



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
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In the Matter of

The Salon Academy,

Docket No. 19-42-SP

Federal Student Aid Proceeding

PRCN: 2016-4-07-29420

Respondent.

Appearances: April Crandall, President, and Brian Jennette, Financial Administrator,
Self-represented, for the Respondent

Hannah Hodel, Office of the General Counsel, U.S. Department of
Education, for Federal Student Aid

Before: Angela J. Miranda, Administrative Law Judge

DECISION

I. Jurisdiction and Procedural History

A request for review, dated May 15, 2019, was timely filed with the Administrative Actions and Appeals Service Group (AAASG), of the Office of Federal Student Aid (FSA), U.S. Department of Education (Department) on May 17, 2019 (OES Document 1).¹ The request challenged Finding 4 in a Final Program Review Determination (FPRD), dated April 5, 2019, issued by the FSA's Third Party Servicer Oversight Group (TPSOG). The Respondent, The Salon Academy (Salon Academy) challenged FSA's determination that it did not have a Return of Title IV Fund (R2T4) policy and that it did not correctly calculate R2T4 for two students included in a review sample selected from the 2015-2016 award year. In support of its challenge to the imposition of the liability of \$583,571.00, Salon Academy filed a copy of its compliance audit for the fiscal year that ended December 31, 2016.

¹ OES is the Office of Hearings and Appeals Electronic Filing System.

On June 13, 2019, I issued an Order Governing Proceeding (OGP) (OES Document 8). The OGP established specific procedures for this proceeding, which included, among other things, a briefing schedule for this hearing. Respondent was given an opportunity to supplement its request for review by filing a brief, which it chose not to do. In the absence of a supplemental brief from the Respondent, the arguments presented in the request for review are given full consideration. FSA timely filed its response brief, and the Respondent chose not to file a reply brief. The administrative record is closed and this matter is ready for decision.

II. Federal Student Aid's Final Program Review Determination (OES Documents 2 and 12, pp. 7-69)²

As indicated in the FPRD, TPSOG represents it conducted an on-site review of Salon Academy's third-party servicer, Boston Educational Network, Inc. (BEN) from September 12, 2016 to March 6, 2018.³ Simultaneously, TPSOG conducted an off-site review of Salon Academy. The on-site and off-site reviews were conducted to determine BEN's and Salon Academy's compliance with the applicable statutes and regulations as they pertain to Salon Academy's administration of Title IV programs.

TPSOG examined five (5) randomly selected files from a statistical sample of the total population of students who received Title IV funds in the 2015-2106 award year. An additional eleven (11) files were judgmentally selected to test Salon Academy's compliance with the HEA's Fiscal Administration requirements. Of those 16 reviewed files, errors in calculation of R2T4 were found in two student files. A Program Review Report (PRR) was issued to Salon Academy on March 28, 2018, approximately nine (9) days after Salon Academy closed on March 19, 2018 (OES Document 12, pp. 32-56).⁴ The PRR identified twelve (12) findings, but only Finding 4, which was identified as a "systemic issue" related to Salon Academy's failure to have a R2T4 policy, prompted the TPSOG reviewers to require a full file review that the PRR indicated "could result in identification of a liability" owed to the Department (OES Document 12, p. 15).

The required action for Finding 4 in the PRR directed that Salon Academy assist BEN in performing a comprehensive file review that included all Title IV recipients who officially or unofficially withdrew during the 2015-2016 and 2016-2017 award years. Specific directives for the file review were included in BEN's PRR and were not repeated in the PRR to Salon Academy

² A partial copy of the FPRD was filed as an exhibit to the Respondent's request for review (OES Document 2). FSA filed Exhibits 1 through 5 to its brief (OES Document 12). ED-Ex. 2 is the complete copy of the FPRD, including all appendices (OES Document 12, pp. 7-69) (page reference in the cites to this decision are to the PDF page of the document as uploaded to OES).

³ The representation that TPSOG's reviewers were on-site at BEN for more than 17 months is inconsistent with past known practices for on-site program reviews as well as the guidance in FSA's *Program Review Guide for Institutions 2009*, the guide in place at the time the program review was conducted, which advises the on-site portion of a program review typically is for a period of five days (*Program Review Guide for Institutions, 2009*, hereinafter 2009 Guide, Ch. 1, p. 1-6).

⁴ The Program Report Review was included as an exhibit to Respondent's request for review. It was uploaded to OES at Documents 3 and 4 and filed as an exhibit to FSA's brief.

(OES Document 12, p. 45). Nonetheless, Salon Academy was expected to provide written assurances that acknowledged Salon Academy and BEN reviewed, and revised as needed, all policies and procedures that would assure Salon Academy and BEN properly perform R2T4 Fund calculations in the future (OES Document 12, p. 45).⁵

On April 5, 2019, TPSOG issued a FPRD to Salon Academy. Since Salon Academy was closed, the FPRD considered all findings resolved except for Finding 4 (OES Document 12, p. 15).⁶ The FPRD noted that Salon Academy did not provide any response to the PRR issued on March 28, 2018, did not complete a file review of all Title IV recipients who withdrew, officially or unofficially, during the 2015-2016 and 2016-2017 award years, and therefore, failed to provide documentation Salon Academy properly prepared the R2T4 calculation upon the withdrawal of a student (OES Document 12, p. 17).

Due to Salon Academy’s failure to respond to the PRR and failure to complete the required file reviews, the FPRD indicated the Department could have assessed liabilities for all Title IV funds disbursed during the award years “in question” (OES Document 12, p. 17). Instead, the FPRD indicated that TPSOG reviewers determined Salon Academy was only liable for all Title IV funds extended to students the Department was able to identify as having withdrawn from Salon Academy (OES Document 12, p. 17). The FPRD assessed liabilities for the award years 2014-2015, 2015-2016, and 2016-2017, that included:

Award Year	Pell Grants	Cost of Funds - Pell Grants (Interest) (rounded to nearest dollar)	Direct Loans	Cost of Funds - Direct Loans (Interest)	
2014-2015	68,035.00	1,553.00	149,348.00	3,258.00	222,194.00
2015-2016	112,697.00	1,965.00	141,850.00	2,241.00	258,753.00
2016-2017	49,043.00	458.00	52,770.00	453.00	102,724.00
Subtotal	229,775.00	3,976.00	343,968.00	5,952.00	583,671.00
Total Liability					\$583,671.00

(OES Document 12, p. 19).

III. Issue

Whether the liability of \$583,571.00 assessed against Salon Academy in the Final Program Review Determination, dated April 5, 2019, is supported, in whole or in part, following Federal Student

⁵ The record does not establish whether BEN submitted a response to the PRR that was issued to BEN.

⁶ The FPRD indicated Findings 1-3 and 5-12 were considered closed only because the institution stopped participating in Title IV programs, but noted if Salon Academy ever sought reinstatement, these findings would have to be fully resolved prior to it becoming an eligible participating institution.

Aid's Third Party Servicer Oversight Group program review, which was based on a review of five (5) randomly selected files from a statistical sample and eleven (11) judgmentally selected files from the 2015-2016 award year.

IV. Legal Framework/Applicable Laws and Regulations

A. Applicable Statutes

Higher Education Act of 1965, Qualification of Postsecondary Institutions, Program Participation Agreements, Administrative Capability & Financial Responsibility, Program Reviews, and Right to Hearing

The Higher Education Act of 1965 (HEA), as amended, provides a variety of grants and programs for students to make the benefits of postsecondary education available to eligible students (20 U.S.C. § 1070 *et seq.*).

