UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

Jett College of Cosmetology and Barbering,

Respondent.

Docket No. 95-21-SP

Student Financial Assistance Proceeding

Appearances:

Glenn Bogart, Higher Education Compliance Consulting, Birmingham, Alabama, for Jett College of Cosmetology and Barbering.

S. Dawn Robinson, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before: Judge Richard I. Slippen

DECISION

On November 22, 1994, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED) issued a **final program review determination** (FPRD) finding that for award years 1989-90 through 1992-93 Jett College of Cosmetology and Barbering (Jett) disbursed Federal student financial assistance funds in violation of Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 et seq. As a result, according to SFAP, Jett must repay the holders of guaranteed student loans $17,517.61 and repay ED interest and special allowances and Federal Pell and SEOG Grant program liabilities totaling $23,793.39.1/ Although the FPRD included eight findings against the institution, Jett only challenges four of those findings in this proceeding. 2/

Jett operates five proprietary institutions in Memphis, Tennessee, each owned by the Betty Rose Corporation. Although each institution is independently operated, one central office administers the Title IV programs for all five institutions. According to Jett, its institutions offer 1500 clock hour programs in cosmetology and barbering, and have been in existence since 1964 under its present ownership. Over the course of the period at issue, Jett's institutions awarded more than $2.7 million in Federal student financial assistance.

I

To lawfully participate in Title IV programs, each institution must have in effect a statutorily defined "fair and equitable" refund policy, under which the institution refunds unearned tuition,

fees, room and board, and other charges to students who received Title IV assistance, if the student withdraws or otherwise fails to complete the period of enrollment for which the assistance was provided. 20 U.S.C. § 1091b(a). Notably, many of the rules regarding a school's participation in Title IV programs under went significant changes during the period at issue in this case. In one relevant respect, for example, Congress amended Title IV's statutory definition of a "fair and equitable" refund policy. Through its enactment of the Higher Education Amendments of 1992, Pub. L. No. 102-325, § 485(a), 106 Stat. 619, (the 1992 Amendment) Congress redefined how institutions, such as Jett, must comply with Title IV's requirement that institutions implement a fair and equitable refund policy. 3/

Under the 1992 Amendment, an institution's refund policy is considered fair and equitable if, inter alia, the policy provides for a refund in an amount of at least the amount required by the statutory "pro rata refund calculation." Under Section 485(a) of the 1992 Amendment, pro rata refund is defined, in relevant part, as:

a refund by the institution to a student attending such institution for the first time of not less than that portion of the tuition, fees, room and board, and other charges assessed the student by the institution equal to the portion of the period of enrollment for which the student has been charged that remains on the last day of attendance by the student, rounded downward to the nearest 10 percent of that period[.]

In addition, the 1992 Amendment contains a safe harbor provision precluding the mandatory application of the pro rata calculation requirement for any student whose date of withdrawal from the institution is after the 60 percent point (in time) in the period of enrollment for which the student has been charged.

Prior to the enactment of the 1992 Amendment, Title IV's pro rata safe harbor refund provision precluded mandatory application of the pro rata refund calculation requirement for any student whose last recorded date of attendance was after the halfway point (in time) for the student's program of study or was six months after the beginning of the student's program. See, e.g., 34 C.F.R. § 682.606(b)(2)(i) and (ii) (1991). In Jett's view, the application of the pre-1992 safe harbor provision would require the tribunal to reject SFAP's imposition of liability under Finding 3. According to Jett, since the evidence it has submitted supports its contention that each of the students identified in Finding 3 enrolled in Jett for more than six months before his last date of attendance, Jett was not required to determine the students' refund using the pro rata calculation. Aside from the specific instances noted infra, SFAP does not dispute this factual contention. In that regard, the issue before the tribunal is which statutory refund policy requirement governs Jett's participation in Title IV programs under Finding 3.

