

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

In the Matter of

Docket No. 96-138-SP

KELSEY-JENNEY COLLEGE,
Respondent.

Student Financial Assistance Proceeding

PRCN: 199510900003

Appearances:

Peter S. Leyton, Esq., Fairfax, VA, for Kelsey-Jenney College.

Alexandra Gil-Montero, 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 September 10, 1996, the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a final program review determination (FPRD) finding that Kelsey-Jenney College (KJC) violated several regulations promulgated pursuant to Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.*

The FPRD contains two findings against KJC, of which the institution only challenges one. [See footnote 1¹](#) KJC challenges SFAP's finding that it awarded and disbursed Title IV funds to students who violated KJC's attendance policy and thus, were ineligible to receive Title IV funds. [See footnote 2²](#) As directed by SFAP, KJC reconstructed its attendance records for the 1992-1993 award year. KJC then reviewed a statistical sample of 291 students. SFAP projected liabilities to a universe of 988 students. Initially, SFAP assessed liability in the following amounts: Pell Grant Program: \$83,591.18; Supplemental Educational Opportunity Grant Program: \$509.27; and the Federal Family Education Loan (FFEL) Program: \$62,674 for a total of \$146,774.45. In its brief, SFAP reduced the liability by \$6,462.67, which reflects an amount already paid by KJC. SFAP further reduced the liability by \$31,409.78 for students who attended the institution's El Centro campus whose attendance records were later produced by KJC. Currently, SFAP seeks \$108,902 in liability.

According to KJC's attendance policy, students who are absent for eight consecutive days will automatically be withdrawn from the institution. [See footnote 3³](#) SFAP argues that KJC disbursed Title IV funds to students who should not have been enrolled according to KJC's published attendance policy. SFAP argues that the language of the policy itself indicates that the institution did not have discretion in determining whether a student would be withdrawn after being absent for eight consecutive days.

KJC presents several arguments as to why liability should not be assessed or that it be reduced. First, KJC argues that SFAP's reasoning that the students who were absent eight consecutive days necessarily made them ineligible to receive Title IV funds under 34 C.F.R.

§ 668.7(a) (1991) is flawed. Second, KJC argues that it has the right to make exceptions to its own rules and it reserved such a right in its catalog. Third, KJC argues that its students are enrolled based on quarterly enrollment contracts. Therefore, according to KJC, students who became ineligible due to excessive absences could become eligible again merely by “re-enrolling” in the next quarter, since this constituted a new enrollment contract. Fourth, KJC argues that it is not required to maintain an attendance policy and that the institution does so voluntarily.

To be eligible to receive Title IV funds, a student must maintain satisfactory academic progress in his or her course of study. 20 U.S.C. § 1091(a)(2) and 34 C.F.R. § 668.7(a)(5) and (c) (1991). An institution must establish, publish, and apply reasonable standards for measuring satisfactory academic progress. 34 C.F.R. § 668.14(e) (1991). A determination of reasonableness includes the consistent application of the satisfactory academic progress standards. 34 C.F.R. § 668.14(e) (1991).

Consistent with its obligation under 34 C.F.R § 668.14(e), an institution is required to consistently enforce its own attendance policy so long as it is reasonable. *In re Mountain States Technical Institute*, Docket No. 93-60-SP, U.S. Dep't of Educ. (September 16, 1993) at 7. In *Mountain States*, the institution had a policy whereby students were required to maintain a 90 percent attendance rate during a phase (i.e. a period of approximately 11 days). *Id.* at 4. Although the tribunal acknowledged that neither the Department nor the accrediting agency required a 90 percent standard, this did not mean that the institution was not required to consistently apply its own reasonable standards. *Id.* This tribunal has found that where an institution has disbursed Title IV funds to students who violated its published attendance policy (i.e. quantitative standard for measuring satisfactory academic progress), the institution is liable for the Title IV funds disbursed to these students. *In re Indiana Barber/Stylist College*, Docket No. 94-111-SP, U.S. Dep't of Educ. (March 23, 1995).

