

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

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STUDENTS FOR SENSIBLE DRUG
POLICY FOUNDATION, on behalf of itself
and its members; AND KRAIG SELKEN,
NATHAN BUSH & ALEXIS SCHWAB, on
behalf of themselves and all other similarly
situated individuals,

Plaintiffs,

vs.

MARGARET SPELLINGS, Secretary
of the United States Department
of Education, in her official capacity,

Defendant.

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CIV. 06-

**COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY RELIEF**

I. INTRODUCTION

1. Every fall, as college students across the country walk onto campus for their first day of classes, thousands more are denied entry by the federal government. These would-be students, unable to afford ever-increasing tuition, are barred from receiving the financial aid that would allow them to pursue their dreams solely because they were convicted of a drug offense. While any non-drug offender, from a murderer to a shoplifter, can receive financial aid, an individual who is caught with any amount of a controlled substance, including a small amount of marijuana, is automatically denied aid by the federal government. The United States Department of Education (“DOE”) refuses

to disburse financial aid, including loans, grants, and work-study opportunities, to these students pursuant to a little-known law with very serious consequences: Section 438 of the Higher Education Act Amendments of 1998 (“the HEA Aid Elimination Provision”), 20 U.S.C. § 1091(r), *codified as amended at* Pub. L. No. 109-171 (Feb. 8, 2006). In this nationwide class-action lawsuit, plaintiffs challenge this unconstitutional law in order to realize their educational and professional aspirations.

2. For more than 40 years the federal government has made higher education a reality for millions of Americans by disbursing aid based on financial need to students who could not otherwise afford tuition. Accepting applications from students seeking to attend four-year colleges, junior colleges, vocational schools, graduate schools, law schools, medical schools, and other post-secondary educational institutions, the government provides financial aid in the form of Pell Grants, Perkins Loans, Stafford Loans, Federal Educational Opportunity Grants, and work-study opportunities.

3. Historically, the government has left matriculation decisions to educational institutions. Allowing schools to decide for themselves who was qualified to attend their institution, the government granted financial aid solely on the basis of a student’s financial need. Student aid has been awarded pursuant to a formula that compares a student’s family’s income and assets to the cost of attending the student’s school. Until recently, the government did not use financial aid as a means by which to punish people convicted of a criminal offense. Nor, until recently, did the government use the financial aid system to specify a class of people it found worthy of post-secondary education.

4. This changed in 1988 with the passage of the McCollum Amendment to the Anti-Drug Act, 21 U.S.C. § 862, the precursor to the HEA Aid Elimination Provision. The McCollum Amendment allowed federal and state courts to suspend eligibility for federal student loans to an individual convicted for illegally possessing or distributing a controlled substance as part of the individual's criminal sentence.

5. However, almost all courts refused to exercise their discretion to strip individuals of eligibility for financial aid. Between 1990 and 2004, courts rescinded financial-aid eligibility for fewer than 2 out of every 1,000 people (0.2%) convicted of a drug offense. Frustrated that the judiciary refused to impose this criminal punishment, Congress passed the HEA Aid Elimination Provision. This law mandates that the DOE deny federal student aid to drug offenders.

6. The HEA Aid Elimination Provision requires the DOE to deny student aid for one year to applicants convicted of possessing a controlled substance while students receiving financial aid, for two years to applicants twice convicted of possessing a controlled substance while students receiving financial aid, and permanently to applicants convicted three or more times of possessing a controlled substance while students receiving financial aid. The HEA Aid Elimination Provision also requires the denial of student aid for two years to applicants convicted of distributing a controlled substance while students receiving financial aid and permanently to applicants convicted two or more times of distributing a controlled substance while students receiving financial aid. Any conviction for possessing or distributing a controlled substance will result in the

denial of student aid, regardless of whether the conviction occurred in federal or state court and whether the offense was a misdemeanor or felony.

7. The results have been devastating. Since 2000, when the DOE promulgated its implementing regulations, at least 200,000 students have been denied federal financial aid as a result of past drug convictions pursuant to the HEA Aid Elimination Provision. Approximately 35,000 students annually have been denied student aid as a result of this law. Many of these students are unable to raise sufficient funds to continue their education, forcing them to drop out of school. Those students who manage to take out high-interest loans to pay their tuition and other school-related expenses eventually drop out of school under financial strain or face enormous financial debt upon graduation.

