In the Matter of NETTLETON JUNIOR COLLEGE,
Respondent.

Docket No. 93-29-SP
Student Financial Assistance Proceeding

**DECISION**

## I.
## INTRODUCTION

This is an appeal proceeding arising under Subpart H of the student financial assistance programs (SFAP) at 34 CFR 668.111 et. **seq., and** Title IV of the Higher Education Act of 1965 (HEA), 20 U.S.C. 1070 et. seq. On January 20, 1993, a final program review determination (FPRD), adverse to Nettle Junior College (Nettleton), was issued under the name of Mr. Harry C. Shriver, Jr., Chief, Institutional Review Branch, Region VIII, Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (ED). On March 11, 1993, Nettleton,See footnote 1 [1] of Sioux Falls, SD, filed a request for review of the FPRD. Subsequently, on July 26, 1993, Nettleton filed a brief and exhibits, as did OSFA on May 17,1994. Nettleton also filed a motion to dismiss the proceedings on October 12, 1993. The school alleged that the FPRD is void because it was signed by a Linda L. "for" Harry C. Shriver, Jr. Nettleton also requests that certain. FPRD findings be set aside. Further, because of related issues pending in Docket No. 93-7-SP, In re Edmondson Junior College decided April 5, 1994, both parties sought and were granted a procedural delay.

**ISSUES**

1.) Whether the FPRD is signed by an appropriate ED official.
2.) Whether .Nettleton is practicing as a term or non-term school.
3.) Whether the OSFA should be directed to apply a so-called Actual Loss Worksheet formula for calculating any loss to the **Department** for ineligible Stafford and SLS loans.
4.) Whether Nettleton must pay lenders and ED for Federal funds disbursed incorrectly according to various FPRD findings.
5.) Whether FPRD Finding No. 3, Late FFEL Refunds, and Finding No. 14, Untimely Notification to Federal Pell Grant of Student Status Chanae, require that refunds be made for students who withdrew or were terminated from certain programs.
6). Whether this Tribunal should direct certain adjustments/corrections as requested by Nettleton.See footnote 2 [2]

Docket No. 93-29-SP

STATEMENT OF FACTS AND FINDINGS

**AUTHORIZED OFFICIAL ISSUE**

By letter dated December 17, 1993, the attorney/representative for OSFA asked that the Office of Hearings and Appeals delay a ruling on Nettleton's motion to dismiss. See footnote 3 [3] On January 3, 1994, OSFA submitted its "Consent Motion to Delay Ruling"' on the motion to dismiss until the Secretary of Education (Secretary) decided an appeal in Cincinnati Metropolitan College. By decision served February 15, 1994, the Secretary of Education found that a

procedural order properly was signed by an underling who was designated to act in a superior's stead during the latter's temporary absence from the office. Two other similar decisions of the Secretary were served on February 16, 1994, in Southeastern University and in Long Beach Colleqe of Business. Therefore, as to the clerical issue noted above, I find that the FPRD properly was signed by the underling because of the ratification thereof by a superior.

FPRD FINDINGS NO. 2

OSFA notes that CFR section 668.22 published November 19, 1986, provides a distribution formula for institutional refunds. OSFA believes that Nettleton measures academic progress in credit units and uses an academic quarter system calendar of classes.

OSFA observes that before August of 1991, Nettleton defined its academic year and payment periods, for purposes of Title IV aid, as an institution which uses credit units without terms to measure student progress. Thus, OSFA jumps to the conclusion that **Nettleton** is a term institution. The result, according to OSFA, is an overpayment to Nettleton during the first quarter, and an overpayment during the second half of the second quarter for the SEOG and Perkins programs. This methodology also would result in an overpayment for the first quarter for the Pell Grant program.
OSFA asserts that Nettleton must repay the following amounts:

| YEARS | AMOUNTS |
|---|---|
| 1988-89 | $ 172,907 |
| 1989-90 | S 173,699 |
| 91 | $ 180,553 |
| 1991-92 | $ 175,511 |
| TOTAL | $ 702,670 |

Nettleton maintains that it is a non-term school and owes no money to ED under FPRD Finding No. 2.

Nettleton demonstrates that there are multiple bases for reversing Finding No. 2. The first is that Finding No. 2 is identical both legally and factually to a single issue in Edmondson Junior Colleqe, Docket No. 93-7-SP decided June 4, 1993, in which Administrative Judge Canellos ruled in favor of Edmondson Junior College. See footnote 4 [4] As in the case of Nettleton, Edmondson is owned and operated by PCI.
The issue raised in support of Nettleton's position. that Finding No. 2 must be reversed and vacated was resolved in Edmondson. Judge Canellos found that "Edmondson chose to be treated as a non-term school," and "it disbursed funds based c.. its decision to be a non-term school." (Edmondson at page 5)
Nettleton points out the second reason Finding No. 2 must be reversed is found in the work papers of the Office of Inspector General (OIG) for an OIG audit conducted at PCI covering the period between July 1, 1987, and June 30, 1990. The OIG auditor stated **the following** concerning PCI:

For financial aid purposes, colleges of PCI [Phillips Colleges, Inc.] measure students' progress in credit hours or clock hours but without standard academic terms. For Pell, Perkins loans and SEOG [Supplemental Educational Opportunity Grant] funds, PCI schools were required to make only two payments of SFA [student financial aid] for each academic year according to PCI policies. (Ex. R-11).

