THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

NATIONAL COLLEGE

Docket No. 19-17-SP

Federal Student Aid Proceeding

PRCN: 2013-2-07-28230

Respondent.

DECISION OF THE SECRETARY

The question presented in this case is whether a non-monetary finding in a Final Program Review Determination is reviewable within the Department's administrative appeals process. In this case, because the non-monetary finding was the direct basis of a subsequent monetary finding of liability, the non-monetary finding is subject to review on appeal. Based on the following analysis, I vacate and remand the appealed decision for further proceedings.

Applicable Law

As part of their voluntary participation in Title IV student financial aid programs, institutions are required to submit to routine file reviews. Among other things, institutions must provide records to the office of Federal Student Aid (FSA) demonstrating that Title IV funds are distributed only to eligible students and that the institutions are otherwise compliant with the eligibility regulations. Under 34 C.F.R. § 668.34, "[a]n institution must establish a reasonable satisfactory academic progress policy for determining whether an otherwise eligible student is making satisfactory academic progress [(SAP)] in his or her educational program and may receive assistance under the title IV, HEA programs."

Where the Department issues a determination that an institution failed to comply with Title IV, an institution may challenge the Department's final program review determination (FPRD) in a Subpart H proceeding. In a Subpart H proceeding, first FSA must make a prima facie case that the institution has failed to comply with its Title IV obligations in some respect.[1] Then, the institution bears the burden of proving that its questioned expenditures were proper or that it met all program requirements to avoid liability.[2]

[1] *In the Matter of Empire Tech. Sch.*, Dkt. No. 91-51-SP, U.S. Dep't of Educ. (Dec. 13, 1993) at unp. 20 (holding that the Department "must present sufficient evidence to enable a reasonable person to draw from it the inferences sought to be established.").
[2] 34 C.F.R. § 668.116(d).

Factual Background

National College is a Title IV-participating proprietary college in the State of Tennessee offering various programs of which the highest degrees available are at the Associates level. FSA conducted a program review at National College from Feb. 11–14, 2013, for the 2011-2012 and 2012-2013 award years. In FSA's program review report, among other things it asserted that National College's SAP policy did not comply with the applicable regulations because it had two "systemic deficiencies" related to the policy's failure to adhere to graduation standards and minimum pace standards.[3] National College initially responded by contradicting FSA's conclusion, asserting that its SAP policy was "proper and compliant" and expressed its intent to "continue to implement it scrupulously."[4] Nevertheless, FSA ordered National College to revise its policy and conduct a file review for the 2011–2012, 2012–2013, 2013–2014, and 2014–2015 award years to determine whether any students received disbursements who would have been ineligible under the revised policy.

National College objected to FSA's requirement that it revise its policy, but with no avenue to appeal FSA's preliminary conclusion, National College complied with FSA's order and created a new policy. Then, at FSA's instruction, National College created and submitted a full file review, examining its records for compliance with the new SAP policy. The review identified 83 students who received ineligible disbursements under the new SAP policy. In its FPRD, issued on January 8, 2019, FSA's Finding 6 assessed a final liability of $388,988 for these ineligible disbursements. National College appealed Finding 6 to the Office of Hearings and Appeals.

Administrative Law Judge Robert G. Layton (ALJ) heard the case. In his decision, the ALJ held that FSA met its prima facie obligation by informing National College, through the FPRD, that it had an obligation to only disburse funds to eligible students and identified ineligibility under the new SAP policy as the basis for the liability. National College asserted that FSA erred by requiring revision to the institution's SAP policy in the first place. However, the ALJ found that issue to be outside the scope of a Subpart H hearing on the institution's liability, because FSA's order to revise the SAP policy was not a finding of financial liability. On the narrow issue of liability, the ALJ found that FSA had the authority to order the file review, the file review demonstrated that 83 students received ineligible distributions, and National College failed to meet its obligation to show that it complied with the Title IV requirements.

National College has since appealed the ALJ's decision to the Secretary.

Analysis

The Department's practice is to prohibit institutions from appealing findings with no attached monetary liability. The FSA cover letter provided to National College with the FPRD states (with emphasis added):

[3] FPRD at 33.
[4] FPRD at 65.