8. The HEA Aid Elimination Provision not only imposes harsh personal consequences on would-be students, but it exacts a serious societal toll. The law interferes with the objectives of drug treatment, drug prevention, and criminal rehabilitation by denying a higher education—and its attendant economic benefits—to those convicted of drug offenses. Accordingly, approximately 250 organizations, including the American Public Health Association; the American Federation of Teachers; the American Bar Association; the NAACP; the Association for Addiction Professionals; and many established religious organizations, including the Presbyterian Church (USA), the United Methodist Church General Board of Church and Society, the Progressive Jewish Alliance, and the Evangelical Lutheran Church in America have called on Congress to repeal the HEA Aid Elimination Provision in its entirety.

II. PARTIES

A. ORGANIZATIONAL PLAINTIFF

9. Students for Sensible Drug Policy Foundation (SSDP) is a student-led organization devoted to reducing the harms inflicted on students by the government's drug policies. The organization is comprised of student chapters at colleges and universities across the country, including in South Dakota. Its members include students who will be ineligible for student aid next year because of a drug conviction, as well as students who are currently, or were formerly, ineligible for student aid pursuant to the HEA Aid Elimination Provision. SSDP sees education as essential to the development of a productive, successful society, and it believes that it is unfair, irresponsible, and irrational to prevent an individual from receiving an education solely because he or she has been convicted of a drug offense. To that end, one of the priorities of SSDP is to stop the government from denying student aid to individuals with drug convictions.

B. INDIVIDUAL STUDENT PLAINTIFFS

10. Plaintiff Kraig Selken is a citizen of South Dakota currently residing in Aberdeen, located in Brown County. Mr. Selken is a history major at Northern State University, where he has a grade point average in excess of 3.0. He was expecting to graduate in June 2007 and had dreams of becoming a teacher or attending law school upon receiving his B.A. However, in October 2005, Mr. Selken, who receives federal financial aid, pled guilty to a misdemeanor for possessing marijuana after law enforcement officers found a small amount of marijuana in a house he shared with two other students. Although Mr. Selken has completed his court-imposed sentence, he likely

will be unable to complete his last year of college because he will be ineligible for student aid pursuant to the HEA Aid Elimination Provision.

11. Plaintiff Nathan Bush is a citizen of the State of Wisconsin, currently residing in Madison, located in Dane County. He is a junior majoring in political science at the University of Wisconsin-Madison, where he has a 3.0 grade point average. In May 2005 Mr. Bush was a passenger in the back seat of a car that was pulled over by a law enforcement officer, who discovered a small amount of marijuana in the vehicle. Even though the marijuana was not found on Mr. Bush's person, he was indicted on felony charges for possessing a controlled substance and pled guilty to a misdemeanor possession charge in January 2006. He was receiving federal student aid at the time of the offense and therefore will be ineligible for student aid next year pursuant to the HEA Aid Elimination Provision. Mr. Bush, who has completed his court-imposed sentence, relies on federal student aid to pay tuition and the other costs of his education. Unless he is able to locate other funding sources, he will be unable to enroll in his senior year of college.

12. Plaintiff Alexis Schwab is a citizen of the State of Indiana, currently residing in Muncie, located in Delaware County. Ms. Schwab is a sophomore at Ball State University, where she is majoring in public relations. She has received federal student aid for her first two years of college. In August 2005, however, Ms. Schwab was convicted for possessing a small amount of marijuana, and she therefore will be ineligible for student aid for her junior year of college pursuant to the HEA Aid Elimination Provision. Accordingly, Ms. Schwab, who has completed her court-imposed sentence,

will be forced to take out a substantial high-interest loan, which will place her in significantly more debt than had she continued to receive federal student aid, in order to remain enrolled in college.

C. DEFENDANT

13. Defendant Margaret Spellings, sued in her official capacity only, is the Secretary of the DOE. As Secretary, Ms. Spellings is charged with implementing the HEA Aid Elimination Provision.