Nettleton's third reason why Finding No. 2 must be reversed is that institutions operating with standard academic terms, charge tuition and fees on a per term basis. For example, a quarter term institution structures its tuition charges upon the number of credits taken per quarter term and bills students for each quarter term. This method of operation locks a school into a standard quarter term school; however, charging as Nettleton does, that is, on the basis of the full cost of the education program in which a student is enrolled, precludes classification of Nettleton as a term institution. Exhibit R-8-1, which is Nettleton's enrollment agreement, shows the total tuition cost for a two-year associate degree Paralegal Program that a student contracts to pay, subject to a refund schedule. Also see Exhibit R-12-4, which is an excerpt from a Nettleton 1989-91 Catalog that lists the tuition for each of the programs Nettleton then offered.

Nettleton believes that its policy of charging the full cost of its educational program undercuts Finding No. 2. This is established in a November 22, 1988 Memorandum from William L. Moran, then Director, Division of Policy and Program Development for OSFA, who advised all Regional Offices:

The loan period must coincide with a bona fide academic term established by the school. See 427A(g)(2) of the [HEA]See footnote 5 [5] . An academic term that is not used for purposes of assessment of institutional charges would not constitute a bona fide academic term.

The minimum period for which a school may certify a loan application is:

> ° at a school that measures academic progress in credit hours and uses a semester, trimester, or quarter system, a single academic term /e.q., a semester or quarter); or
>
> ° at a school that measures academic progress in clock hours, or measures academic progress in credit hours but does not use a semester, trimester, or quarter system, the lesser of a) the length of the student's program at the school, or b) the academic year as defined by the school in accordance with 34 CFR 668.2, paragraphs (b) and (c) of the definition of "Academic Year."
> (Ex. R-13) (emphasis in the original).

This principle was made part of the Federal Family Education
Loan Program (FFELP) regulations as 34 C.F.R. 682.200(b)

> Period of enrollment. The period for which a Stafford, SLS, or Plus loan is intended. The period of enrollment must coincide with a bona fide academic term established by the school for which institutional charges are normally assessed. The period of enrollment is also referred to as the loan period.

(57 Fed. Req. 60327) (Dec. 18, 1992) (emphasis added in part).

It is clear that it was OSFA's policy that a school could choose to define its academic year as consisting of quarter terms, and that the school then would have to assess institutional charges **on the** basis of quarter terms. Nettleton states that it never chose to assess institutional charges on a quarter term basis. As shown in Exhibits R-8-1 and R-12, Nettleton assessed tuition on the basis of the specific educational program in which a student was enrolled. Therefore, the school did not have a bona fide quarter term, and, indeed, had to define its academic year on a credit hour without term basis.

Nettleton cites a September 25, 1981 letter from William L. Moran, then Chief, Policy Section, Basic Grant Branch. Moran advised South Oklahoma City Junior College with regard to "the appropriate method of determining an academic year for a system that has overlapping terms...." He said that "[d]espite the overlapping terms in your academic system, it is still permissible to use a 32-week academic term. However, you have the option of using a 43.27 week academic year if you prefer." Ex. R-5-5 (emphasis added). In addition, in a September 22, 1982 letter from the Acting Chief, Policy Section, Basic Grant Branch, OSFA advised Atlantic Community College that:

if the combined blocks [of academic credits] taken during a semester are less than a semester, it would be treated as a nonstandard term. For purposes of the Culinary Arts program, if the student is enrolled in fewer than 4 combined blocks and the student is not enrolled in any general education credits, then he or she is considered to be enrolled in a nonstandard term. Ex. R-5-6.

Another example of the ability of the school to determine for itself whether it functions as a standard term or non-term institution is contained in a November 19, 1984 letter from the Chief, Policy Section, Pell Grants Branch, to the Upper Valley Joint Vocational School District:

Section 690.3 of the Pell Grant regulations defines the first payment period for institutions that do not use academic terms as the period of time in which the student completes the first half of his or her academic year. If you do not consider the "quarters" in the 1343-hour License Practical Nurse Program to be academic terms, then a payment period for the Pell Grant Program **would** be one-half the academic year. If you define the academic year as 1343 clock hours, the first payment period would be 672 clock hours and the second payment would be 671 clock hours. (Ex. R-5-7) (emphasis added).