An institution of higher education is deemed eligible for participation in Title IV programs only upon approval by the Secretary of a program participation agreement (PPA) (20 U.S.C. § 1094(a)). Initial and continuing eligibility requires submission of required audits, demonstration of financial responsibility, and cooperation with enforcement standards (20 U.S.C. § 1094(a)(4)). The Secretary has the authority to prescribe regulations as necessary and consistent with the statutory authority and has the specific authority to require a variety of financial audits while an institution participates in Title IV programs (20 U.S.C. § 1094(c)(1)(A)(i)). The required financial audits must be conducted by a qualified independent auditor (*Id.*).

An institution of higher education qualifies for participation in Title IV programs upon the Secretary's determination that the institution has the legal authority to operate within a state, has accreditation status, and has administrative capability and financial responsibility (20 U.S.C. § 1099c(a)). In determining an institution's financial responsibility, the Secretary considers whether the institution is able to meet all of its financial obligations, including refunding institutional charges and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary (20 U.S.C. § 1099c(c)(1)(C)).

To strengthen the administrative capability and financial responsibility of participating institutions, the Secretary is required to conduct program reviews on a systematic basis, pursuant to enumerated priorities (20 U.S.C. §§ 1099c-1(a)(1) and (2)). To ensure uniformity of practice, the program reviews shall be conducted upon established guidelines that are made available to each participating institution. The guidelines are required to permit institutions to correct or cure an administrative, accounting, or record keeping error so long as there is not a pattern of error and there is no evidence of fraud or misconduct. Additionally, FSA is to assess any penalty based upon the gravity of the violation, failure, or misrepresentation (20 U.S.C. §§ 1099c-1(b)(1-4)). A participating institution subject to a program review shall be given an adequate opportunity to review and respond to a program review report before any final program review report is issued and the final program review report (determination) shall include a written statement addressing the response, the basis for such report, and a copy of the institution's response (20 U.S.C. §21 1099c-1(b)(6)& (7)).

An institution that has received written notice of a final audit or program review may request a hearing in review of that determination (20 U.S.C. § 1094(b)).

Institutional Refunds/Return of Title IV Funds

An institution is responsible for the return of Title IV funds received by an enrolled student upon the withdrawal of that student (20 U.S.C. § 1091b). The calculation of the amount of the return is based on the amount of the assistance that was earned by the student, which is based on a percentage earned (20 U.S.C. §§ 1091b(a)(3)(A) & (B)). The percentage earned is equal to the percentage of enrollment for which assistance was awarded that was completed as of the withdrawal date (20 U.S.C. § 1091b(a)(3)(B)). When a student's withdrawal date occurred after the student completed 60% of the payment period, then 100% of the funds were earned (20 U.S.C. § 1091b(a)(3)(B)(ii)). The return is the responsibility of the institution as well as the student (20 U.S.C. §§ 1091b(b)(1) & (2)).

B. Applicable Regulations

Qualification of Postsecondary Institutions, Program Participation Agreements, Administrative Capability, Financial Responsibility, Program Reviews, and Right to Hearing

A postsecondary institution establishes eligibility to participate in any HEA program by application (34 C.F.R. § 600.20). If the Secretary determines the institution satisfies all the statutory and regulatory requirements, then the institution is eligible to participate and the Secretary signs a PPA (34 C.F.R. § 600.10(a)(i)).

Consistent with the statutory requirement for a PPA, the Secretary's regulations require that an institution enter into a PPA to participate in Title IV programs (34 C.F.R. § 668.14(a)(1)). The PPA conditions an institution's initial and continued participation upon compliance with the HEA, the Department's regulations, and the institution's PPA (34 C.F.R. § 668.14(a)). Upon acceptance of a PPA by the Secretary, the institution agrees it will use Title IV funds solely for the purposes specified in and in accordance with that program participation agreement (34 C.F.R. § 668.14(b)(1)). Furthermore, under a PPA a participating institution accepts liability for all improperly spent or unspent funds received under Title IV programs as well as any returns of Title IV program funds that the institution may be required to make (34 C.F.R. §§ 25(b)(25)(i) and (ii)). A participating institution is a fiduciary for administering Federal funds (*See*, 34 C.F.R. § 668.14(b)(2)).

The Secretary's regulations are consistent with the HEA and require that an institution must demonstrate financial responsibility to begin and continue participation in any Title IV program (34 C.F.R. § 668.15(a)). Generally, an institution is considered financially responsible only if it 1) is providing the services indicated in its official publications, 2) is providing administrative resources necessary to comply with program requirements, 3) is meeting its financial obligations including, but not limited to, refunds it is required to make and repayments to the Secretary for liabilities and debts incurred in programs administered by the Secretary, 4) is current in its debt payments, 5) provides a letter of credit to the Secretary, as required, and 6) an accountant has not

expressed doubt about the institutions ability to continue in operation or made an adverse opinion in the institution's most recent audit report (34 C.F.R. §§ 668.15(b)(1)-(6)).⁷

The Secretary's regulations, consistent with the HEA, establish administrative capability requirements that participating institutions must follow (34 C.F.R. § 668.16). Those requirements include administering the Title IV programs in accordance with all statutory and regulatory requirements as well as any special arrangements, agreements, and limitations agreed to pursuant to the applicable statutory authorities (34 C.F.R. § 668.16(a)). Additionally, participating institutions must: (1) administer Title IV programs with adequate checks and balances within its internal control systems; (2) establish and maintain records required by the Title IV programs; (3) provide all fiscal and financial statements necessary for compliance with Title IV; (4) show no evidence of significant problems that affect the institution's administration of Title IV programs; and (5) not otherwise appear to lack the ability to administer the Title IV programs (34 C.F.R. §§ 668.16(c), (d), (i), and (n)).

Consistent with the statutory requirement for submission of financial audits, the Department's regulations address compliance audits and audits required at the end of an institution's participation (34 C.F.R. §§ 668.23 and 668.26). Audits must be completed by an independent auditor who meets the Government Auditing Standards qualification and independence standards (34 C.F.R. § 668.23(a)(1)). An institution must submit compliance audits annually, no later than six months after the institution's fiscal year ends (34 C.F.R. § 668.23(a)(4)).

In terms of program reviews, the regulations require that a participating institution cooperate with an independent auditor, the Secretary, the Department's Inspector General, the United States Comptroller General, and others, in the conduct of audits, investigations, programs reviews, or other reviews authorized by law (34 C.F.R. § 668.24(f)(1)). The regulations also require that an institution keep all records involved in a claim or expenditure questioned by a Title IV program audit, investigation or other review until the questioned expenditure is resolved (34 C.F.R. § 668.24(e)(3)(i)). A final program review determination is defined in the regulations as a written notice of a determination issued by a designated Department official and resulting from a program compliance review of an institution's participation in any or all the Title IV programs (34 C.F.R. § 668.112(b)(1)). Furthermore, if a violation resulted from an administrative, account, or recordkeeping error that was not part of a pattern or error, fraud, or misconduct, then the institution is permitted to correct or cure the error (34 C.F.R. § 668.113(d)(1)). These regulations are consistent with the statutory authority requiring the Secretary to conduct program reviews. As indicated previously the statute requires the Secretary to establish guidelines so program reviews will be uniformly conducted. The regulations are silent as to specific guidelines, but as discussed below, the Secretary met the mandate by establishing and publishing Department policy that is made available to participating institutions.

When the Department conducts a program review and issues an FPRD directing a school to return Title IV program funds, the school has the right to challenge the Department's determinations in

⁷ In its brief, FSA cited 34 C.F.R. §§ 668.82 (a) and (b), the standards of conduct expected from a participating institution, which apply to Subpart G proceedings. Since appeals of program reviews are conducted under Subpart H, the more applicable regulation is § 668.15, which is a regulation that addresses general standards for participation in Title IV programs.

a hearing governed by Subpart H of Part 668 (34 C.F.R. §§ 668.111-668.124). In a hearing, the school has the burden of proving that the questioned or disallowed disbursements of Title IV program funds were proper and that the school complied with the Title IV program requirements (34 C.F.R. § 668.116(d)). Also in a hearing, this Tribunal has expected that the Department must first meet its prima facie burden to show that it provided adequate notice to the school of the basis for liabilities that included identification of the regulatory and statutory provisions the school has violated.⁸ The hearing official, in turn, is charged with conducting a fair hearing and issuing a decision whether the FPRD was “supportable, in whole or in part” (34 C.F.R. § 668.118).