If SFAP's position is correct, then the current safe harbor provision, enacted as a result of the 1992 Amendment, would not operate to preclude mandatory application of the pro rata refund calculation requirement. In this respect, even where Jett is able to show that the students at issue had remained enrolled for six months before withdrawing from school, under the undisputed facts, the students' date of withdrawal from school did not occur after the 60 percent point (in time) in the period of enrollment, as required under the 1992 safe harbor provision. 4/ In that regard, Jett would have under-refunded its students by failing to use the pro rata calculation.

SFAP argues that Jett must repay $5,682.85 to the current holders of Title IV loans and repay $7,310.09 to ED for its failure to refund unearned tuition fees and other charges consistent with the statutory calculation for payment of pro rata refunds. SFAP cites 20 instances for which Jett did not calculate a proper refund. 5/ Opposing SFAP's position, Jett concedes that the "rules" regarding the application of the pro rata refund requirement were altered effective July 23 , 1992 by the enactment of the Higher Education Act Amendments of 1992, but argues that it should be entitled to rely on the pre-1992 safe harbor provision because ED did not amend or otherwise recodify its regulations to reflect the change in the governing statute. Instead. according to Jett, ED merely re-promulgated the same preexisting safe harbor requirement. See 57 Fed. Reg. 60,323, Friday, December 18, 1992. In addition, Jett contends that ED's Federal Student Financial Aid Handbook, 1993-94 (at 3-64) indicates that SFAP permitted schools like Jett to follow the pre-1992 safe harbor provision because the agency had not established the final guidelines for implementation of the new pro rata refund calculation requirement.

In response to Jett's position, SFAP argues that despite the fact that 34 C.F.R. § 682.606 contains 6/ a safe harbor provision that would preclude mandatory application of the current pro rata calculation requirement in instances where Jett is able to show that a first-time Title IV financial assistance recipient withdrew from Jett after six months of enrollment, that regulation should be ignored because as of July 23, 1992, schools were required to implement the refund policy required by the amended statute. In that regard, according to SFAP, the 1992 Amendment "superseded" Section 682.606 by conditioning application of the safe harbor provision upon a student's completion of 60% of their program. The tribunal finds SFAP's argument persuasive and correct.

It is axiomatic that administrative tribunals may interpret regulations, but may not waive them or rule on their invalidity. Gulf Coast Trades Center, Dkt. No. 89-16-S, U.S. Dep't of Education (Decision of the Secretary) (October 19,1990). Pursuant to 34 C.F.R. § 668.117(d) the hearing official is bound by all applicable statutes and regulations, and may not waive a statutory mandate. As such, Jett cannot obtain relief from the requirements of the 1992 Amendment from this tribunal. Nor does the existence of a contravening regulation support Jett's position before this tribunal. This tribunal is bound to enforce the clear and unambiguous requirement embodied in the 1992 Amendment that institutions like Jett implement a refund policy that follows the pro rata refund calculation. While Jett presents a clear argument addressing issues why the institution should be granted relief by showing that [1] ED re-promulgated a preexisting regulation in the Federal Register, 7/ [2] the regulation clearly and undisputedly conflicts with the governing statute, and [3] the agency subsequently disavowed the significance of the publication of a regulation in the Federal Register without repealing or amending the regulation, the tribunal is bound to enforce the law as it is clearly set forth by the governing statute. 8/ Unquestionably, this tribunal is without jurisdiction to declare that Section 485(a) of the Higher Education Amendment of 1992 is unenforceable. 9/ Accordingly, under Finding 3, regarding students A23 and B14, Jett failed to show that the institution issued a refund determined under the 1992 amended pro rata calculation requirement. Consequently, SFAP's determination of liability with regard to these two students is upheld.