Nettleton uses still another example of OSFA's policy of allowing schools to define their own academic terms in a letter dated November 8, 1988, from Pamela A. Moran, Chief, Policy Section, Guaranteed Student Loan Branch, in which OSFA advised a school of medicine that whether its students are "eligible to receive five loans in a 10-semester period '40 months) ... is determined by the school's definition of an academic year and the guarantee agency's loan guarantee policy." Ex. R-5-8. Accordingly, Nettleton Junior College is similarly permitted to define for itself its academic year, and the consequence of the College's definition is that it is a non-term institution.

After all, with respect to the issue of whether, as in Edmondson, OSFA must honor the College's choice to have operated as a non-term institution throughout the relevant period, the College must be treated by OSFA as OSFA has treated other schools. Consequently, the various examples of OSFA's treatment of other schools (Ex. R-5) are relevant and stand in contrast to

Finding No. 2. In fact, in response to a question posed to Region V as to whether a school may be allowed to retroactively formalize in writing its definition of academic year for GSL purposes and reconstruct student awards to establish that all GSL applications were certified properly (Ex. R-5-9), OSFA responded:

A school may change its definition of an academic year, assuming it complies with the regulatory definition cited above. However, the new definition may not be applied retrospectively.

Ex. R-5-10. Therefore, Nettleton believes it was free to define its academic year as long as the definition met the regulatory definition of "academic year," a fact which is not questioned by OSFA in this case. Furthermore, on November 20, 1989, in response to an inquiry from a school that wished to change from three payment periods to two, Region VI advised: "The answer to your question is dependent upon the structure of the academic program....If the program does not have academic terms, the
academic years of 36 credits may be divided into two payment periods of 18 quarter hours each." (Ex. R-5-11).

Nettleton believes that OSFA is seeking to impose a new requirement that the school should have operated as a standard term institution. Such a requirement would deny rights which OSFA extends to other institutions. See footnote 6 [6] Such an approach would violate the U.S. Constitution. Thereunder, equal protection of law required for "persons similarly situated," City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985); accord, Mahone v. Addicks Utility District of Harris County, 836 F.2d 921 932 (5th Cir. 1988):

As the Supreme Court explained long ago, equal protection of the law requires not only that laws be equal on their face, but also that they be executed so as not to deny equal protection. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

In any event, OSFA is required to observe 20 U.S.C. 1232(c), which specifies that all "regulations [of the Secretary of Education] shall be uniformly applied and enforced throughout. the fifty States." See Chula Vista City School Dist. v. Bennett, 824 F.2d 1573, 1583 (1987), cert. denied, 484 U.S. 1042 (1988).

Nettleton points out that OSFA is well aware that Nettleton is a non-term institution because OIG work papers include the following portion of the Financial Aid Manual issued by Phillips to all of its colleges:

CREDIT HOUR NON-TERM AWARDS

The colleges of the Phillips College system measure progress in credit hours or clock hours but without standard academic terms. The tuition and book costs are for the entire program, not for the classes scheduled each grading period.
ACADEMIC YEAR

The institution must identify its academic year meeting the minimum established by regulations.

For schools using credit hours or clock hours but not using terms. an academic year is the period in which a student is expected to complete a minimum of 36 quarter hours, 24 semester hours, or 900 clock hours.

(Ex. R-11-4) (emphasis added); accord, Exs. R-11-2 and R-3-6).
All institutions that participate in the SEOG, Perkins and CWS programs are required to make an annual report. For the 1988-89 award year, for example, Nettleton reported enrollments on a monthly basis (Ex. R-9-3) based on the Fiscal Operations Report for 1988-89 and Application to Participate for 1990-1991 (FISAP) instructions for institutions operating on a "Non-traditional calendar," defined as follows: "Non-traditional calendar means that your institution admits a new group of students monthly or more frequently into a majority of its eligible programs, even if 12 they attend classes on a quarter, trimester, or semester basis." Ex. R-16-2. The FISAP instructions states: "Traditional calendar means that your institution has academic terms that are quarters, trimesters or semesters, and that the institution has only one admission period during each academic term." Id. This stands in contrast to Nettleton because, of the twelve months reported on Exhibit R-9-3, Nettleton had significant numbers of new students beginning enrollment for 7 of the 12 months reported (Lines 9-21). Of the 12 months reported on Exhibit R-15-3, Nettleton had significant numbers of new students beginning enrollment for 8 of the 12 months reported (Lines 9-21). Moreover, during the two years reported on Exhibits R-9-3 and R-15-3, Nettleton enrolled 2 or more new students in 19 of those 24 months.
Thus, Nettleton shows that admission periods are far more frequent than once every three months, as would pertain to a quarter term institution.

The major difference between having the status of a term school, as opposed to a non-term school for Federal financial aid to students, is that a non-term school makes payments in two installments. Consistent with its status as a non-term school, Nettleton disbursed Federal student financial assistance in two installments.
Lastly, Nettleton points out that OSFA routinely provides guidance to its own employees, to the institutions which participate in any Title IV programs, and to the general public.