Institutions are required to maintain program and fiscal records in a “systematically organized manner” (34 C.F.R. § 668.24 (a)-(d)), provide for inspection of those records (34 C.F.R. § 668.24(d)(2)), and cooperate in audits, investigations, program reviews and “other reviews authorized by law.” (34 C.F.R. § 668.24(f)). Additionally, when an institution closes, stops providing educational programs, or otherwise suspends or terminates its participation in Title IV programs, it must provide for the retention of required records and access to those records by, among others, the Secretary (34 C.F.R. § 668.24(d)(4)).

Institutional Refunds/Return of Title IV Funds

When a student recipient of Title IV funds withdraws from an institution during a payment period or period of enrollment in which the recipient began attendance, the institution must determine the amount of Title IV funds that the student earned as of the student’s withdrawal date (34 C.F.R. 668.22(a)(1)-(2)). The method by which an institution must calculate the amount earned is set forth in 34 C.F.R. § 668.22(e).

C. Applicable Policy

The statutorily mandated guidelines for conducting program reviews are found in two FSA publications. These publications are, and have been, available to participating institutions. FSA’s publications are available online in FSA’s Knowledge Center.⁹

One publication is the *Program Review Guide for Institutions* (Guide), of which there were multiple editions. The Guide was substantially revised in 2001,¹⁰ then reissued with revisions in 2009 and 2017.¹¹ The Guide provides the processes for conducting a program review, consistent

⁸ See *In re CUNY Lehman College*, Dkt. No. 18-38-SP, U.S. Dep’t of Educ. (April 11, 2020); *In re Housatonic Community College* Dkt. No. 15-36-SP, U.S. Dep’t of Educ. (July 26, 2016).

⁹ FSA’s Knowledge Center can be found at [Search | Knowledge Center](#) (last visited November 3, 2023). The Knowledge Center website was preceded by FSA’s Information for Financial Aid Professionals (IFAP) website. The Knowledge includes current policy publications and some historical publications.

¹⁰ The initial publication of the Guide, in place prior to 2001, and the 2001 edition of the Guide were not available on the Knowledge Center website when last visited on November 3, 2023. The 2001 edition was available on FSA’s website in 2019, when OHA downloaded and saved a copy of the 2001 edition, which will be included as a reference document in the OES file of this appeal.

¹¹ There were significant changes from the 2001 edition to the 2009 edition. The 2001 and 2009 editions were identified as a “first point of reference in preparing for and conducting a program review.” The 2001 Guide was further identified as a “compendium of procedures to cover many different school situations” (2001 Guide, Introduction, p. i), while the 2009 Guide indicated it provided information about the general guidelines to be followed by Department personnel conducting program reviews and as a source of information to assist institutions in preparing for and

with the statutory mandate that include instructions for FSA’s preparation for a program review and all requirements through the issuance of the FPRD.

The other publication is *The Federal Student Aid Handbook* (FSA Handbook).¹² The FSA Handbook is an annual publication that is intended for use by financial aid administrators and counselors who help students in the aid process, verify information, make corrections, and make other changes to the information that a student reports on the Free Application for Federal Student Aid (FAFSA).¹³

Program Review Guide for Institutions 2009 (2009 Guide)¹⁴

The Guide applicable to Salon Academy’s program review was the 2009 Guide. The 2009 Guide was the current Guide when TPSOG commenced Salon Academy’s program review and was the current Guide for the 2015-2016 award year, which was the award year that was under review.

As indicated in the 2009 Guide, the authority to conduct program reviews at postsecondary institutions has been delegated by the Secretary to FSA and includes the authority to resolve any program review findings and initiate administrative actions for any program review conducted by a School Participation Team (SPT).¹⁵ Program reviews test an institution’s financial responsibilities and administrative capability standards.¹⁶ A program review plan is developed by the SPT, indicating the type (standard or joint), scope of the review (general assessment or focused), and the award years to be reviewed.¹⁷ Informal notice, followed by a written letter is provided to the institution usually two to four weeks in advance, unless there are reasons to provide a shorter notice.¹⁸ The notice typically confirms the review location (on-site or off-site), start date, reviewers/primary Department contact, award year(s) to be reviewed, and identifies institution records to have available for the reviewers when they arrive on-site for on-site reviews or to be reviewed off-site for off-site reviews.¹⁹

Program reviews include review of institutional processes and data to facilitate understanding of the institution’s administration of the Title IV programs²⁰ as well as reviews of student level information.²¹ The review of institutional processes may result in an institutional finding that

participating in a program review (2009 Guide, Preface, p. ii). This analysis offers comparisons of the 2001 and 2009 in the instances when the differences are relevant to this analysis.

¹² The current and prior FSA Handbooks are found at: [Federal Student Aid Handbook | Knowledge Center](#) (last visited October 5, 2023).

¹³ 2015-2016 Handbook, (Introduction, p. AVG-1).

¹⁴ The 2009 Guide was published on June 15, 2009. The off-site program review of Salon Academy was commenced in September 2016 and reviewed the 2015-2016 award year. TPSOG conducted its analysis for the remainder of 2016 through March 28, 2018, when TPSOG issued the PRR to Salon Academy. Although, the Guide was updated in June 2017, the portions of the 2009 Guide cited in this decision were not materially changed in the 2017 publication. The 2009 Guide is found at [*Program Review Guide for Institutions \(ed.gov\)](#) (last visited November 27, 2023).

¹⁵ 2009 Guide, (Introduction, p. vii-viii).

¹⁶ *Id.*, (Introduction, p. vii).

¹⁷ *Id.*, (Ch. 1, pp. 1-4 to 1-5).

¹⁸ *Id.*, (Ch. 1, p. 1-6, Ch. 2, pp. 2-1 to 2-4).

¹⁹ *Id.*, (Ch. 2, p. 2-3).

²⁰ *Id.*, (Ch. 4).

²¹ *Id.*, (Ch. 5).

identifies an incomplete or unacceptable policy or procedure.²² The review of student level information may result in a student specific finding.²³

The reviewing team will review data and records from the institution and records maintained by the Department, which include the National Student Loan Data System (NSLDS), the Common Origination and Disbursement (COD) system, and the Institutional Student Information Report (ISIR), for all the students in the sample.²⁴ The reviewing team will interview employees and students of the institution.²⁵

Student level reviews begin with identification of a sample of student files from the institution's population of Title IV recipients. The 2009 Guide required that a *valid statistical sample* (emphasis added) for each award year under review be identified before a **review sample** (emphasis added) is selected from that valid statistical sample.²⁶ The 2009 Guide indicated "[t]his 'review sample' is generally randomly selected using the first 15 records in the statistical sample and adding up to 14 more student records as necessary to ensure the review sample includes a representative subset."²⁷ The 2009 Guide allowed the reviewers to expand the review to include student files of other recipients or recipients with specific characteristics "to follow-up on certain issues," and requires that all errors found in any student file must be included in the PRR.²⁸

After securing the requested records the reviewers will analyze the documentation to assess whether the institution is in compliance with the requirements of the Title IV programs and to identify any errors that may exist in the documents reviewed.²⁹ At any time during the site reviews or analysis time, the review team may request additional information from the institution before issuing the PRR.³⁰

Errors found in the review of student files result in a student specific finding.³¹ In a student specific finding, if there is no potential or actual liability, the institution must correct the errors and correct any policy that may have caused or contributed to the student specific error.³² In cases where the error found has an actual liability then the reviewers must determine if the error rate is "low" or "high."³³ If the error rate is "high," then the reviewers may direct the institution to perform a full file review of the statistical sample or the entire population of students who received Title IV funds.³⁴

²² *Id.*, (Ch. 8, p. 8-4).