Regarding the remaining improper refunds under this finding, Jett admits to liability for student Bi in the amount of $351.09, and SFAP demonstrates, through submission of a Pell Grant

Summary Report, that despite Jett's protestations otherwise, student A14 received Pell Grant funds and thus Jett is liable in the amount of $569.75 for this student. The other instances are uncontested and, consequently, are upheld. Therefore, the evidence shows that Jett failed to calculate pro rata refunds for students A14, A29, A44, Bi, B2, B3, B4, BS, B6, B7, B8, B9, B10, B11, B12, B13, B15, and B16 Accordingly, SFAP's determination of liability is upheld under Finding 3.

II

Under Finding 4, SFAP determined that Section 682.606 requires Jett institutions to include in the calculation of pro rata refunds charges and fees assessed to students for equipment or supplies in instances where the institution requires the student to purchase the equipment or supplies from the school. According to SFAP, Jett institutions required their students to purchase cosmetology kits from Tri-State Beauty Supply, a beauty supply store owned and operated by Jett's parent corporation, the Betty Rose Corporation. 10/ In SFAP's view, Section 682.606 permits institutions to exclude charges for equipment and supplies that can be reissued to other students from the calculation of a pro rata refund only if the school notifies the student in writing prior to enrollment that the student would be required to return the equipment if the student withdraws from the institution and, after a 10-day waiting period and a notice from the institution, the student fails to return the equipment. See 34 C.F.R. § 682.606(c)(5). SFAP argues that Jett did not meet the exclusion permitted under Section 682.606(c)(5) because, as Jett concedes, the same cosmetology kit cannot be reissued to another student due to health and safety considerations. In addition, SFAP argues that even if the charges for the cosmetology kits were otherwise excludable, they would not be excludable in Jett's case because Jett failed to disclose to the student prior to enrollment that the kits were not returnable in the event a student withdrew from the institution. In that regard, according to SFAP, Jett's failure to include the charges for the cosmetology kits in its calculation of pro rata refunds resulted in Jett under-refunding students.

Opposing SFAP's determination under Finding 4, Jett argues that SFAP has not presented a prima facie showing that its students were required to buy their cosmetology kits from Jett's institutions or a store owned by Jett's parent company, the Betty Rose Corporation. Jett concedes that many of its students purchased their cosmetology kits from Tri-State Beauty Supply, but urges that the students did so as a matter of convenience, not because they were required to do so. In support of its position that students were not required to purchase cosmetology kits from Jett or Tri-State Beauty Supply , Jett submitted an affidavit from its president, Charles F. Holland, attesting to the absence of that requirement.

Section 682.606 sets out the standards for calculating pro rata refunds. Under subsection 682.606(c)(5), schools may exclude from their refund calculation charges to the student for equipment that the school issues to the student and determines that it could reissue to another student, if the student fails to return the equipment upon written request. The pivotal issue in deciding whether an institution's refund practice conforms to Section 682.606 is the determination that the school has, in fact, assessed a fee or tuition charge to the student. Consequently, the threshold issue under Finding 4 is whether the pro rata refund policy applies at all.

By its very clear language, the exclusionary provision of subsection 682.606(c)(5) is invoked only in circumstances where the institution actually charged the student for equipment it has issued to the student. In this instance, there is no prima facie showing that Jett issued to its students cosmetology kits. Nor is there a showing that the cost of the cosmetology kits was assessed to a student by the school. Instead, SFAP simply asserts in its opening brief that students were "required" by Jett institutions to purchase cosmetology kits from Tri-State Beauty Supply and cites the findings of the FPRD as support for its position. The FPRD notes that SFAP program reviewers discovered that ledger cards found in the student files at Jett indicated that funds were paid directly to Tri-State Beauty Supply by Jett institutions on behalf of students. On the basis of this determination, SFAP concluded that Jett should have refunded the pro rata refund amount for the cosmetology kits to 12 students. The tribunal does not agree.