This guidance comes in a wide variety of forms ranging from the Federal Register, to ED publications such as a Handbook, and to letters written by OSFA answering questions posed to ED. These forms of guidance have one thing in common: institutions which act in a manner consistent with such guidance are to be accorded the benefit of the Secretary's "safe harbor." As this Tribunal held in Associated Technical Colleqe, at 27, "ED has established in some instances a so-called 'safe harbor' for past actions." If a school acts in a manner as instructed by OSFA, there should be no penalty for such past action.
Another acknowledgement of "safe harbor" is found in a supplemental declaration of Ernest C. Canellos, who was then Acting Deputy Assistant Secretary for OSFA. Exhibit R-6, which was filed by ED in Federal Court, provides:

***

4. The Federal Register Notice provides the public, including plaintiffs, with non binding, non-exhaustive guidance on acceptable means of complying with the amendments to [20 U.S.C.] 1091(d)....

5. ... The Secretary will not rely on the general statements of policy in the Federal Register Notice as dispositive, since the statements are not binding on the Secretary or on other parties.

6. The statements, however, do provide a safe harbor....

(Ex. R-6-2) (emphasis added).

Further, after a 1979 ruling by OSFA, ED closed a program review with no further action required by Phillips Colleges, Inc., with respect to Finding No. 2 issues. Such issues were not raised thereafter in any program review or audit conducted by OSFA for schools owned by Phillips between 1979 and June 1989. See Exhibit R-4-2.
Therefore, for the above reason, Finding No. 2 is set aside. Also see the decision of the Secretary in Docket No. 93-7-SP, dated April 5, 1994.

**FPRD FINDING NO. 4 ISSUE**

**OSFA points out that** one of the criteria for being eligible to receive Title IV financial aid described in Section 668.7 in the General Provisions published December 1, 1987, is that students must have a high school diploma, GED, or demonstrate that they passed a school's ability to benefit (ATB) examination. The file of Student 5 contains documentation establishing that he did not complete a GED program. The file also fails to indicate that the student had a high school diploma or that he had passed an ATB test. Also, Student 5 withdrew from the school before completion of his program. The student appears to have been ineligible for the following aid which he received:

YEARS LOANS AMOUNTS

1990 - 91 Pell $ 1,150
Stafford 272
SLS 1,960

*Disbursement of $1,313 Stafford less $1,041 refunded to lender

Section 668.22, Distribution formula for institutional refund and for repayments of disbursements made to the student for noninstitutional costs reads:
(a) Repayment of institutional refunds to Title IV, HEA programs. (1) An institution shall return a portion of a refund owed to a student to the Title IV, HEA programs if -
(i) The student officially withdraws, dropsout, or is expelled from the institution on or after his or her first day of class of a payment period; and ...

The school seeks to repay ED only for its actual loss according to a formula. Such a formula is used by at least one ED region. OSFA denied this request in its interim letter dated October 1, 1992. The institution was instructed to repay without regard to ED's actual loss. OSFA says that the method of calculating the loss to ED for ineligible Stafford and SLS loans, to which the institution refers, is an alternate method for determining liabilities available to ED reviewers. OSFA says it can select any method within its discretion and that it chooses a repayment method

which best serves ED. The program reviewers determined here that it was not in ED's best interest to apply a **formula for determining** the actual loss to ED. Thus, OSFA says that the student's 1990-91 Federal Pell Grant of $1,150, plus $51 of interest, must be repaid. The institution also was directed to remit the $272 balance of this student's Stafford loan to the lender, as well as for the SLS loan.
As noted, Nettleton requests application of OSFA's Actual Loss Worksheet, which is Exhibit R-10. Also see Exhibit R-18, which is 16 a more current version of the Actual Loss Worksheet. Nettleton states that OSFA, without explanation, without citation of authority, and without reference to any standards, is not free to use or to withhold use of the Actual Loss Worksheet.

Nettleton believes that OSFA's position must be rejected for two reasons. First, in the absence of standards to guide OSFA's exercise of discretion, OSFA's decision to deny application of the Actual Loss Worksheet to Nettleton is arbitrary and illegal.
Nettleton cites Betz Business Colleqe, Inc. d/b/a United Colleqe v. U.S. Dept. of Education, 1989 U.S. Dist. Ct. LEXIS 10301 (D.D.C. 1989) (unpublished), in which a school challenged ED's decision "to change the method of providing student aid funds to the College from advance payment to reimbursement." (Slip op. at 2). The Court there upheld ED, in part, because ED provided the Court with a Department memorandum containing standards and an affidavit as to how those standards were applied:

... This statement [the ED memorandum], on its face, indicates that the Department intended for the statement to act as a binding norm on the Department, imposing restraints on the exercise of its discretion. Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987). In fact, Myers, one of [ED's] program reviewers ... stated in his affidavit that the determination to transfer the College to the reimbursement method was made with reference to the standards in the November 15, 1983, Memorandum.