²³ *Id.*

²⁴ *Id.*, (Ch. 5, pp. 5-9 to 5-10).

²⁵ *Id.*, (Ch. 3, p. 3-2).

²⁶ *Id.*, (Ch. 5, p. 5-1).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*, (Ch. 3, p. 3-2).

³⁰ *Id.*, (Ch. 8, p. 8-1).

³¹ *Id.*, (Ch. 8, p. 8-4).

³² *Id.*

³³ *Id.*

³⁴ *Id.* When a file review requires reconstruction of more than 100 student files, the institution may be allowed to limit its review to the statistical sample of students instead of the entire population. If the review is limited to the statistical sample, then any liability would be projected for the entire population, unless such a projection cannot be used, e.g., R2T4 calculations or when credit balances are owed to the Title IV recipient (Ch. 8, p. 8-6 to 8-7).

Errors found that result in an institutional finding include identification of incomplete or unacceptable institutional policy or procedure.³⁵ When an institutional finding is identified, the reviewers must determine if the error in policy reflects an error in the student file.³⁶ If it does not, the institution shall be required to correct the policy or procedure.³⁷ If the error reflects an error in a student file, then the institution may be directed to complete a full student file review.³⁸ If the error affects institutional eligibility, financial responsibility, or financial reporting the reviewers must determine if there is actual or potential liability.³⁹ If not, then the institution must correct the error and demonstrate the correction was made.⁴⁰ If there is actual or potential liability, then the institution must provide sufficient information to quantify the liability.⁴¹

Additionally, a full file review may be directed when systemic errors or error rates in excess of Department standards are indicated during the preliminary analysis by the reviewers.⁴² Notably, the 2009 Guide provides no definition of systemic errors and does not establish Department standards for rates of errors. Consequently, the 2009 Guide does not provide any means to determine if error rates exceed Department standards for error rates.⁴³

When a file review is directed, the guidelines require that the institution's review be based on the population identified in the PRR and the institution is then required to conduct the review of those student files.⁴⁴ Generally, a direction to complete a file review should only include the award year in which the problem was identified. A review may be required for prior periods if the institution was using an erroneous policy and if there is evidence that the erroneous policy was being used in the prior award year.⁴⁵ A review for prior periods may be required if the institution's policy was correct but the institution was executing the policy incorrectly in the prior award year.⁴⁶

A written PRR, following a specified format, must be provided to the institution.⁴⁷ Findings in the PRR must explain how the institution violated the regulatory requirements, the effect of the violation, and what actions the institution must take in order to be in compliance.⁴⁸ Each finding must cite the statute or regulation that has been violated and a noncompliance section provides a detailed description of the problem identified, as well as all specific occurrences.⁴⁹ The institution is allowed an opportunity to respond to the PRR, which may have directed corrective actions to be

³⁵ *Id.*, (Ch. 8, p. 8-4).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*, (Ch. 8, pp. 8-4 to 8-5).

⁴⁰ *Id.*, (Ch. 8, p. 8-5).

⁴¹ *Id.*

⁴² *Id.*, (Ch. 6, p. 6-1).

⁴³ *Compare, Program Review Guide 2001* (Ch. 3, p. III-17) (Which indicates a deficiency in the review sample that signals a systemic problem is one that is established by an error rate of greater than 10 percent for any given award year. A material deficiency is one which may result in funds payable to the Title IV programs or students, or if the nature and frequency of the problem may be serious enough to warrant a fine or other administrative action.)

⁴⁴ 2009 Guide, (Ch. 8, p.8-6).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*, (Ch. 3, p. 3-3 and Ch. 8, p. 8-3).

⁴⁸ *Id.*, (Ch. 8, p. 8-4).

⁴⁹ *Id.*

taken by the institution.⁵⁰ Upon review of the institution's response, a FPRD is issued that has fully considered that response to the PRR.⁵¹ The guidelines require the issuance of the FPRD within 30 to 90 days after the Department's receipt of the institution's complete and final response to the PRR.⁵²

FSA Student Aid Handbook 2015-2016⁵³

The program review of Salon Academy was conducted for the award year 2015-2016, therefore, the *Federal Student Aid Handbook 2015-2016* (Handbook 2015) is applicable the applicable handbook. The Handbook 2015 also provides guidance for program reviews.⁵⁴ Generally, the guidance in the FSA Handbook is consistent with the statutory and regulatory requirements. The guidance in Handbook 2015 parallels the guidance in the 2009 Guide regarding scope, location, notification, and other procedures for issuance of a PRR and FPRD.⁵⁵ Notably, the Handbook 2015 specifically indicates if a program review finds that an institution improperly disbursed FSA program funds, the institution must restore the funds as appropriate.⁵⁶ Additionally, if serious program violations are indicated in a program review, the institution may be subject to correction and sanctions that may include fines, emergency action, limitation, suspension, or termination.⁵⁷

Although the 2009 Guide did not include specific standards related to financial responsibility and return of funds, Handbook 2015 does specify some standards related to financial responsibility.⁵⁸ Specific standards are indicated in relation to R2T4 calculations and timely return of funds.⁵⁹ It indicates the Department's policy is to provide for a small margin of error in determining that a school has paid all required refunds and returns on time.⁶⁰ The Department considers a school to have paid returns in a timely manner if there is less than a 5% error in a sample of returns examined in a program review conducted by the Department or if there are no more than two (2) late returns in the sample (regardless of the number or percentage of late returns in the sample).⁶¹

Volume 5 of the Handbook 2015 is devoted to overpayments. An overpayment occurs when a recipient receives more aid than the recipient was eligible to receive, particularly as related to when a student withdraws.⁶² Chapter 1 of Volume 5 discusses the general requirements for the treatment of federal student aid when a student withdraws. The Department's guidelines explains that when a student withdraws from the institution, the institution is required to determine the earned and unearned portions of Title IV aid as of the date the student ceased attendance.⁶³ Up through the 60% point in each payment period or period of enrollment, a pro rata schedule is used to determine

⁵⁰ *Id.*, (Ch. 3, p. 3-5 and Ch. 8, pp 8-6 to 8-7).

⁵¹ *Id.*, (Ch. 3, p. 3-6).

⁵² *Id.*, (Ch. 9, p. 9-1).

⁵³ A digital copy is available at [*1516FSAHbkActiveIndexMaster.pdf \(ed.gov\)](#) (last visited on September 11, 2023).

⁵⁴ *Federal Student Aid Handbook 2015-2016*, (Vol. 2, Ch. 8).

⁵⁵ *Id.*, (Vol. 2, Ch. 8, pg. 2-155 to 2-158).

⁵⁶ *Id.*, (Vol. 2, Ch. 8, p. 2-155).

⁵⁷ *Id.*

⁵⁸ *Id.*, (Vol. 2, Ch. 4, pp. 2-71 to 2-73).

⁵⁹ *Id.*, (Vol. 2, Ch 4., p. 2-71 to 2-72).

⁶⁰ *Id.*, (Vol. 2, Ch. 4, p. 2-72).

⁶¹ *Id.*

⁶² *Id.*, (Vol. 5, Ch. 1).