There is no showing, by SFAP, that Jett students were assessed fees by the institution for the cost of cosmetology kits. Indeed, the record contains no evidence whatsoever supporting SFAP's mere assertion that students paid Jett for the purchase of cosmetology kits as a cost of attendance. Undoubtedly, it would stretch the reach of Title IV's refund requirement far afield from that at which it is obviously directed if SFAP were permitted to require institutions to "refund" students for the cost of cosmetology kits or other school supplies, where there is absolutely no showing that the school supplies were purchased from the institution. Notably, it is axiomatic that the refund requirements under Title IV are intended to require institutions only to refund charges assessed by the institution. Accordingly, Finding 4 is rejected.

III

Under Finding 6, SFAP argues that Jett violated 34 C.F.R. § 668.56 (1988) by failing to complete a file verification for 13 students. Section 668.56 provides that institutions must require students, selected for student aid eligibility verification, to submit to the school acceptable documentation that will verify the student's financial information used to determine the student's eligibility for participation in Title IV programs. Apparently, 12 students were selected for eligibility verification at Jett. According to SFAP, its program reviewers determined that the files at Jett lacked evidence that Jett had required or obtained acceptable documents from the 12 selected students. As a result of this determination, SFAP required Jett to review all of its student files for the 1989-90, 1990-91, 1991-92, and 1992-93 award years to identify any additional incidents of failure to require eligibility verification. Over the course of the program review process, Jett satisfied SFAP that the school had obtained acceptable documentation for the 12 students identified by the program reviewers. However, through its own file review, Jett discovered that an additional 13 students had not submitted acceptable documentation. On this basis, SFAP determined that Jett was liable for all Title IV funds disbursed during the award years for which the 13 students were selected for eligibility verification. In that respect, the FPRD requires Jett to repay $14,899.30 to ED for improperly disbursed Pell and SEOG grants, and refund $2,441.25 to the current holder of student E-9's Title IV loan.

For its part, Jett does not challenge SFAP's contention that it owes a liability for 13 students under this finding. Instead, Jett challenges SFAP's calculation of liability by requesting that the tribunal require SFAP to "calculate the liabilities associated with Finding 6 in accordance with the actual loss method" where ineligible Title IV loans are shown. In opposition to Jett's request,

SFAP contends that the use of the actual loss formula is entirely up to the discretion of SFAP, and in this case it has chosen not to calculate the institution's liability on that basis. 11/ The question of whether SFAP's use of the actual loss formula is entirely discretionary or may be compelled by this tribunal is not squarely before the tribunal. As such, the tribunal declines to address that issue. 12/

Regarding the facts under Finding 6, the application of the actual loss formula is clearly not appropriate. As made evident below, the very nature of the actual loss formula renders it inapplicable to the recovery of Pell or SEOG grant funds. Consequently, to the extent that Jett's position may be understood to request use of the actual loss formula with regard to Title IV grant liabilities, that request is flatly rejected.

With regard to Finding 6's requirement that Jett repay the holder of student E-9's Title IV loan, the actual loss formula does not provide a more equitable measurement of loss than requiring the institution to repurchase a single improperly disbursed loan. The actual loss formula measures the estimated loss to ED that has or will result from ineligible loans certified by the institution. Under the formula, an institution's cohort default rate is multiplied by the total amount of ineligible loans disbursed during a given award year to yield an estimated expenditure of defaulted loans. This estimate is added to estimated loan subsidies and special allowance payments (ISAs) made by ED during the award year to yield the actual loss formula liability.

In this case, SFAP has not sought to recover an estimated loss to the agency. Instead, SFAP is relying on its enforcement power under 34 C.F.R. § 682.609 to require Jett to repurchase from the holder of a Title IV loan the entire loan amount or that portion of the loan for which it has been determined that the borrower was ineligible to receive. Clearly, this measure of recovery is consistent with SFAP's unrebutted determination that Jett did not obtain acceptable documentation verifying that student E-9 was eligible for Title IV funding. Consequently, the tribunal finds that the use of the actual 1055 formula is not appropriate under Finding 6. Accordingly, SFAP's calculation of liability under this finding is upheld.

