THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

[redacted]

In the Matter of

INTERNATIONAL JUNIOR COLLEGE,

Docket No. 07-52-SA
Federal Student Aid Proceeding

Respondent.

ORDER OF REMAND

This matter comes before the Secretary on appeal by International Junior College (Respondent). Respondent requests that I either remand this case for further fact-finding or reverse the Initial Decision issued by Administrative Judge Richard F. O'Hair on September 24, 2008. Judge O'Hair upheld the liability sought by the office of Federal Student Aid (FSA) in the amount of $1,365,078. The basis of Respondent's appeal is that the Initial Decision erroneously concluded that Respondent violated the 90/10 rule by deriving more than 90 percent of its revenues in audit year 2005 from Federal student financial aid programs.

Pursuant to section 102(b) of the Higher Education Act of 1965, as amended (HEA or Title IV), to be eligible to participate in Federal student financial assistance programs, a proprietary institution may derive no more than 90 percent of its revenue from Title IV programs.[1] The Department reviewed Respondent's compliance with the requirements of Title IV for audit year 2005 and, as a result, concluded that $15,789 in tuition revenues from 34 students who attended courses held on Saturdays could not be included in the 90/10 calculation

[1] Pub. L. No. 105-244, § 102(b), Title IV, § 493(a), Oct. 7, 1998, 112 Stat. 1622 (to be codified at 20 U.S.C. 1099c). More directly, section 102(b) provides that a proprietary institution must have "at least 10 percent of the school's revenues from sources that are not derived from funds provided under title IV, as determined in accordance with regulations prescribed by the Secretary." Consistent with the HEA, the Department's regulation further provides, pursuant to 34 C.F.R. § 600.5(a)(8), that a proprietary institution must have "no more than 90 percent of its revenue derived from title IV, HEA program funds." The statute and regulation codify what is commonly referred to as the "90/10 rule."

as tuition revenues because the Saturday courses are not eligible for Title IV aid.[2] The effect of excluding the Saturday course tuition revenue from the 90/10 calculation is that Respondent's percentage of revenues derived from Title IV sources increases for 2005: the percentage is 90.34%. Since this result exceeds 90%, FSA concluded -- and Judge O'Hair agreed -- that Respondent violated the 90/10 rule.

On appeal, Respondent argues that Judge O'Hair "misapplied the law and relied on facts not supported by the record." In Respondent's view, the tuition revenue from the Saturday courses should be included in the 90/10 calculation because completion of the courses satisfied part of the course requirements for one of Respondent's eligible programs. Opposing Respondent's position, FSA argues that Respondent did not meet its burden of proof showing that the 34 students at issue were enrolled in an eligible program. Instead, according to FSA, the students were enrolled in a single Saturday class, which is not the "educational benefit that Congress sought to facilitate through its adoption of the 90:10 rule." As such, in FSA's view, the "*sole* issue on appeal" is whether "revenue received from students attending a single class could be counted" in the 90/10 calculation. Ultimately, FSA is correct in its statement regarding what issue impacts whether Respondent must return the Title IV funds disbursed in 2006.

Certainly, it is also correct that if the 34 students at issue *only* enrolled in *one* of Respondent's courses -- whether it met on Saturday or any other day -- that evidence would not suffice to meet the pertinent regulatory requirement that a student be enrolled in an *eligible* program.[3] But, the pertinent question in this case is whether Respondent's 34 students actually were enrolled in an eligible program, notwithstanding that these students attended courses offered one day per week. In other words, the fact that the courses were held on Saturday is not, itself, dispositive of the question presented.

With regard to the question presented, although the judge concludes that the 34 students were not enrolled in an eligible program, his reason for that conclusion, rather than being fact-based, is based on his determination that the students "could not commit themselves to, at a minimum, a half-time student status."[4] Apparently, Judge O'Hair concluded that student status is the proper legal standard to apply in this case, and doing so resulted in a *per se* ruling. I do not agree.

As an initial matter, whether Respondent's 34 students were eligible for Title IV funding is not relevant to the matter at hand; there is no prohibition from including, as revenue, cash from ineligible students in the revenue portion of the 90/10 calculation. Indeed, to be included as revenue in the calculation, Respondent could only use funds that came from non-Title IV sources; hence, the fact that students are ineligible for Title IV funding has no bearing on the analysis in this case.

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[2] Under Title IV, only eligible students attending eligible programs may receive Title IV aid. Although the revenues at issue are not Federal funds, the 90/10 rule requires the tuition revenue to be applied to Title IV-eligible programs. 34 C.F.R. § § 600.5 & 668.8 (2008).

[3] Respondent does not assert that it offered a single-course eligible program.

[4] Judge O'Hair may have mistakenly applied *student eligibility*, rather than *program eligibility*, standards to answer the question at issue. Hence, one of the judge's citations in support of his conclusion included 34 C.F.R. 668.32, which is a student eligibility regulation.

More important, neither a student's status nor the fact that a student attended courses offered one day per week is *per se* dispositive of the question presented. To answer the question presented, the tribunal should have determined whether Respondent demonstrated that each of the 34 students at issue was actually enrolled in an eligible program; this is largely a fact-based question. It would have been, for example, entirely appropriate to rule on this matter by relying on the burden of proof. Yet, the judge did not rule on the burden of proof or otherwise engage in fact-finding.[5] Although FSA argues that the evidence favoring Respondent does not exist in the record, the parties dispute what the record reveals. Accordingly, I agree with Respondent that this matter should be remanded for further proceedings.

On the basis of the foregoing, I reverse Judge O'Hair's *per se* determination that the students at issue were not enrolled in an eligible program. I remand this matter for fact-finding on whether Respondent's 34 students were enrolled in one of the institution's Title IV-eligible programs. The fact-finding may require review of evidence concerning enrollment agreements, graduation records, courses completed in accordance with Respondent's program requirements, and/or other such matters.

ORDER

ACCORDINGLY, I HEREBY ORDER that this matter be REMANDED for further proceedings consistent with this order.

So ordered this 25th day of November 2009.

Arne Duncan

Washington, D.C.

[5] FSA and Respondent disagree as to whether the judge's comments regarding the students being properly enrolled in the institution and satisfying all relevant admission requirements constitute dicta or fact-finding.

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