⁶³ *Id.*, (Vol. 5, Ch. 1, p. 5-3).

the amount of Title IV funds the student has earned at the time of withdraw.⁶⁴ When attendance continued after the 60% point, the student earned 100% of the Title IV funds the student was scheduled to receive during the period.⁶⁵ In addition to providing extensive guidance for determining earned and unearned portions of Title IV funds, the Handbook 2015 provides guidance to evaluate if a student has withdrawn and to determine the date a student has withdrawn.⁶⁶ Chapter 1 of Volume 5 provides a comprehensive step-by-step guide for school financial aid administrators to follow and consider when processing R2T4 calculations⁶⁷ as well as providing a variety of calculation worksheets.⁶⁸ Chapter 2 provides numerous case studies as examples of specific situations that may present when a R2T4 calculation is required.⁶⁹

V. Findings of Fact

1. The Boston Education Network, Inc. (BEN) was the third-party servicer for Salon Academy, which was a proprietary institution of higher education that offered non-degree programs of one year or less in length (OES Document 12, p. 13).
2. Salon Academy's PPA was last renewed on February 22, 2018 (OES Document 12, pp. 100-117).
3. While conducting an on-site review of Salon Academy's third-party servicer, TPSOG conducted an off-site review of Salon Academy to determine BEN's and Salon Academy's compliance with the applicable statutes and regulations as they pertained to Salon Academy's administration of Title IV programs (OES Document 12, p. 14).
4. During the program review, TPSOG examined five (5) randomly selected files from a statistical sample of the total population of students who received Title IV funds in the 2015-2016 award year and eleven (11) files from that award year that were judgmentally selected (OES Document 12, p. 14). The review of these files established that Salon Academy and BEN made errors when completing return calculations for Students 1 and 4 (OES Document 12, p. 16).
5. The errors identified in the R2T4 calculations for Students 1 and 4 did not result in an incorrect or late return of funds to the Department because these students completed more than 60% of the period of enrollment at the time of their withdrawal.
6. In the PRR dated March 28, 2018, TPSOG determined that Salon Academy's Refund Policy-Notice of Cancellation, included in its school catalog, incorrectly informed students that upon a student's withdrawal, a calculation for R2T4 will be completed and any applicable returns will be paid in a specified order, which included unearned aid being returned to the student, despite Department regulations that do not allow unearned aid to be returned to a student (OES document 12, p.p. 44-45).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*, (Vol. 5, Ch. 1, pp. 5-4 and 5-22).

⁶⁷ *Id.*, (Vol. 5, Ch. 1, pp. 5-42 to 5-114).

⁶⁸ *Id.*, (Vol. 5, Ch. 1, following p. 5-119).

⁶⁹ *Id.*, (Vol. 5, Ch. 2, starting at p. 5-127).

7. The identified error in Salon Academy's R2T4 policy did not result in or cause an incorrect or late return of funds to the Department.
8. As a consequence of the two calculation errors and misstatement in Salon Academy's policy related to R2T4 calculations, the PRR directed Salon Academy and BEN to review and revise their internal policies and procedures, provide written assurances that Salon Academy and BEN properly perform R2T4 calculations, and Salon Academy was directed to assist BEN in performing a comprehensive (full) file review that included all Title IV recipients who officially or unofficially withdrew during the 2015-2016 and 2016-2017 award years (OES Document 12, p. 45).
9. Salon Academy closed on March 19, 2019, did not respond to the PRR, and did not complete the full file review ordered by the Department (OES document 12, p. 17).
10. On April 5, 2019, FSA issued the FPRD to Salon Academy, which assessed liabilities in the amount of \$583,571.00 (OES Document 12, p. 18). This liability includes distributions of Pell Grants and Direct loans, along with cost of funds (interest) for award years 2014-2015, 2015-2016, and 2016-2017 to students identified by FSA as having withdrawn from Salon Academy prior to completion of the program of study in which they were enrolled (OES Document 12, p. 19).

VI. Arguments

A. Respondent's Request for Review (OES Document 1)

The Salon Academy asserted it completed refund calculations as required by the Department and the two students identified in the PRR did not require a refund. It argued the "difference in hours could not be explained because of many variables." In support of its argument, Salon Academy enclosed a copy of the Audited Statements from the 2016 calendar year and argued that the audit showed "a 100 percent audit on all drop students was completed with no findings in Return to Title IV." Additionally, Salon Academy reported all the school's files were "saved electronically though Smart System and cannot be accessed because the school is no longer in operation."

B. FSA's Responsive Brief (OES Document 13)⁷⁰

FSA relied on 34 C.F.R. §§ 668.116(d)(1)-(2) and argued that Salon Academy has the burden of proving expenditures questioned or disallowed were proper and that the institution or services complied with all program requirements. Consequently, FSA argued the liability, including cost of funds, that totaled \$583,571.00 was supported in the FPRD because Salon Academy failed to conduct the file reviews that were directed in the PRR and, therefore, failed to offer any evidence to support that refunds of Title IV funds were properly calculated for students who withdrew during the award years 2014-2015, 2015-2016, and 2016-2017.

⁷⁰ On September 12, 2019, Counsel filed FSA's brief (OES Document 11). The initial filing failed to include Counsel's signature on the service page. Counsel re-filed the document with signature on the service page (OES Document 13).

FSA relied upon Salon Academy's PPA, and the statutory and regulatory requirements related to PPAs, which require that the institution meet all program requirements, including using Title IV funds only for the purposes specified in each of the programs. Furthermore, participating institutions are expected to act as a fiduciary in the administration of those programs and are subject to exercising the highest standard of care and diligence when administering those programs. FSA's cites Salon Academy's PPA approved by the Secretary on February 22, 2018 (OES Document 12, pp. 100-117), as "covering the unaudited time period in November 2014" but provides no further explanation of what period has been unaudited (OES Document 13, p. 5).

In relation to Finding 4, and pursuant to 34 C.F.R. §§ 668.22(a)(1)-(2), FSA argued the program regulations require an institution and servicer to perform a "return of Title IV (R2T4), when a student withdraws from school." Relying on the review of student files from the 2015-2016 award year, in which TPSOG identified errors in the R2T4 calculation for two students, Salon Academy was required to complete a full file review to determine the amount of Title IV grant or loan assistance that the student earned as of the student's withdrawal date, and to determine the amount the school must return to the Department. Based on that directive and Salon Academy's failure to perform the required review, FSA argued the assessed liability of \$573,743.00 for principal and \$9,828.00 for interest/cost of funds was supported based on the total of Title IV grant and loan funds that were distributed to students who were identified by the Department as having withdrawn during the 2015-2016 and 2016-2017 award years.⁷¹ FSA asserted this assessed liability was favorable to the institution because FSA elected to impose a liability based only on the Title IV funds that were distributed to students who were identified by the Department as having withdrawn in the 2015-2016 and 2016-2017 award years, when FSA could have determined a liability based on "all Title IV funds dispersed for the time period covered by the ordered file review" citing *In the Matter of La Lan 2000 Computer Training Center*, 2010 WL 3514127,*4 (ED. OHA, Docket No. 05-50-SP, Aug. 20, 2010).

FSA rejected Salon Academy's assertion that the requested file review could not be completed because the Respondent was unable to access the records following its closure since they were only saved electronically through Smart System. FSA also rejected Salon Academy's assertion that its annual compliance audit was an adequate substitute for completion of the required file review. In rejecting those assertions, FSA argued the inaccessibility of student files does not shield Salon Academy from its fiduciary duties to properly complete the required R2T4 calculations. Furthermore, FSA argued Salon Academy's assertion that the compliance audit reported no errors or findings related to R2T4 calculations was not supported by the audit, which found one error in the R2T4 calculation.

C. Respondent's Reply Brief

Although given the opportunity to file a reply brief to FSA's brief, Salon Academy, chose not to submit any additional filings.

⁷¹ FSA asserted that this liability included Title IV funds distributed to students who withdrew during the 2015-2016 or 2016-2017 award years who were enrolled and received Title IV funds in the 2014-2015 award years (Declaration of Bridget Pratt, ED. Ex. 1, Footnote 1 (OES Document 12, p. 4)).