III. CLASS-ACTION ALLEGATIONS

14. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2). The class consists of students and prospective students across the country who, pursuant to the HEA Aid Elimination Provision, are, or will be, ineligible for student aid due to a drug conviction and who otherwise would be eligible to receive financial aid for a post-secondary education.

15. The class is so numerous that joinder of all members is impracticable; there are questions of law and/or fact common to the class; the claims of the representative class plaintiffs are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and plaintiffs are represented by experienced counsel who will adequately represent the interests of the class. Furthermore, defendants have acted and have refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

IV. JURISDICTION AND VENUE

16. The Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 2201, & 2202. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(3).

V. FACTUAL BACKGROUND

A. Applying for Federal Financial Aid

17. The cost of attending a post-secondary educational institution, including tuition, books, and living expenses, is well beyond the means of most students. Accordingly, the federal government provides financial aid to ensure that schools are accessible to more than the wealthiest of prospective students. The government provides financial aid in the form of Pell Grants, Perkins Loans, Stafford Loans, Federal Educational Opportunity Grants, and work-study allowances. According to the DOE, approximately sixty-three percent of undergraduate students received financial aid in 2003-04, during which period the average financial aid award covered three-quarters of the student's academic expenses.

18. Students applying for federal financial aid must complete the Free Application for Federal Student Aid ("FAFSA"). The FAFSA asks 103 questions of financial aid applicants. The answers to these questions allow the DOE to determine whether the applicant is eligible for financial aid and, if the applicant is eligible, to calculate the amount of federal aid the student will receive. To that end, most of the FAFSA questions relate to information about the students', and their families', income, assets, and debts.

19. If the DOE determines that a student is eligible for federal financial aid, it will calculate the student's Expected Family Contribution ("EFC"). Should the student's EFC fall below a certain amount of money, the student will be provided with a Pell grant.

20. This information is then shared with the educational institution to which the student seeks to matriculate, which will subtract the EFC, Pell grant, and other financial assistance (e.g., scholarships) from the cost of attending the school. The difference is the student's expected financial need, which the federal government fills through Stafford loans, work-study allowances, and other forms of financial aid.

B. HOW THE HEA AID ELIMINATION PROVISION WORKS

21. While almost all of the FAFSA questions relate to financial information, such as family income and debts, there is one question that is unlike all of the others. Question 31 of the FAFSA asks: "Has the student ever been convicted of possessing or selling illegal drugs."

22. The FAFSA includes Question 31 because the HEA Aid Elimination Provision requires the DOE to deny student aid for one year to applicants convicted of possessing a controlled substance while students receiving financial aid, for two years to applicants twice convicted of possessing a controlled substance while students receiving financial aid, and permanently to applicants convicted three or more times of possessing a controlled substance while students receiving financial aid. The HEA Aid Elimination Provision also requires the denial of student aid for two years to applicants convicted of distributing a controlled substance while students receiving financial aid and permanently to applicants convicted two or more times of distributing a controlled substance while

students receiving financial aid. Accordingly, if the applicant answers Question 31 in the affirmative, he or she is directed to a worksheet that asks various questions in order to ascertain whether, and for how long, the applicant's drug conviction renders him or her ineligible for student aid.

23. The HEA Aid Elimination Provision allows students to regain eligibility before the prescribed time periods have concluded through enrollment in specified drug-treatment programs. However, access to these programs is often extremely limited, and many have long waiting lists. Moreover, the approved programs can be prohibitively expensive, sometimes costing more than a semester of tuition at the applicant's school. Furthermore, most of these drug-treatment programs do not accept financial aid applicants who have occasionally used, but are not addicted to, controlled substances—a population that constitutes the vast majority of those who are denied aid pursuant to the HEA Aid Elimination Provision. Finally, many people live in areas where there is no federally approved drug-treatment program at all.

C. Whom the HEA Aid Elimination Provision Affects

24. Approximately 35,000 students are denied student aid annually pursuant to the HEA Aid Elimination Provision. Over the past six years, more than 200,000 students have had their educational and professional dreams derailed, if not destroyed, by the HEA Aid Elimination Provision.