IV

Under Finding 8, SFAP argues that Jett violated 34 C.F.R. § 682.604 by improperly disbursing Title IV loan funds after a student's last date of attendance. According to SFAP, Jett made its improper disbursements to the student accounts of 6 students. In this regard, SFAP seeks recovery of those funds in the amount of $6,751.78. 13/

Under circumstances relevant to this case, section 682.604 prohibits the disbursement of Title IV loan funds where the institution receives the student's loan proceeds from the lender before the end of the period for which the loan was made, but after the student ceased to be enrolled at the school on at least a half-time basis. In the event that an institution does receive loan proceeds after a student's last date of attendance, section 682.604(e)(3)(i) requires the institution to return the loan funds to the lender within 30 days of the institution's determination that the student has withdrawn from the institution. Jett concedes that it is liable for improperly disbursed loans for student #41 and #48, but argues that the actual loss formula should be applied to this finding. The tribunal rejects Jett's requests for the same reasons identified under Finding 6.

Regarding the remaining 4 students, Jett argues that the loan proceeds were received by the institution while the students were still enrolled in their respective programs. However, as SFAP points out, the evidence in the record does not support the institution's position. Included in the record are copies of "Student Ledger" cards maintained by Jett. With regard to student #43, the student ledger card plainly indicates that the student's last date of attendance was November 12, 1992, the same date Jett disbursed a Title IV loan in the amount of $1221.09 for student #43. Although it is possible that Jett did not know until some time later that student #43 withdrew from its institution on the same date that Title IV funds were credited to that student's account, the school was, nonetheless, required by 34 C.F.R. § 682.604(e)(3)(i) to return those funds to the lender. Similarly, the student ledger records of students #4, #46, and #49 show that for each student Jett received the student's loan proceeds from the lender after the student ceased to be enrolled at the school on at least a half-time basis. Accordingly, the tribunal finds that in each of the six instances cited under Finding 8, Jett violated 34 C.F.R. § 682.604 by improperly disbursing Title IV loan funds after a student's last date of attendance.

FINDINGS

1. In instances where a first-time student's date of withdrawal from an institution occurred prior to the 60 percent point (in time) in the student's period of enrollment, the institution was required to use the pr pro rata refund calculation to determine that student's refund. In that regard, Jett failed to carry its burden of proof that the institution properly calculated pro rata refunds for students A23 and B14.

2. For the award years at issue, under Section 485(a) of the Higher Education Act of 1965, as amended, an institution's refund policy must be fair and equitable. In that regard, an institution's refund policy is considered fair and equitable if, inter alia, the policy provides for a refund in an amount of at least the amount required by the statutory "pro rata refund calculation." Jett failed to carry its burden of proof that the institution properly calculated pro rata refunds for students A14, A29, A44, Bi, B2, B3, 134, BS, B6, B7, B8, B9, B10, Bli, B12, B13, B15, and B16

3. There is no showing by SFAP supporting the inference that Jett students were assessed fees by Jett for the cost of cosmetology kits.

4. Under 34 C.F.R. § 682.609, SFAP may require an institution to repurchase from the holder of a Title IV loan the entire loan amount or that portion of the loan for which it has been determined that the borrower was ineligible to receive. In that respect, the use of the actual loss formula is neither required nor appropriate. Therefore, SFAP's calculation of liability owed by Jett for its failure to obtain student aid eligibility verification is upheld.

5. Jett violated 34 C.F.R. § 682.604 by improperly disbursing Title IV loan funds after a student's last date of attendance.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Jett College of Cosmetology and Barbering pay to the United States Department of

Education the sum of **$22,209.39**, and repay to the current holders of Title IV loan notes **$14,875.88**.

SO ORDERED.