VII. Analysis

Statutory Mandate to Establish Guidelines for Program Reviews and Established General Guidelines

The analysis of whether the FPRD, dated April 5, 2019, is supported in whole or in part, must start with the statutory requirement in 20 U.S.C § 1099c-1(a)(1) that mandates that the Secretary conduct program reviews of participating institutions on a systematic basis by establishing guidelines to ensure uniformity of practice in conducting those reviews and to make those guidelines available to the participating institutions (20 U.S.C. §§ 1099c-1(b)(1)&(2)). Under the statute the Secretary was to establish guidelines for conducting program reviews and the Secretary, in turn, delegated that responsibility to FSA.

As referenced earlier in this decision, the FSA established standard guidelines for program reviews with publication of FSA's *Program Review Guide for Institutions* and with the annual publications of the *Federal Student Aid Handbook*.⁷² These guidelines meet the statutory mandate that institutions be allowed an opportunity to correct or cure an administrative, account, or record keeping error, and allow the institution to respond to the PRR that is considered by the Department before the issuance of a FPRD. Additionally, these publications provide specific practices and procedures that, if followed, should facilitate uniformity when program reviews are conducted. In summary, the guidelines require that program review be conducted by reviewers who have:

- developed a plan prior to commencement of the on-site or off-site review,
- provided notice to the institution,
- reviewed data and records as specified in the notice that includes student files and institutional files (policies/procedures),
- identified a valid statistical sample from the universe of Title IV recipients and identified a review sample,
- identified findings that resulted from errors found in student files and institutional files,
- issued a written program review report, and
- issued a final program review report or determination that considered the institution's response to the PRR and included a copy of the response as an appendix to the FPRD.

Therefore, this analysis must first determine if the TPSOG reviewers followed the guidelines when conducting the program review of Salon Academy.

TPSOG's Processes in the Program Review of Salon Academy

The FPRD addresses one unresolved finding. The finding is both a student-specific finding and an institutional finding. As more fully explained in this analysis the FPRD, as written, fails to establish that TPSOG followed the guidelines and procedures for conducting program reviews. Furthermore, the filings submitted on behalf of FSA in this hearing do not otherwise establish that TPSOG followed the Department's published guidelines and procedures for conducting a program review. As discussed herein, the deficiencies by TPSOG reviewers in conducting the program

⁷² See, Footnotes 15 and 54.

review of Salon Academy render the FPRD unsupportable.

Analysis of TPSOG's Adherence to FSA's 2009 Program Review Guide for Institutions

The first deficiency found in the procedures used by TPSOG's reviewers is related to the requirement that a plan for a program review be developed prior to commencement of a program review. FSA provided no specific evidence of a plan that was established prior to conducting the program review and provided no evidence the program review of Salon Academy was within the statutory priorities found at 20 U.S.C. § 1099c-1(a)(2). The primary elements of such plan requires specification of the type, scope, and years of review. While not precisely written, it can be inferred from the FPRD that the type of review was a standard review, conducted only by the TPSOG and not in conjunction with another office within the Department, and the scope was general, which is the most common program review to establish if the institution is meeting its administrative and financial obligations under Title IV. The FPRD does not precisely specify the award years under review. The 2009 Guide indicated that generally a program review considers student files from the current year in which the program review is conducted, or if early in the award year, then student files from the prior year are reviewed. In this case, TPSOG commenced the review of Salon Academy in September 2016 and reviewed student files from the 2015-2016 award year. Consequently, the award year under review must be established as only 2015-2016, that being the award year prior to the commencement of Salon Academy's off-site review and the only award year upon which student files were reviewed by TPSOG reviewers.

The second deficiency found in the procedures used by TPSOG's reviewers relates to the lack of evidence that appropriate notice of the review was given to Salon Academy. Without evidence of the written notice, FSA has not established with specificity what records and data were requested for the program review. While this can probably be inferred, the FPRD does not even document that TPSOG provided informal or written notice to Salon Academy prior to commencing the program review. Furthermore, no additional evidence was filed in this record that documented that proper notice was provided to Salon Academy. This deficiency could have been prevented by inclusion of a single sentence identifying when notice was sent to Salon Academy, what records were requested, and which award year(s) was (were) the subject of the review or by filing a copy of the notice in this proceeding. Although this failure does not by itself negate the validity of the FPRD, the failure is consistent with the significant pattern of deviation, as indicated herein, in which TPSOG operated when it conducted the program review of Salon Academy.

The third deficiency in the procedures used by TPSOG's reviewers relates to TPSOG's failure to follow the policy requirements of identifying a valid statistical sample and for selecting a review sample. The PRR and FPRD established that five (5) student files from the 2015-2016 award year were identified for review, labeled as the student sample in Appendix A, and an additional eleven (11) files were judgmentally selected, labeled fiscal student sample in Appendix B. The 2009 Guide required that a **valid statistical sample** be identified for each award year under review. From that valid statistical sample, the first 15 student files are "randomly selected" and identified as the review sample.⁷³ Following identification of the review sample, up to fourteen (14) more

⁷³ *Program Review Guide for Institutions 2009*, (Ch. 5, p. 5-1). The 2009 Guide identification of the first 15 files as "randomly selected" is a change from the 2001 Guide, which indicated the [valid] statistical sample should be identified using the CMO Statistical Sampling Template, which is also used to randomly select the 15 student files for

records may be added “as necessary to ensure the review sample includes a representative subset.”⁷⁴ While TPSOG added an additional eleven (11) files to the initial review sample, it failed to follow the guidelines to identify a review sample consistent with the requirements that a review sample consist of 15 randomly selected student files. The FPRD does not establish that the review sample was selected from a valid statistical sample, and the Department failed to file any evidence in this record that established a valid statistical sample was identified before it selected only five (5) student files for the review sample. Consequently, the FPRD and the filings in this hearing establish TPSOG failed to conduct the file selection consistent with the guidelines and procedures in the 2009 Guide.

The fourth failure to follow the guidelines by the TPSOG reviewers is related to the R2T4 calculation error identified for Students 1 and 4 by the reviewers. Although the reviewers identified errors in the of number of hours completed by each of these students, the reviewers failed to consider if this error was an administrative, accounting, or bookkeeping error which Salon Academy was entitled to correct. In this circumstance, the error in these student files was more like an administrative, accounting, or record keeping error because it resulted in an incorrect calculation, but the calculation did not change the outcome of whether Salon Academy was required to make a refund to the Department. The failure by the TPSOG reviewers to consider whether this identified error was an administrative, accounting, or bookkeeping established that the guidelines were not followed by the TPSOG reviewers.

The Department’s failure to understand the effect of the R2T4 error found in the files for Students 1 and 4 resulted in the fifth failure to follow the guidelines by the TPSOG reviewers. The PRR and FPRD asserted that Salon Academy used an incorrect number for hours completed by Students 1 and 4 to calculate if a refund was required based on the number of hours scheduled for the payment period, which in each case was 450 (OES Document 12, pp. 16 and 45). Salon Academy identified that Student 1 completed 280.5 hours and Student 4 completed 352 hours. TPSOG’s reviewers identified that Student 1 completed 270.5 hours and Student 4 completed 308 hours (*Id.*). Applying the required formula to determine if a refund of program funds was required, both students completed more than 60% of the program at the time of their withdrawal. This holds true whether using Salon Academy’s or TPSOG’s hours completed, and therefore, these students earned all the Title IV funds that had been received.⁷⁵ Consistent with the Handbook 2015, there was no refund due to the Department and, therefore, no liability for Salon Academy. In a student-specific finding, the 2009 Guide directed that the required action upon finding an error in student files depends on whether there was a potential or actual liability resulting from the discovered error.⁷⁶ When there is no potential or actual liability, the required action in a PRR is limited to directing the institution to correct the error for the students in the sample.⁷⁷ Instead of following this guideline, the TPSOG reviewers required that Salon Academy conduct a full file review for 2015-2016 and 2016-2017

review (2001 Guide, Ch. II, pp. II-11 and II-12).