... [W]hile the Memorandum was not publicly announced, it still indicates that the Department's decision was guided by a standard. ... Finally, the Court concludes 17
that the Myers affidavit is appropriately considered as explanatory of the original record. AT&T Information System v. General Services Admin., 810 F.2d 1233, 1236 (D.C. Cir. 1987). (Slip op. at 15-16).

Nettleton concludes that neither of the prongs on which Betz was grounded applies here. An agency's action must be upheld, if at all, on the basis articulated by the agency itself. Motor Vehicle Mfrs. Ass'n of 'United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 50 (1983). An administrative "agency must make findings that support its decision, and those findings must be supported by substantial evidence." Burlinqton Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). Here, there are no findings and no analysis to justify the choice made to deny Nettleton's request for application of the Actual Loss Worksheet. Nettleton thus seeks application of the Actual Loss Worksheet formula.See footnote 7 [7] For the reason stated by Nettleton above, I agree.

Nettleton also states that Finding No. 4 must be dismissed as moot because Phillips Colleges, Inc., the College's parent corporation, already has paid the $1,150, in Pell Grant funds as shown

in Exhibit R-8-6. Apparently, OSFA agrees. See page 8 of its brief dated May 17, 1994, wherein OSFA abandons claims under Finding No. 4.

**FPRD FINDING NO. 6 ISSUE**

OSFA points out that section 582.201 of the FFEL regulations published November 10, 1986, require a student to be enrolled at least half-time to be eligible to receive a FFEL. The reviewers noted that Student 1 was not enrolled at least half-time when the school made the following loan disbursements:

DATES LOANS AMOUNTS

5/23/91 Stafford $ 1,313
6/20/91 SLS $ 2,000

The above disbursements represent liabilities to the school. Nettleton concedes that two loans totalling $3,313 were disbursed to Student 1 on May 23 and June 20, 1991, respectively, a time when the student was in class for less than six hours or less than half-time.

Nonetheless, with respect to Finding No. 6, Nettleton asserts that the FPRD erroneously treated Nettleton as a term-based institution and, as a result, applied the wrong definition of "half-time student" to Student 1. Nettleton cites a definition contained in 34 C.F.R. 682.200:

Full-time student: A student enrolled in an institution of higher education (other than a student enrolled in a program of study by correspondence) who is carrying a full-time academic workload as determined by the school under standards applicable to all students enrolled in that student's particular program. The student's workload may include any combination of courses, work, research or special studies, whether or not for credit, that the school considers sufficient to classify the student as a full-time student;

***

Half-time student: A student who is enrolled in a participating school, is carrying an academic workload that amounts to at least one-half the workload of a full-time student, as determined by the school, and is not a full time student. A student enrolled solely in an eligible program of study by correspondence is considered a half-time student.

As is established by Student 1's Enrollment Agreement (Ex. R8-1) and her Academic Transcript (Ex. R-8-2), Student 1 began to attend her two-year program leading to an Associate of Science Degree - Paralegal based on a full-time schedule. Indeed, all students at Nettleton must be in full-time attendance unless they have approval from the College Dean to take less than a full load. (Ex. R-3-5). Apparently, permission to take a reduced load was obtained because the student withdrew, after her initial enrollment, from two of three courses.

Nettleton states that OSFA falls into error in Finding No. 6 because OSFA does not understand the definition of "enrolled." At 34 C.F.R. 668.2, "Enrolled" is defined as the "status of a 20 student who -- Has completed the registration requirements (except for payment of tuition and

fees) at the institution he or she is attending." The Enrollment Agreement for Student 1 (Ex. R-8-1) demonstrates that she enrolled for 12 hours and that she later withdrew to less than six before the challenged Federal grants were disbursed. In my opinion, Nettleton must repay a portion of the subject loans because the school still had time and notice to react to the change in the student's status from full-time to part-time. As noted, the school had to grant permission for such a change and the change occurred before the challenged payment.

**FPRD FINDING NO. 7 ISSUE**

OSFA applies CFR Section 690.63 published March 15, 1985, for calculation of Pell Grant payments based on a student's enrollment status. According to OSFA the following part-time students were improperly disbursed Federal Pell Grant payments scheduled for full-time students:

| STUDENT | TERM | PAID | CORRECT PERIOD | PAYMENT |
|---|---|---|---|---|
| 1 | Spring '91 | $1,150 | 1990-31 | $ 383 | $ 767 |
| 16 | Summer '91 | $1,200 | 1991-92 | 400 | 800 |
| 35 | Winter '92 | $ 800 | 1991-92 | 400 | 400 |

