfactory progress before dispensing student financial aid under 34 C.F.R. § 668.16 during the audit period?

Under U.S.C. § 1094 (c)(1)(B), the Secretary is authorized to prescribe regulations necessary to establish reasonable standards for an institution to demonstrate they have the administrative capability to administer title IV programs. Further, it is important to remember that an institution participates in these federal programs as a fiduciary and, as a result, must exercise the highest degree of care in administering the program and accounting for the funds. As part of this requirement each institution must demonstrate that its individual aid recipients are maintaining satisfactory progress toward their educational goals.

During the first half of the 1983-84 academic year, institutions were required to develop their definition of satisfactory progress with little regulatory guidance. The relevant regulation read as follows--

> To participate in a title IV student financial aid program, an institution must be able to adequately administer those programs. The Secretary considers an institution to have that capability if it establishes and maintains required student and financial records and if it -
>
> ....
>
> (d)(1) Administers title IV programs with adequate checks and balances in its system of internal controls; and
>
> ....
>
> (e) Establishes, publishes, and applies reasonable standards for measuring whether a student receiving aid under any title IV program is maintaining satisfactory progress in his or her course of study;
>
> ....

34 C.F.R. § 668.16 (1983)

Effective January 1, 1984, and through the duration of the 1984-85 academic year, more specific guidance in developing a definition of satisfactory progress was provided to institutions by the amendment of § 668.16 (e) as follows --

> (e) Establishes, publishes, and applies reasonable standards for measuring whether a student, who is otherwise eligible for aid under any title IV program, is maintaining satisfactory progress in his or her course of study. The Secretary considers an institution's standards to be reasonable if the standards-
>
> ....
>
> (3) Include the following elements:
>
> (i) Grades, work projects completed, or comparable factors that are measurable against a norm.
>
> (ii) A maximum time frame in which the student must complete his or her educational objective, degree, or certificate. The time frame shall be-
>
> (A) Determined by the institution,
>
> (B) Based on the student's enrollment status, and

> (C) Divided into increments, not to exceed one academic year. At the end of each increment, the institution shall determine whether the student has successfully completed a minimum percentage of work toward his or her educational objective, degree or certificate for all increments reported. The minimum percentage of work shall be the percentage represented by the student compared to the maximum time frame set by the institution;
>
> ....
>
> (iv) Specific policies defining the effect of course incompletes, withdrawals, repetitions, and noncredit remedial courses on satisfactory progress; and
>
> ....

34 C.F.R. § 668.14 (1984)

Under both regulatory schemes, it is clear that the individual institution was to demonstrate its administrative capacity by establishing, publishing, and applying its own policy of satisfactory progress within the then current regulatory framework.

In the case at hand, it is stipulated that Sinclair did establish and publish a Standards of Satisfactory Progress policy (SSP) to be applied during the relevant time period. ALJ Decision, at 15-16. It is further stipulated that the SSP policy was never implemented by the institution. Id. at 17. The reasons stipulated for this failure include two floods which occurred on January 9th and 14th, 1983 draining the resources of the college; and, computer problems, including the relatively low priority of implementing the SSP policy compared with the registration, billing and enrollment functions of the computer. Id. at 16-17.

The ALJ held that because the SSP policy was never applied, it was not the appropriate standard to judge Sinclair's liability. Id. at 27. The ALJ then allowed Sinclair to apply its Probation & Dismissal policy (P&D) intended to determine a student's good standing with the institution, for purposes of calculating a student's satisfactory progress for purposes of title IV financial aid. For reasons fully explained in the ALJ Decision, the ALJ allowed Sinclair to apply the P&D policy to determine its liability on the satisfactory progress issue for the entire audit period, despite an explicit finding that the P&D policy did not meet the requirements of the amended § 668.16 (e) effective January 1, 1984. Id. at 37.

On appeal, the parties spend considerable energy debating whether the two versions of 34 C.F.R. § 668.14 (e) require an implicit or explicit maximum time limitation for a student to complete their educational objective; and, whether Sinclair's SSP or D&P policies satisfy the relevant requirement. Although I agree with the ALJ that an explicit time limitation is clearly required by the amended regulation; and, question whether the ALJ fully considered the impact of Sinclair's failure to account for withdrawals under an implicit limitation, I find that this case may be decided on more direct grounds.

The concern addressed by 34 C.F.R. § 668.16 is the necessary administrative capability of the institution as a prerequisite to participating in a Title IV student financial aid program. When an institution fails to apply its otherwise valid, established and published policy, the solution is not to apply different standards. The solution is to retroactively apply the standards the institution already established and published for this purpose. During the audit period, Sinclair's established and published policy for determining a student's satisfactory progress was the SSP policy. ALJ Decision at 16. Therefore, I hold that the SSP policy is the appropriate policy to be applied to determine and quantify Sinclair's liability for any failure to comply with the satisfactory progress provisions of 34 C.F.R. § 668.16 (e).

2. Whether OSFA met its burden of production and established a prima facie case by introducing into evidence the audit report prepared by the Inspector General of the United States Department of Education?

Clearly 34 C.F.R. § 668.116 (d) places the ultimate burden of proof on Sinclair. The ALJ correctly held that the burden referred to in the regulation is the burden of persuasion. ALJ Decision at 37. This means that when all the evidence is considered, Sinclair must convince the factfinder that Sinclair's arguments are more compelling. The ALJ also correctly held that Sinclair's burden of persuasion did not relieve OSFA of a burden of production. Id. This means that OSFA is required to present evidence that when considered alone would lead the factfinder to the inference that a violation had occurred.