25. The HEA Aid Elimination Provision denies access to a higher education to those with a drug conviction who are not sufficiently wealthy to pay for tuition

themselves. Because financial aid awards are based solely on financial need, the law affects only those who require financial assistance to pursue higher education.

26. The law also discriminates against racial minority groups. According to United States Department of Justice statistics, African Americans comprise 12% of the United States population and 13% of drug users, but they account for more than 62% of those convicted of drug offenses. A disproportionate number of African Americans are denied financial aid on this basis.

27. The law targets those convicted of a drug offense, but not of any other class of criminal behavior. Thus, convicted rapists, murderers, and others convicted of violent offenses are not denied federal student aid, while occasional marijuana users—or even someone who tried marijuana just once—can be denied the opportunity to pursue an education.

VI. CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(All Plaintiffs Against Defendant Spellings in her Official Capacity, for Violation of the Equal Protection Component of the Due Process Clause of the Fifth Amendment to the United States Constitution)

28. Plaintiffs hereby incorporate by reference each and every prior paragraph of this Complaint as if more fully set forth herein.

29. The Fifth Amendment to the United States Constitution provides, in relevant part: “No person shall be deprived of life, liberty, or property, without due

process of law.” The Due Process Clause contains an equal protection component akin to the Equal Protection Clause of the Fourteenth Amendment.

30. Defendants’ actions violate plaintiffs’ rights under the equal protection guarantee of the Due Process Clause by singling out, for denial of financial aid, the category of individuals with a controlled substances conviction. While any non-drug offender, from a murderer to a shoplifter, can receive financial aid, an individual who is caught with any amount of a controlled substance, including a small amount of marijuana, is automatically denied aid by the federal government.

31. Plaintiffs have suffered and will continue to suffer irreparable harm caused by being denied post-secondary financial aid. The denial of student aid causes plaintiffs to forego the opportunity for an education or requires them to undergo significant financial and personal hardship in order to remain enrolled in school.

SECOND CAUSE OF ACTION

(All Plaintiffs Against Defendant Spellings in her Official Capacity, for Violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution)

32. Plaintiffs hereby incorporate by reference each and every prior paragraph of this Complaint as if more fully set forth herein.

33. The Fifth Amendment to the United States Constitution provides, in relevant part: “No personal shall be . . . subject for the same offence to be twice put in jeopardy of life or limb” The Double Jeopardy Clause protects against the imposition of multiple criminal punishments for the same offense.

34. The denial of educational loans to students convicted of a drug offense is a punishment prohibited by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Defendants have subjected plaintiffs and members of the plaintiff class to an unconstitutional punishment by denying them educational assistance based on their having been convicted of illegally possessing or distributing controlled substances, in spite of the fact that they have already received a separate criminal punishment.

35. Plaintiffs have suffered and will continue to suffer irreparable harm caused by being denied post-secondary financial aid. The denial of student aid causes plaintiffs to forego the opportunity for an education or requires them to undergo significant financial and personal hardship in order to remain enrolled in school.

VII. REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request the following relief:

36. A determination by the Court that this action may be maintained as a class action;

37. A declaration that the HEA Aid Elimination Provision and defendants' implementation of the HEA Aid Elimination Provision violates the Double Jeopardy Clause of the Fifth Amendment;

38. A declaration that the HEA Aid Elimination Provision and defendants' implementation of the HEA Aid Elimination Provision violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment;

39. A preliminary and permanent injunction ordering defendant, her agents, assigns, and all persons acting in concert or participating with her to:
- A. cease suspending eligibility for federal financial aid to individuals based on their convictions for a drug offense;
 - B. reassess eligibility for federal financial aid for the 2006-07 school year to plaintiffs and members of plaintiffs' class who have applied for student aid without any regard for the applicants' drug convictions;
 - C. (i) notify all Plaintiffs and members of Plaintiffs' class who have applied for student aid for the 2006-07 school year and were denied aid based on their answer to FAFSA Question 31 that they may be eligible for student aid, and (ii) invite these individuals to re-apply for aid for the 2006-07 school year immediately.
40. An award of reasonable attorneys' fees and costs in favor of plaintiffs.
41. Such other relief as this Court may deem just and proper.

Dated this 21st day of March 2006.

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