OSFA's final determination noted that the institution responded that Student 1 had a Federal Pell Grant processed at a time when the college correctly considered itself a non-standard term institution. Therefore, enrollment status is a consideration here. The Federal Pell overpayment of $767 for this student was a liability for the institution, assuming that the student already was part-time at the moment of disbursement of Federal funds. It also appears that Nettleton already has made the $767 refund and that the controversy concerning Student 1 is moot as to Finding No. 7. The same student, it should be noted is involved in Finding No. 6. As to Student 16, this student enrolled full-time for the fall term, but received only half of the $800 due for full-time enrollment. Nettleton believes that a portion of the summer overpayment owed by the school should be reduced. OSFA notes that this student actually withdrew shortly after the fall term began, so that the student initially was entitled to a full-time Pell disbursement. However, the school concedes that it owes $400 of this student's Federal Pell, and displays a copy of a canceled check for $400 which was deposited into the school's 1991-92 Federal Pell account. Nonetheless, OSFA believes that the entire $800 is a school liability and seeks repayment for the entire amount. In my opinion, the school owes only $400.
As to Student 35, the school agrees that this student was overpaid $400 in 1991-92 Federal Pell. The school submits a copy of a canceled check reimbursing their 1991-92 Federal Pell account as requested and this appears to resolve the controversy concerning **Student 35.**

**FPRD FINDING NO.** 12 ISSUE

Section 668.7 requires that students receiving Title IV aid must maintain satisfactory progress. The institution's satisfactory progress policy discloses that determination of a student's **progress** toward completion of his/her degree or diploma is measured by the following:

A student is expected to successfully complete 60% of all hours attempted.

Programs of two or more academic years in length will be assessed at the end of each academic year.

Upon review, a student not successfully completing the minimum percentage of hours will be placed on financial aid probation **for** the next increment or assessment period. A student on probation may **continue to receive** Title IV funding. If the minimum percentage of cumulative hours is not successfully completed at the end of the probationary increment, the student is not eligible to receive further Title IV funding.

Student 2 had completed only 38 percent of the units attempted at the end of her first academic year, Winter Quarter 1991. Therefore, the student was in the probation status during Spring. At the end of the quarter the student had completed only 33 percent of units attempted, and thus seemingly was ineligible for further **financial** aid.
OSFA finds the school liable for the following disbursements paid during the student's period of suspension:

Stafford $1,312
SLS 200
1991-92 Pell $1,150
TOTAL $5,775
23

The institutions's response fails to provide evidence that the above liabilities have been paid as required.
Indeed, Nettleton did not address Finding No. 12 in March 11 or July 26, 1993, pleadings. The amounts totaling $5,775 must be repaid.
Reviewing the disputed findings therefore, I conclude that Nettleton owes nothing under FPRD Finding No. 2; a reduced amount under ED formula under FPRD Finding No. 4; one-half of loan amounts under FPRD Finding No. 6; $400 under FPRD Finding No. 7; and $5,775 under FPRD Finding No. 12.

Repayment is to be sent to USDA - Administrative Collections, P.O. Box 70792, Chicago, IL 60673.

**ADJUSTMENTS/CORRECTIONS REQUESTED BY NETTLETON IF FINDING NO.** 2 IS NOT SET ASIDE.
Nettleton notes that in the alternative if this Tribunal should uphold Finding No. 2, the repayment liability, if any, must take into account each of the following adjustments and corrections:

1. Any liability must adjust for all refunds previously made.
2. The $175,511 repayment sought for the 1991-92 award year must be excluded for the reasons set forth in footnote 7 of Nettleton's brief and in Exhibit R-3-19 and 20 and R-4-1 and 2.
3. OSFA must exclude all Title IV awards to students in Nettleton's Cosmetology Program,

which was measured in clock hours, because regardless of how Finding No. 2 is resolved as to Nettleton's programs measured in credit hours, it cannot apply to any Title IV disbursements to students whose disbursements were scheduled on the basis of clock hours completed.

4. The College is entitled to net or offset against any **over-awards** based on two payments any under-awards based on three payments. For example, under a two-payment system, assume Student A got 50% of his award with the first disbursement, but withdrew such that the one disbursement he received would have only been 331/3% under a three payment system. Under a second scenario, **however,** assume Student B withdrew before reaching the mid-point of the academic year under a two-payment system, but after the start of the second of three payment periods under the three payment periods OSFA seeks to impose retroactively on the College. Under the two-payment system, Student B received only 50% of her award but under OSFA's three payment system Stucent B was entitled to receive 66-2/3% of his award, resulting in an under-award to Student B of 16-2/3%. Over-awards to Student A must therefore be netted against under-awards to Student B to achieve an equitable **result and** the true financial effect of the two payment system versus the three payment system.
In this regard, it is important to note that in Edmondson, Administrative Judge Canellos observed that "OSFA fails to realize that Edmondson may have saved federal money at those times when the school disbursed 50% of the available funds before a student 25 withdrew rather than the 66% that it would have disbursed had a second payment been authorized and the school had been practicing as a term institution." (Appendix A at 5). It is also important to note that Region VIII's 1992 Program Review Report for Nettleton (Ex. R-17-4), but not the FPRD (Ex. R-2), expressly recognized the obligation to "determine the amount of over/under payments made as a result of using the incorrect academic year definition to calculate and pay Title IV funds." In any event, the College's right of offset, i.e., the obligation on the part of ED to net overpayments against underpayments, exists under Section 490(d)(7) of the Higher Education Amendments of 1992, amending Section 487(c) of the HEA, which permits an institution to offset Title IV funds to which it was entitled but did not receive against any Title TV funds determined to be owed by the institution.
5. Another adjustment results from the fact that the formula used in the FPRD fails to take into account that under the system of disbursement used by Nettleton during the entire period at issue, a student who started school at the beginning of a full 12week session and withdrew during the second 12-week session would not have received his or her second disbursement. See Exhibit R-35, paragraph 19. In short, since these students had enrolled in 2/3 of the academic year, they were entitled to 2/3 of their Title IV awards; however, only 1/2 had been disbursed. All such students must be excluded both from any determination of withdrawal rates and total disbursements made. Finding No. 2 is flawed by OSFA's failure to do so.
6. OSFA's finding ignores the SEOG, Perkins, and GSL regulations which allow institutions to disburse certain dollar amounts in one payment. Specifically, the applicable SEOG regulation, 34 C.F.R. 676.16(f), provides:

Only one payment is necessary if the total amount the institution awards a student for an academic year under the SEOG and NDSL program is less than $501.

The same is true for the regulation governing the Perkins loan program. 34 C.F.R. 674.16(g) provides:

Only one advance is necessary if the total amount the institution awards a student for an academic year under the Perkins loan program is less than $501.

Allowing for an even greater amount to be disbursed in one payment, the GSL Program regulations state at 34 C.F.R. 682.237:

(c)(1) Multiple disbursement requirements: A lender shall disburse GSLP and PLUS Program loans made to student borrowers in multiple installments if -

(i) The amount of the loan is $1,000 or more;and

(ii) On the date of the first disbursement, the time remaining in the period of enrollment for which the loan is made is greater than six months, one semester, two quarters, or 600 clock hours.

Rather than excluding SEOG, Perkins, and GSL amounts which were below the threshold necessary for two payments, the Final Program Review Determination disputed all student financial aid disbursements that were disbursed in two payments.
7. Pursuant to 34 C.F.R. 690.3, no student can receive more than his or her

Scheduled Pell Grant in any award year. Therefore, to the extent Student A was "over-awarded" under the example given above, his or her eligibility to receive Pell in that award year from a second institution was reduced dollar-for-dollar. Since, by definition, OSFA is only concerned in Finding No. 2 with students who withdrew, to the extent that these students reenrolled at another institution during the same award year, the College is entitled to a credit for the amount that the Pell awarded at the second institution was reduced by the so-called over-award. Nettleton states that this information is not available to the College, but is available to ED from the entity with which it contracts to process data relating to Pell.
8. Still another error in the FPRD is overstating Nettleton's Title IV disbursements for the SEOG and Perkins programs by including administrative expense allowances and institutional dollars which required matching funds. Thus, instead of basing its calculation on the SEOG funds disbursed to students, the FPRD included all SEOG funds, i.e., SEOG funds disbursed to students plus the allowance for administrative expense. Moreover, one-ninth of all Perkins loan dollars lent to students are derived 28 from institutional matching contributions and are not subject to repayment to ED for any reason.

9. OSFA's "formula" is also fatally flawed by the inclusion of the "institution's withdrawal percentage rate" as calculated by Nettleton's independent auditor because, as required by law, the figure thus calculated includes (1) non-Title IV recipients; (2) "no shows", i.e., students who enrolled but never began classes; and (3) students who withdrew only after earning at least 50% of their total award (the amount they actually received). Therefore, those percentages do not apply to the cohort of students who are the subject of Finding No. 2. The necessity to exclude non-Title IV recipients is obvious. Equally obvious is the need to exclude "no shows" since either no Title IV funds were disbursed to them or all Title IV funds disbursed were refunded since "no shows" were in the category of students entitled to a 100% refund. The withdrawal percentage rate is therefore inflated, to the material prejudice of Nettleton.

10. To the extent Finding No. 2 requires repayment of loan funds, it is flawed because no adjustment is made for the loans already repaid by Nettleton students and because there is no substantial evidence supporting the amount of loan funds disbursed by Nettleton. This is so because during the subject period, loans were handled almost entirely through commercial lenders, and neither institutions nor OSFA maintained or reported **total loan** funds disbursed.

11. Another material error was OSFA's inclusion in the FPRD of the 1988-89 award year. OSFA's 1992 Program Review Report for Nettleton stated: "(Liabilities will not exist for the stafford/SLS/PLUS programs for students who withdrew prior to November 1, 1988)." (Ex. R-17-5). However, the regulation OSFA was referring to, 34 C.F.R. 668.22, did not become effective until July 1, 1989, i.e., after the end of the 1988-89 award year, because 20 U.S.C. 1089(c) provides that regulations "that have not been published in final form by December 1 prior to the start of the award year shall not become effective until the beginning of the second award year after the December 1 date."