⁷⁴ *Id.*, (Ch. 5, p. 5-1).

⁷⁵ The percentage of the period completed upon withdrawal of a student enrolled in a clock-hour program is calculated by the formula: hours scheduled to complete divided by total hours in the period (2015-2016 Handbook, Vol %, Ch. 1, pp. 5-123 to 5-125). Based on the hours completed identified by Salon Academy, Student 1 completed 62.33% of the program and Student 4 completed 78.22% of the program. Based on the hours completed identified by the TPSOG reviewers, Student 1 completed 60.11% of the program and Student 4 completed 68.44% of the program.

⁷⁶ 2009 Guide (Ch. 8, p. 8-4).

⁷⁷ *Id.*

award years.

I also considered Salon Academy asserted defense that the number of completed hours it used for the R2T4 calculation was due to periods of leave of absence for these students and that there was no liability established. FSA did not refute this assertion in the FPRD, or in documents filed in this proceeding. Notably, the student level liability listing in Appendix C does not include a liability for Students 1 or 4, which is consistent with Salon Academy's assertion that Salon Academy did not have an obligation to return Title IV program funds to the Department following the withdrawal of these students. With the established finding of no liability for return of Title IV funds for Students 1 and 4 in the PRR, TPSOG's reviewers should have known the only corrective action supported by the program review was for Salon Academy to correct the errors found in the files for Student 1 and 4.

The sixth failure to follow the guidelines by TPSOG's reviewers occurred when Salon Academy was required to assist BEN in performing a comprehensive file review that included all Title IV recipients who officially withdrew during the 2015-2016 award year (OES Document 2, pp. 12-15). In this program review, there was no potential or actual liability related to return of funds in award year 2015-2016 despite the alleged error in Salon Academy's identification of hours completed by these students prior to withdrawal. Consequently, the direction to complete a full file review for the 2015-2016 award year in the PRR was not justified under the procedures indicated in the 2009 Guide.

The seventh failure to follow the guidelines by TPSOG's reviewers occurred when the PRR required Salon Academy to assist BEN in performing a comprehensive full file review for the 2016-2017 award year. The TPSOG reviewers did not review any student files for the year 2016-2017 and therefore identified no student specific errors in the 2016-2017 award year. The 2009 Guide indicated that when a full file review is required, the directive should cover only the year(s) in which the problem was identified unless the error uncovered was related to a policy that was incorrect or incorrectly executed **and** (emphasis added) the reviewers determined the incorrect policy or incorrect execution was in place for the prior award year in which the program review was conducted.⁷⁸ The 2009 Guide had no provision for directing a full file review for subsequent award years based on a review of student files in a prior award year. The TPSOG reviewers failed to identify statutory and regulatory authority to order a full file review for the 2016-2017 award year in the PRR or the FPRD when they did not review student files from that award year. FSA's brief failed to identify any statutory or regulatory authority to direct a full file review for an award year subsequent to the award year for which student files were included in the review sample and for which errors were found.

The eighth failure to follow the guidelines by TPSOG's reviewers is related to the fourteen (14) student files in the fiscal sample. TPSOG's reviewers did not identify any errors in the fourteen (14) student files reviewed in the fiscal sample related to R2T4 calculations. Despite not having found errors, Appendix C to the FPRD, which established student level liabilities following Salon Academy's failure to conduct the full file reviews as directed, included the Title IV program funds received by Students 6, 7, 12, and 15 in award year 2015-2016 (OES Document 12, pp. 24-31). If there was no error found in the files of these students, the TPSOG had no basis to include the Title

⁷⁸ *Id.* (Ch. 8, p. 8-6).

IV program funds received by these students in Appendix C, which itemizes the assessed liability by student. The assessed liability is unsupported because it requires Salon Academy to repay Title IV program funds that were properly earned by Students 6, 7, 12, and 15, whose files were included in the fiscal sample.

The ninth failure to follow the guidelines by TPSOG's reviewers is related to the institutional finding that Salon Academy had an incomplete or unacceptable policy in place. The PRR and FPRD determined Salon Academy's policy on R2T4 did not comply with Title IV requirements in one respect (OES Document 12, p. 44). Specifically, the TPSOG found Salon Academy's Refund Policy-Notice of Cancellation included in the school catalog did not comply with the HEA because its policy indicated when a student withdraws prior to course completion, applicable returns will be paid in a specified order that included the student as the last payee for repayment (*Id.*). In the PRR and the FPRD, the TPSOG reviewers determined this error in the policy presents a "potential concern that students may not fully understand the financial implications of withdrawal from a program prior to completion" (*Id.*, pp. 45 and 16). The 2009 Guide required that when an institutional finding is based on an incomplete or unacceptable policy, then the reviewers must determine if the incomplete or unacceptable policy resulted in an error in a student file.⁷⁹ The reviewers may direct a full student file review only when the incomplete or unacceptable policy resulted in an error in the student file.⁸⁰ The determination that the policy error could potentially result in a student misunderstanding is not sufficient under the guidelines and procedures of the 2009 Guide to require a full file review. The FPRD does not indicate such a connection between the policy in place and the errors identified in the files of Student 1 and 4. FSA did not file any evidence supporting such a connection in this proceeding. Consequently, the FPRD is not supported.

In addition to the failure to follow the guidelines by TPSOG's reviewers, there are notable deficiencies in the 2009 Guide that raise questions whether the 2009 Guide meets the statutory requirement to establish guidelines to ensure uniformity for conducting program reviews.⁸¹ The 2009 Guide directed that during the exit conference when preliminary analysis indicates systemic errors or error rates in excess of Department standards are identified, the institution will be notified that instructions for conducting a file review will be included in the PRR.⁸² However, the 2009 Guide provided no guidance on how to identify when an error is systemic.⁸³ The 2009 Guide only

⁷⁹ 2009 Guide, Ch. 8, p. 8-4).

⁸⁰ *Id.*

⁸¹ Although the 2009 Guide was replaced with the 2017 Guide, these same deficiencies are included in the 2017 Guide, which is the most recently published Guide.

⁸² 2009 Guide, (Ch. 6, p. 6-1).

⁸³ Compare this to the 2001 Guide that included more detailed discussions for identifying systematic issues and specific guidelines to assess whether an error is identified as systemic. The more detailed discussions include reminders that reviewers must analyze deficiencies to assess if they are isolated instances or systemic (p. III-5), that reviewers must use professional judgment to determine if the random sample needs to be expanded because the deficiencies are material and systemic (*Id.*), reviewers must consult with co-team leaders and the area case director if serious and systemic deficiencies are noted in administrative systems or deliberate misuse of funds is indicated (*Id.*), that there must be significant evidence of serious, recurring or systemic problems to justify expanding the program review (p. 111-8), that because of the cost to institutions, there must be careful consideration before a full file review is directed and when a full file review is directed it should be limited only to the year where a systemic problem was identified (p. III-18), that more complex problems like granting awards to ineligible recipients may indicate systemic problems (p. III-19), that problems with an institution's Student Financial Aid assessment may indicate systemic issues

indicated when non-compliance is found, the reviewers may continue testing to determine if the error found is systemic.⁸⁴ In relation to identifying error rates in excess of Department standards, the 2009 Guide failed to identify Department standards for error rates, except to indicate when student-specific findings have been identified, the 2009 Guide requires that a full file review will be required when the error results in a potential or actual liability **and** (emphasis added) the error rate is “high”.⁸⁵ The term “high” is not objectively quantified in the 2009 Guide and, therefore, failed to establish any objective measure that facilitates uniformity, as is statutorily required. Guidelines such as these provide no basis to ensure uniformity of practice when a program review is conducted because they allow the reviewers to exercise subjective judgment due the absence of any objective measures. The deficiencies in the policy are contrary to the statutory mandate requiring uniformity

Based on the deficiencies in the procedures used by TPSOG’s reviewers, as indicated herein, the required action in the PRR for Finding 4 to conduct full file reviews for the 2015-2016 and 2016-2017 award years was not justified. Therefore, assessing a liability due to Salon Academy’s failure to perform full file reviews for the years indicated is not supportable.