> If National elects to appeal to the Secretary of Education for a review of the financial liabilities established by this FPRD, the institution must file a written request for a hearing. **Please note that institutions may appeal financial liabilities only.**

In the appealed decision, the ALJ determined that he was without authority to consider whether FSA erred by ordering revision of the SAP policy because that preliminary conclusion was not a financial liability. The ALJ cited to past decisions of the Department holding that Subpart H proceedings are contractual in nature and permit recovery of funds.

However, in the instant case, FSA's preliminary conclusion that National College must revise its SAP policy is the direct basis for the financial liability asserted in the FPRD. In other words, the financial liability was based solely on a file review that retroactively applied the new SAP policy. Prior to FSA issuing the FPRD, National College had no avenue to challenge this preliminary conclusion. The applicable regulations at 34 C.F.R. § 668.116(d) separately allow for an institution to prove that expenditures were proper *and* that it complied with program requirements:

> (d) An institution or third-party servicer requesting review of the final audit determination or final program review determination issued by the designated department official shall have the burden of proving the following matters, as applicable:
>
> (1) That expenditures questioned or disallowed were proper.
>
> (2) That the institution or servicer complied with program requirements.

Where FSA determines an institution is not compliant with program requirements and uses this determination as the direct basis for a finding of financial liability, I find that the institution may appeal that determination in a Subpart H proceeding. The fact that FSA's preliminary conclusion is not itself a financial liability does not allow this conclusion to evade review and later be used as the direct basis for a finding of financial liability. The regulation at 34 C.F.R. § 668.116(d)(2) expressly provides an institution with an opportunity to prove that it complied with program requirements, separate and apart from proving that "expenditures questioned or disallowed were proper."

I also find that the decisions cited by the ALJ about the contractual nature of Subpart H recovery of funds do not limit the authority of an ALJ or the Secretary to rule on whether an institution complied with program requirements. In a more recent ruling, in *Chauffer's Training Sch., Inc. v. Spellings*, 478 F.3d 117, 129 (2nd Cir. 2007), the United States Court of Appeals for the Second Circuit held that the Department has broad authority under the statute to assess liabilities and require repayment of Title IV funds for failure to comply with program requirements. The Court made no mention of these liabilities being recoverable because they are "contractual" and even repudiated the school's assertion that the Department was relying on a legal analysis of contract law rather than an analysis of the statutory underpinning of its own

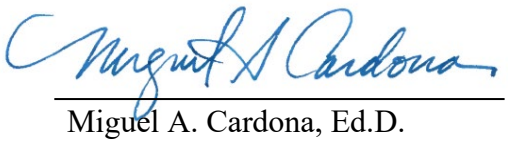
regulations.[5] In this case, the ALJ's review of the FSA determination on the SAP policy is proper under the statutory and regulatory scheme.

In the instant case, FSA required National College to revise its SAP and then apply the new policy to its records to calculate a demand of monetary liability. Therefore, the new policy is the direct basis for the monetary finding, and FSA's determination that National College's original SAP policy did not comply with the Title IV requirements is a matter reviewable under 34 C.F.R. § 668.116(d)(2). Prior to its appeal, National College had no opportunity to formally argue that it complied with the program requirements and that FSA erred in ordering the revision of the policy. Therefore, the ALJ must first consider whether FSA erred in requiring National College to revise its SAP policy. If FSA so erred, the ALJ should only uphold a finding of liability upon a showing by FSA that National College incurred such liability under the original SAP policy.

ORDER

ACCORDINGLY, Judge Layton's decision in this case is vacated, and the case is remanded for further proceedings as described above.

So ordered this 9th day of January 2023.



Miguel A. Cardona, Ed.D.
Secretary
U.S. Department of Education

Washington, D.C.

[5] *Chauffer's Training Sch., Inc. v. Spellings*, 478 F.3d 117 at 129 n.14 ("The School argues that the Department's interpretation in this case is not entitled to deference because the Department was interpreting contract, not statutory, provisions. We disagree. The Department interpreted statutory provisions, and this interpretation applied to the School once it was eligible and agreed to a program participation agreement.").

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