Although the Secretary published 34 C.F.R. 668.22 as a final regulation on December 1, 1987, he admitted that Section 668.22 was one that "will become effective after the information collection requirements contained in these sections have been submitted by the Department of Education and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980." 52 Fed. Req. 45712, col. 1 (1987) (emphasis added). OSFA's attempt to evade the effect of the Secretary's failure to comply with the requirements of the Paperwork Reduction Act of 1980 by asserting that "[t]hese regulations are generally not subject to [20 U.S.C. 1089(c)]" (Id.) (emphasis added) is meaningless. Regulations like 34 C.F.R 668.22 that have not been submitted to the Office of Management and Budget ("OMB") pursuant to the Paperwork Reduction Act of 1980, 44 U.S.C. 3504(h), are not "in final form" 30
within the meaning of 20 U.S.C. 1089(c) because "the authority of an agency under any other law to prescribe ... regulations, and procedures for Federal information activities is subject to the authority conferred on the Director [of OMB] by this chapter." 44 U.S.C. 3518(a) (emphasis added). See 58 Fed. Req. 14153, col. 1 (March 16, 1993).

Therefore, publication in non-final form of 34 C.F.R. 668.22 on December 1, 1987, means that it could not be effective until July 1, 1989, and, therefore, cannot be the basis of liability for any portion of the 1988-1989 award year.
Accordingly, even assuming arguendo that the College should have used three payment periods, Finding No. 2 must still be dismissed or, in the alternative, each one of the eleven adjustments listed above must be made in order to determine the amount, if any, of the repayment liability. In the latter case, a remand by this Tribunal to OSFA with directions to apply the foregoing adjustments would be necessary.
For all these reasons, Nettleton asserts that OSFA's analysis of this issue and its conclusions regarding the College's disbursements are wrong. Nettleton Junior College thus requests the rejection of Finding No. 2 in its entirety.

III

**CONCLUSIONS IT IS ORDERED:**
For reasons previously stated, I reject Finding No. 2 in its entirety and uphold the other four disputed Findings assigned to me for decision only in part, as previously explained.

Dated this 8th day of June, 1994.

Paul S. Cross
Administrative Law Judge
Office of Higher Education Appeals
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-3644

---

Docket No. 93-29-SP

**SERVICE LIST**

Leslie H. Wiesenfelder, Esq.
Dow, Lohnes & Albertson
1255 Twenty-Third Street, NW
Washington, D.C. 20037

Denise Morelli
Office of the General Counsel
U.S. Department of Education
FOB-6, Room 4115
400 Maryland Avenue, SW
Washington, DC 20202-2110

---

Footnote: 1 [1] ***Nettleton*** *is corporately-owned by Phillips Colleges, Inc. (PCI). PCI owns and operates approximately thirty career and technical schools in the United States.*

---

Footnote: 2 [2] *In assessing certain liability OSFA refers to a regulation, 34 CFR 668.22, which did not become effective until July 1, ;989, i.e., after the end*

*of the 1988-89 award year. This is so because 20 U.S.C. 1089(c) provides that regulations "that have not been published in final form by December 1 prior to the start of the award year shall not become effective until the beginning or the second award year after the December 1 date." Publication in the non-final form of 34 CFR 668.22 on December 1, -987, meant that it was effective on July 1, 1989, and cannot be the basis of liability* ***for any portion of*** *1988-89 award year.*

---

*Footnote: 3* [3] *Counsel for Nettleton in effect joined in OSFA's request for delay. Such was granted.*

---

*Footnote: 4* [4] *On July 11, 1992, OSFA appealed Edmondson to the Secretary* ***of Education. The Secretary*** *recently affirmed the June 4, 1993 decision in Edmondson.*

---

*Footnote: 5* [5] *Section 427A(g)(2) of the HEA then stated: "the term 'period of enrollment' shall be the period for which the loan is made as determined by the institution of higher education and shall coincide with academic terms such as academic year, semester, trimester, quarter, or other academic period as defined by such institution."*

---

*Footnote: 6* [6]
*The circumstances which led PCI to agree that all Title IV funds be disbursed in no fewer than three payments and redefine the* ***school and*** *the other schools owned by Phillips as standard term institutions as of July 1, 1991, are described in Exhibit R-3-1920.* ***However,*** *that change does not affect either the lack of validity in Finding No. 2 nor the correctness of Nettleton's long standing position.*

---

*Footnote: 7* [7] *This request is not limited to Finding No. 4. Consequently, to the extent this Tribunal determines that any* ***of the loans*** *questioned in the subject Final Program Review Determination* ***were improperly disbursed in whole or in part, Nettleton*** *Junior College requests that this Tribunal require all such repayments be made by Nettleton directly to the U.S. Department of Education in accordance with ED procedures designed to accomplish that purpose, as shown in Exhibits R-10 and R-18.*