Analysis of TPSOG’s Adherence to FSA Student Handbook for 2015-2016 Award Year

The Handbook 2015 includes a chapter on program reviews that generally mirrors the overall procedures for program reviews indicated in the 2009 Guide.⁸⁶ In addition to a chapter on program reviews, the Handbook 2015 includes guidance for audits that are applicable to aspects of a program review.⁸⁷ In contrast to the 2009 Guide, which generically referenced error rates but quantified them only as “high” or “low” and which also referenced error rates that exceed Department standards without indicating specific Department standards, the Handbook 2015 gives specific guidance related to standards for financial responsibility in the chapter addressing Audits, Standards, Limitations, & Cohort Rates.⁸⁸ The standards explained in the Handbook have four factors to evaluate an institution’s financial responsibility: a composite score, a means of identifying if an institution has sufficient cash reserves to return FSA funds when a student withdraws, a specified time for returning funds after a student withdrew, and a specified measure of compliance thresholds for timely return of funds.⁸⁹

The factor related to compliance thresholds is particularly relevant in relation to the program review of Salon Academy. This standard indicated an institution is deemed to be in compliance with the requirement of timely returns if findings from a program review fall within a small margin of error.⁹⁰ The small margin of error includes a finding of less than five percent (5%) error rate in

(p. IV-1), that failure to correct items from past reviews may indicate system issues (p. IV-73), and that a thorough program review is essential to identify systemic weaknesses (p. V-4). Additionally, the 2001 Guide defines a material deficiency, thereby providing guidance that was more likely to result in uniformity of practice (p. III-17).

⁸⁴ 2009 Guide, (Ch. 4, p. 4-1 and Ch. 5. P. 5-2).

⁸⁵ *Id.*, (Ch. 8, p. 8-4), *but compare* the standard established in the 2001 Guide indicating that an error rate greater than 10% for any given award year would signal a systemic problem (p. III-17.)

⁸⁶ Handbook 2015, Vol. 2, Ch. 8, pp. 2-155 to 2-158.

⁸⁷ *Id.*, (Vol. 2, Ch. 4, starting at p. 2-59).

⁸⁸ Handbook 2015, (Vol. 2, Ch. 4, starting at p. 2-63).

⁸⁹ *Id.*, (Vol. 2, Ch. 4, pp. 2-71 to 2-72).

⁹⁰ *Id.*, (Vol. 2, Ch. 4, p. 2-72).

a sample of returns examined in a program review⁹¹ or no more than two (2) late returns in the sample. Although the TPSOG reviewers identified an error by Salon Academy for the R2T4 calculation for Students 1 and 4, the error did not require Salon Academy to return any Title IV funds to the Department. Since there was no error in returning funds for students in the review sample, Salon Academy was in compliance with the obligation to timely return funds. Similarly, if Salon Academy had no obligations to return funds, then there were no late returns by Salon Academy. Consequently, the reviewers had no statutory or regulatory authority to require Salon Academy to conduct a full file review for multiple award years and the directive to conduct those full file reviews was contrary to Department guidelines and procedures as established in the 2009 Guide and Handbook 2015.

I considered FSA arguments related to Salon Academy's obligation to maintain access to student records and related to Salon Academy's reliance on its annual compliance audit is not an adequate substitute for conducting a full file review. Further discussion of those arguments is unnecessary because the directive by the TPSOG reviewers to conduct the full file review was not consistent with the Department's own guidelines that were in place at the time Salon Academy's program review was conducted.

VIII. Conclusion of Law and Order

The directive in the PRR, Finding 4, that required Salon Academy to conduct a full file review for the 2015-2016 and 2016-2017 award years, was inconsistent with established procedures under the Department's guidelines for conducting program reviews. The imposition of student level liabilities, including cost of funds, for award years 2014-2015,⁹² 2015-2016, and 2016-2017 in the amount of \$583,571.00, upon Salon Academy's failure to follow that directive, is inconsistent with the Department's established guidelines (OES Document p. 19, and 24-31). Given that my authority in this appeal is to determine if the FPRD is supportable in whole or in part, for the reasons indicated herein, I conclude it is not.

Considering the foregoing findings of fact and conclusions of law, it is **HEREBY ORDERED** that Salon Academy is not responsible for the liability of \$583,571.00 assessed in the Final Program Review Determination, dated April 5, 2019.

Date: December 21, 2023

Angela J. Miranda
Administrative Law Judge

⁹¹ While this factor is not clearly explained, for the purposes of this analysis, I have interpreted "a 5% error rate in a sample of returns ... examined in ... a program review" to mean 5% of a review sample based on the requirements in the 2009 Guide that the review sample is the first 15 student files from a valid random sample and any additional student files reviewed in a program review so long as a sufficient number of student files were reviewed so that a threshold of a 5% error rate is not meaningless.

⁹² In the declaration of Bridget Pratt, an Institutional Review Specialist employed by the Department, the liability for the award year 2014-2015 was based on students who withdrew during the 2015-2016 or 2016-2017 award years but received disbursement of program funds in the 2014-2015 award year (OES Document 12, p. 4, Declaration paragraph 9, Footnote 1). FSA failed to identify any statutory or regulatory authority in the FPRD that would allow an assessment of liability to Salon Academy under these circumstances.

NOTICE OF DECISION AND APPEAL RIGHTS-SUBPART H

This is the initial decision of the hearing official pursuant to 34 C.F.R. § 668.118. The regulation does not authorize motions for reconsideration. The following language summarizes a party's right to appeal this decision as set forth in 34 C.F.R. §§ 668.119 and 668.121(b).

An appeal to the Secretary, shall be in writing and explain why this decision should be overturned or modified. An appeal must be filed within 30 days from receipt of this notice and decision. If an appeal is not timely filed, by operation of regulation, the decision will automatically become the final decision of the Department.

An appeal to the Secretary shall be filed in the Office of Hearings and Appeals (OHA). The appealing party shall provide a copy of the appeal to the opposing party. The appeal shall clearly indicate the case name and docket number.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system. Otherwise, appeals must be timely filed in OHA by U.S. Mail, hand delivery, or other delivery service. Appeals filed by mail, hand delivery, or other delivery service shall be in writing and include the original submission and one unbound copy addressed to:

Hand Delivery or Overnight Mail*	U.S. Postal Service*
Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 550 12 th Street, S.W., 10 th Floor Washington, DC 20024	Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 400 Maryland Avenue, S.W. Washington DC 20202

These instructions are not intended to alter or interpret the applicable regulations or provide legal advice. The parties shall follow the regulatory requirements for appealing to the Secretary at 34 C.F.R. § 668.119. Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.

* OHA and the Department of Education are now operating in accordance with the Office of Management and Budget Memorandum M-23-15, issued April 13, 2023. Consistent with the Department's current operating directives, OHA's on-site support staffing does not provide coverage during all OHA's general office hours (Monday thru Friday, 8:00 am to 4:30 pm, Eastern Time). Hand delivery or courier-delivered mail or parcels at the OHA's physical location may be accepted by Education's mail delivery personnel, however, a party filing by hand delivery or courier-delivered mail or parcels, should contact the OHA main phone at 202-245-8300 to verify OHA staff is available to accept a filing. Hand delivery and delivery by U.S. Mail to OHA will likely be delayed. Extensions to the time to file will not be granted by OHA.