The ALJ in his decision held the OSFA failed to meet its' burden of production and present a prima facie case to establish that Sinclair was liable for the repayment of funds as determined by the audit report. Id. The ALJ based this conclusion upon his interpretation of 34 C.F.R. § 668.116 (e)(1)(i) which "provides that ED audit reports and audit work papers for audits performed by the United States Education Department Office of Inspector General may be submitted as evidence in this type of proceeding." Id. at 40. The ALJ interpreted the word "and," in the phrase "audit reports and audit work papers," using the normal

conjunctive connotation. Therefore, the ALJ concluded that the work papers were a necessary foundation to the introduction of the audit report.

In common usage "and" is considered to have a conjunctive connotation. However, in construing a statute or regulation, great care must be taken to read the language in context. Bruce v. First Fed. Sav. & Loan Ass'n of Conroe, 837 F.2d 712 (5th Cir., 1988). In the instant case, the relevant regulation, 34 C.F.R. § 668.116 (e), reads as follows--

> (e)(1) A party may submit as evidence to the administrative law judge only materials within one or more of the following categories:
>
> (i) ED audit reports and audit work papers for audits performed by the United States Education Department Office of Inspector General.
>
> (ii) Institutional audit work papers, records, and other materials, if the institution provide those work papers, records or materials to ED no later than the date by which it was required to file its request for review in accordance with § 668.113.
>
> (iii) ED program review reports and work papers for program reviews.
>
> (iv) Institutional records and other materials provided to ED in response to a program review, if the records or materials were provided to ED by the institution no later than the date by which it was required to file its request for review in accordance with § 668.113.
>
> (v) Other ED records and materials if the records or materials were provided to the administrative law judge no later than 30 days after the institution's filing of its request for review.
>
> ....

Here the purpose of the regulation is to establish "categories" of evidence which might be entered into the record without the need to lay any additional evidentiary foundation. For reasons similar to those relied upon by the court in Bruce, I find that the word "and," for purposes of 34 C.F.R. § 668.116

(e)(1), should be given both a conjunctive and a disjunctive connotation. In short, "and" should be interpreted as "and/or." Therefore, the audit report should be part of the record and is valid evidence indicating and quantifying the liability of Sinclair.

When the audit report is included in the record, it is clear that OSFA has met its' burden of production and cleared the hurdle of establishing a prima facie case--

> A party will have satisfied his burden of production if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established.

McCormick, Evidence 789-790 (2nd ed. 1972) (cited in Maine v. U.S. Dept. of Labor, 669 F.2d 827 (1982)). The audit report is a government document, prepared in the normal course of business. The report was challenged by Sinclair only on the basis of methodology, and not on its' substantive calculations or findings. Having found that the report uses the appropriate methodology of applying Sinclair's established and published SSP policy, I find that it is sufficient to enable a reasonable person to draw from it the inference sought to be established.

Therefore, I find that OSFA met its burden of production and presented a prima facie case establishing the liability of Sinclair.

3. If OSFA met its burden of production, whether Sinclair met its burden of persuasion?

In his decision, the ALJ found that even if OSFA had met its burden of production, Sinclair's evidence was "sufficient to sustain any burden of persuasion, if it were needed." ALJ Decision at 41. While little more than dicta in the original Decision, this finding becomes relevant to the final disposition of this case now that it is established OSFA met its burden of production.

While an ALJ is normally granted great deference on factual matters; the ALJ Decision, the documentary evidence, and the briefs of the parties make it clear the difference between the conclusions of Sinclair and the conclusions of OSFA are a result of applying the different policies to the "satisfactory progress" requirement of 34 C.F.R. § 668.14 (e). Having previously determined that Sinclair's methodology of applying the P&D policy was incorrect, I must now find that Sinclair failed to meet its' burden of persuasion.

Finding of liability:

Having found that OSFA has met its burden of production with evidence that applies the appropriate methodology and that Sinclair has failed to meet its' burden of persuasion, I must now conclude that the Inspector General's audit report is accurate in regard to the issue of satisfactory progress. Sinclair paid $497,721 in financial aid to students who were not maintaining satisfactory academic progress under Sinclair's own Standards of Satisfactory Progress policy. Sinclair has the legal obligation to refund these monies to the United States Department of Education.

4. Whether there is substantial evidence to support the ALJ finding a certain group of 51 students were "regular students enrolled in eligible programs" as required by the Pell Grant and Campus-based student financial aid programs?

In its Appeal Brief OSFA argues that the ALJ erred in not finding that Sinclair disbursed $24,561 of Pell Grant, Perkins Loan, Campus Work Study, and Supplemental Educational Opportunity Grant funds to 51 students who did not qualify as "regular students enrolled in an eligible program" as required by 34 C.F.R. § 690.4(a)(3), § 674.9(a)(2), § 675.9(a)(2), and § 676.9(a)(2) (1985). This is primarily a factual question which was fully considered by the ALJ. I find no basis for overturning the original finding.

Conclusion:

In conclusion, I sustain in part, and reverse in part, the ALJ Decision. Sinclair is hereby ordered to refund to the United States Department of Education the sum of $ 497,721 paid to students who failed to maintain satisfactory academic progress during the 1983-85 audit period and $ 1,610 for inappropriate room and board allowance, for a total of $ 499,331.

This decision is signed this 26th day of September, 1991.

Lamar Alexander

Lamar Alexander, Secretary
United States Department of Education
Washington, DC