The language of KJC's policy is clear: students absent eight consecutive days will be withdrawn from the college. KJC argues that this policy is not as it appears in its catalog. KJC points to language in its catalog that it asserts contemplates counseling by the Dean's staff and permits exceptions by the Dean. [See footnote 4⁴](#) KJC states that during 1992, its policy was to allow the Dean's Office, in concert with the respective faculty, to use their professional judgment to determine if the student could successfully continue in their classes given the consecutive absences before implementing the policy of automatic withdrawal. [See footnote 5⁵](#) Further, KJC states that based on the professional judgment of the faculty and Dean's Office, some students were allowed to continue in classes after eight consecutive absences. Additionally, KJC points out that a later edition of the institution's catalog added the word “may” to reflect its right to make exceptions to its automatic withdrawal policy. [See footnote 6⁶](#) KJC next argues that its policy permitting leaves of absence under certain circumstances further evidences the institution's flexibility in implementing its attendance policy. [See footnote 7⁷](#)

This tribunal has consistently held that an institution is required to apply its policies, namely policies relating to a students' eligibility, as published. *In re Sinclair Community College*, Docket No. 89-21-S, U.S. Dep't of Educ. (September 26, 1991) (Decision of the Secretary); *In re Santa Clara Beauty College*, Docket No. 94-24-SP, U.S. Dep't of Educ. (November 14, 1994); *In re Bryant & Stratton Business Institute*, Docket No. 94-190-SA, U.S. Dep't of Educ. (September 16, 1996). KJC's explanation of how individualized judgements and/or unwritten standards were used to determine if its clearly articulated attendance policy would be enforced demonstrates that the institution failed to apply its policy as written. Further, the language in KJC's catalog that contemplates counseling only applies to students whose attendance would subject them to probationary status. Under KJC's policy, students are automatically withdrawn from the institution once they accrue eight consecutive absences, they are not placed on probation.

An institution is also required to publish its satisfactory academic progress policy under 34 C.F.R. § 668.14(e) (1991). This tribunal has held that the regulation's use of the word “publish” requires that the institution make known all of the required elements of its satisfactory academic progress policy. *In re Chicago State University*, Docket No. 94-172-SA, U.S. Dep't of Educ. (April 26, 1996); *In re Santa Clara Beauty College*. KJC admits that it used non-published standards in order to determine if its policy of “automatic” withdrawal would be applied. KJC's admission that it used

non-published standards violates the requirement that an institution publish its satisfactory academic progress policy.

Further, KJC's argument that it was not regulatorily required to apply its attendance policy is rejected. KJC cites *In re Southeastern University*, Docket No. 92-102-SA, U.S. Dep't of Educ. (November 13, 1995), in which the tribunal held that an institution could not be held liable for failing to maintain copies of its students' high school diplomas in order to demonstrate that its students were high school graduates. The tribunal found that the regulations only require that an institution document that its students were high school graduates but it did not specify what type of documentation was needed. *Id.* at 4. The tribunal's finding in *Southeastern University* is inapplicable here because Southeastern University's failure to follow its own procedures did not violate any Title IV program requirement. Conversely, KJC's failure to follow its attendance policy, although it was developed by KJC, does rise to the level of a violation of a Title IV program requirement. In the instant proceeding, KJC was required to comply with the regulatory requirements that it establish, publish, and consistently apply its chosen attendance policy because that policy was a measure of satisfactory academic progress as required by 34 C.F.R. §§ 668.7(a)(5), (a)(7) and 668.14(e) (1991). Therefore, KJC's failure to apply this policy during the program review period resulted in disbursement of Title IV funds to students who were not "enrolled" under KJC's own quantitative standards.

