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

In the Matter of

VERNON'S KANSAS SCHOOL OF COSMETOLOGY,

Respondent.

Docket No. 04-27-SP

Federal Student Aid Proceeding

PRCN: 200330721521

Appearances: Frederick J. Laurino, CEO, Vernon's Kansas School of Cosmetology, Wichita, KS, for Respondent.

Steven Z. Finley, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Federal Student Aid Programs.

Before: Richard I. Slippen, Administrative Judge

DECISION

Vernon's Kansas School of Cosmetology (VKSC) operates as a school that offers programs relating to the study and practice of cosmetology. VKSC's programs are offered as clock-hour programs and the school participates in the federal student aid programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq*. and 42 U.S.C. § 2752 *et seq*.

VKSC appeals the U.S. Department of Education (Department), office of Federal Student Aid's (FSA) Final Program Review Determination (FPRD) dated April 13, 2004.[1] The FPRD contains two findings: (1) VKSC incorrectly calculated its return of Title IV funds calculations for 30 students who withdrew from the school prior to the completion of their programs of

[1] After some missteps by Respondent and FSA in filing their briefs and exhibits including notifying each other and the tribunal as to whether Respondent intended to file a brief in response to the tribunal's July 15, 2004, Order Governing Proceedings, on January 3, 2005, the tribunal set forth a new briefing schedule, and submissions from FSA and Respondent were then subsequently filed.

study;[2] and (2) VKSC improperly disbursed federal student aid to one student.[3] The FPRD identified $17,869 in liability payable to the Department and the return of $1,436 to the appropriate Federal Family Education Loan (FFEL) holder(s). The liability at issue in this proceeding, however, correctly totals $18,049 in liability payable to the Department and $1,436 in FFEL funds.[4]

VKSC raises eleven arguments or issues regarding the return to Title IV funds finding contained in the FPRD. As an initial matter, the tribunal notes Respondent's *pro se* status and acknowledges that many of the school's arguments are reflective of said status.[5] Although some of these arguments or issues overlap, the tribunal will address each argument separately. VKSC's arguments are as follows:

1. Return of Title IV funds calculations for five students (Student Nos. 1, 8, 32, 43, and 77) were correct because these students completed 70 percent or greater of their attempted clock-hours.
2. Disbursement of FFEL loan funds are determined by payment periods and thus, are not governed by the method for calculating the return of Title IV funds laid out in 34 C.F.R. § 668.22.
3. Mitigation principles should apply if students re-enter the school and continue in their programs of study.
4. A school should only be required to repay the actual loss suffered by the Department.
5. The school's contract period, as laid out in the school's enrollment agreements with its students, should be used to determine the disbursement of FFEL loan funds.[6]

[2] The 30 students are identified as Student Nos. 1, 2, 5, 7, 8, 9, 14, 18, 23, 24, 32, 36, 39, 41, 43, 45, 47, 50, 51, 52, 53, 54, 55, 68, 69, 75, 76, 77, 79, and 80.

[3] The student at issue is No. 3. VKSC did not address this finding in either its original or reply briefs. The tribunal finds that the FPRD establishes a factual and legal basis for the alleged liability for Student No. 3. Therefore, the $632 in liability for this student is upheld.

[4] The FPRD includes $461 in liability for Student No. 77 in the body of the document. FSA inadvertently left out the $461 assessed for this student in Attachment B of the FPRD and in the document's final calculation of liability section. Additionally, in its brief, FSA reduced the liability sought for Student No. 80 by $281. Based on the aforementioned adjustments, the FPRD liability at issue in this proceeding totals $18,049 in Department funds and $1,436 payable to FFEL lenders.

[5] Respondent's arguments are indicative of a lack of expertise in crafting legal arguments and understanding regulations and case law. As a result, the tribunal has endeavored to comprehensively respond to the myriad of issues that encompass Respondent's appeal of the FPRD.

[6] VKSC challenges the liability for two students (Student Nos. 41 and 55) based on above-listed second, third, fourth, and fifth arguments raised.