Judge Richard I. Slippen

Dated: October 19, 1995

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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1/ The awarding of guaranteed student loans and Pell and SEOG grants is authorized by 20 U.S.C. §§ 1070a, 1071, 1078-1 and 1078-2. In its opening brief, SFAP reduced the liability imposed against Jett by the FPRD from $26,180.94 in loan repayment liabilities to $17,517.61, and from $24,702.59 in grant liabilities to $23,793.39.

2/ According to Jett, its appeal is limited to the issues included under Finding 3 (failure to calculate pro rata refunds), Finding 4 (failure to include all charges in calculation of pro rata refunds). Finding 6 (incomplete verification of information on student aid applications), and Finding 8 (improper disbursal of student loan funds after student has withdrawn from institution).

3/ The 1992 amendment took effect the date of its enactment, July 23, 1992. See § 498 of the Higher Education Amendments of 1992.

4/ Jett measures its programs in clock hours. As such, the 60 percent point (in time) is calculated by dividing the total number of clock hours comprising the enrollment period into the number of clock hours remaining to be completed by the student in that period as of the last recorded day of attendance.

5/ Although the FPRD cites 12 additional instances, SFAP has withdrawn its assessment of liability in each of those cases.

6/ To date, the relevant regulatory provision has not been repealed or amended. See 34 C.F.R. § 682.606 (1994).

7/ Final agency regulations were published on December 18, 1992. 57 Fed. Reg. 60,280. The re-promulgation of 34 C.F.R. § 682.606 is found at 57 Fed. Reg. 60,373. The text of Section 682.606 does not depart from its preexisting version found at 34 C.F.R. § 682.606.

8/ The tribunal notes that under the facts of this case the consequences of upholding the FPRD with respect to this issue results in only a de minimis increase in the amount of tuition funds that SFAP may recover. See, e.g., FPRD at Finding 3.

9/ This decision is not inconsistent with a prior decision adopted by the Secretary concerning whether the refund policy set out in Section 485(a) applied to students who had enrolled in an institution prior to the enactment of the 1992 Amendment, but had withdrawn from the institution subsequent to the effective date of the 1992 Amendment. See In the Matter of Blaine Hair School, Dkt. No. 94-129-SP, U.S. Dep't of Educ. (January 31, 1995). There, the administrative judge determined that the refund requirement embodied in the 1992 Amendment applied to all students who withdrew from an institution on or after July 23, 1992, the effective date of the amendment. Unquestionably, the finding of that decision rests on an evaluation of the unique facts of that case. In the case at bar, the parties do not dispute that the 1992 Amendment required the application of the pro rata requirement to first-time Title IV funds recipients. At dispute is whether the amendment's safe harbor from the pro rata requirement properly applies to the facts of this case. As such, this issue was not addressed or otherwise resolved by the decision in Blaine Hair School

10/ Jett concedes that the cost of these kits at the stores owned by the Betty Rose Corporation was approximately $400.

11/ In addition, SFAP argues that as a general policy matter, ED does not use the actual loss formula where an institution has a clear legal obligation to make a refund to student or lender or disburses Title IV funds without eligibility verification when such is required. According to SFAP, use of the actual loss formula in such cases would deprive the student borrower of the benefit of a reduction in the amount of his or her debt.

12/ The tribunal recognizes, however, that the actual loss formula has been relied upon by SFAP in prior cases as an alternative assessment of liability against an institution found to have improperly disbursed Title IV loans. More importantly, the decisions of this tribunal have consistently approved SFAP's use of the actual loss formula as a fair and accurate assessment of liability. See, e.g., In the Matter of Selan 's System of Beauty Culture, Dkt. No. 93-82- SP, U.S. Dep't of Educ. (December 19, 1994); In the Matter of Berk Trade & Business School, Dkt. No. 93-170-SP, U.S. Dep't of Educ. (June 27, 1994).

13/ Under this finding, the FPRD requires the institution to repay the holders of Title IV loans for students #4, #41, #43, #46, #48, and #49. Student #47 was also included, but SFAP subsequently withdrew student #47 from this finding.