KJC's contention that its students have quarterly enrollment contracts that allow those students that did not maintain the required attendance rate to "re-enroll" for the next quarter and thereby be eligible to receive Title IV funds is not persuasive. KJC's own evidence to support its argument demonstrates that its enrollment contracts were entered into on the basis of an entire academic program and not quarterly. Moreover, the record indicates that its students were admitted into several academic programs of various lengths that apparently spanned several quarters.[See footnote 8⁸](#)

Finally, KJC argues that the liability assessed against it in the FPRD is excessive for two reasons. First, KJC states that the liability should be reduced because some of its students returned to the institution after accruing eight consecutive absences. I do not find KJC's evidence regarding a proposed reduction in liability due to the fact that some of its students returned to the institution persuasive. The amounts identified in KJC's Initial Brief cite three different exhibits regarding two different categories of students: students who returned during the same quarter in which the absences occurred and students who returned in a subsequent quarter.[See footnote 9²](#) In fact, these exhibits cite a number of the same students in each exhibit and it appears that KJC may have counted the Title IV funds more than once in computing its reduced liability. Therefore, I find that KJC has failed to meet its burden under 34 C.F.R. § 668.116(d) in demonstrating that a reduced liability would be warranted.

Second, KJC asserts that the estimated loss liability should be reduced in light of KJC's assertion that the Department is overall able to collect approximately 30 percent of all defaulted FFEL Program loans. The estimated loss formula does not represent a windfall to the Department. The estimated loss formula has been adopted as a fair method of calculating the extent of the Department's losses when an institution has violated Title IV program requirements. *See In re Christian Brothers University*, Docket No. 96-4-SP, U.S. Dep't of Educ. (January 8, 1997) at 2. The estimated loss formula has also been used in cases involving violations similar to the one at issue in the instant proceeding. *Id.* at 3. Therefore, I do not find KJC's assertion relevant to this tribunal's long-held determination that the estimated loss formula is a reasonable method of calculating SFAP's loss due to an institution's improper disbursement of FFEL loans.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Kelsey-Jenney College pay to the U.S. Department of Education the sum of \$108,902.

Judge Richard I. Slippen

Dated: May 1, 1998

SERVICE

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

Peter S. Leyton, Esq.
Ritzert & Leyton
10387 Main Street
Suite 200
Fairfax, VA 22030

Alexandra Gil-Montero, Esq.
Office of the General Counsel
U.S. Department of Education
600 Independence Avenue, S.W.
Washington, D.C. 20202-2110

[Footnote: 1](#) ¹KJC did not appeal the second finding contained in the FPRD which held that KJC failed to make all refunds to the Pell Grant Program in a timely manner.

[Footnote: 2](#) ²Clearly, the regulatory standards contained in 34 C.F.R. § 668.14 regarding satisfactory academic progress are also at issue in this case. Further, given the fact that the requirement that a student maintain satisfactory academic progress is also contained in 34 C.F.R. §668.7, I find SFAP's failure to more clearly articulate its case troubling. However, it is also clear that Respondent knew that satisfactory academic progress was at issue in this proceeding since many of its arguments are addressed to the substance of SFAP's finding that KJC's attendance policy was not applied as published.

[Footnote: 3](#) ³See Resp. Ex. 3 at 41.

[Footnote: 4](#) ⁴See Resp. Ex. 3 at 41.

[Footnote: 5](#) ⁵ The institution's application of its policy was enumerated in a statement written and signed by Wendi Bremermann, Chief Administrative Officer and former dean of KJC, on October 24, 1996.

[Footnote: 6](#) ⁶I also note that other aspects of KJC's attendance policy were altered (i.e. a student is no longer placed on probation for falling below a 60 percent attendance rate for any six week period).

[Footnote: 7](#) ⁷KJC's leave of absence policy is as follows: "If a student must interrupt training for more than eight days, a leave of absence must be requested in writing. If approved, it will be granted by the dean for a period of up to six weeks." See Resp. Ex. 3 at 42. This policy was the same in KJC's 1993-1994 catalog. See Resp. Ex. 4 at 43.

[Footnote: 8](#) ⁸See Resp. Ex. 8.

[Footnote: 9](#) ⁹See Resp. Exs. 5 - 7.