6. Although it made mistakes in reporting certain students' payment periods, VKSC corrected these payment periods, and the proper payment periods are now established and should be used in lieu of the payment periods reported and documented in the student files. Specifically, VKSC challenges the liability for Student Nos. 18 and 52.
7. VKSC argues that it made a sincere effort to follow the guidelines for using "actual institutional charges" instead of "funds disbursed" in its return to Title IV funds calculations and it should be afforded "safe harbor" because the Department did not establish its policy regarding these calculations until 2002, subsequent to VKSC's calculations. Based on this argument, VKSC contends that the liability for Student Nos. 50 and 68 should be eliminated.
8. For students who were enrolled under an enrollment period contract and not under a payment period contract, calculations should be based on award year. Based on this argument, VKSC contends that liability for Student Nos. 2, 39, 41, 53, 76, and 79 should be eliminated.
9. An academic year should be determined by the number of hours a student is expected to complete during a set period of calendar time. As a result, VKSC contends that it was correct in its use of attempted hours instead of actual hours for refund calculations for certain students.
10. VKSC's enrollment contracts with students establish that the school created term-based programs for these students. According to the school, its enrollment contracts reflect an enrollment period based on individual terms with an established start and end date, similar to any other term based school. Because it created a term based program, VKSC argues that it should begin a new payment period once a student had completed a prior period of enrollment.
11. The different rules and policies established by the Department for different types of institutions and their students (i.e. the difference being whether the institution is term-based versus clock-hour and/or the attendance habits of said students) violates the institutions' and students' equal protection rights.[7]

Return to Title IV Funds Regulation (34 C.F.R. § 668.22)

When a recipient of Title IV funds withdraws from a school during a payment period or period of enrollment, the school must determine the amount of Title IV funds the student earned as of the student's withdrawal date. 34 C.F.R. § 668.22(a).[8] If the amount of Title IV funds earned by the student is less than the amount of Title IV disbursed, the difference in these amounts must be returned to the Title IV programs.

[7] Based on the aforementioned ninth, tenth, and eleventh arguments, VKSC asserts that liability for fourteen students (Student Nos. 1, 5, 8, 14, 18, 23, 32, 36, 43, 47, 50, 51, 69, and 75) should be eliminated.

[8] Unless specified otherwise, all regulatory citations are to the 2000 Code of Federal Regulations (C.F.R.).

To calculate the amount of Title IV funds to be returned, the school must first determine the percentage of Title IV funds that has been earned by the student and apply this percentage to the total amount of Title IV funds disbursed. The percentage of Title IV funds earned is equal to the percentage of the payment period or period of enrollment that the student completed as of the student's withdrawal date, if the withdrawal date occurs on or before completion of 60 percent of the clock-hours scheduled to be completed for the payment period or period of enrollment. 34 C.F.R. § 668.22(e)(2). The total amount of unearned Title IV funds is calculated by subtracting the amount of Title IV funds earned by the student from the amount that was disbursed as of the date the student withdrew. 34 C.F.R. § 668.22(e)(4). If a student withdraws after completing more than 60 percent of the clock-hours scheduled to be completed for the payment period or period of enrollment, the student is deemed to have earned 100 percent of the Title IV funds awarded for that period. 34 C.F.R. § 668.22(e)(2)(ii).

In performing the aforementioned calculations, a school like VKSC may treat Title IV funds for students who withdraw on either a payment period basis or a period of enrollment basis. 34 C.F.R. § 668.22(e)(5). A school must, however, be consistent in its use of either a payment period or period of enrollment for all return to Title IV calculations. 34 C.F.R. § 668.22(e)(5)(ii)(B).

To determine the percentage of the payment period or period of enrollment completed for a student enrolled in a clock-hour program, a school must divide the total number of clock-hours in the payment period or period of enrollment into the number of clock-hours either:

A. Actually completed by the student as of the student's withdrawal date or
B. Scheduled to be completed as of the student's withdrawal date, if the clock-hours completed in the period are not less than 70 percent of the hours that were scheduled to be completed by the student as of the student's withdrawal date.[9]

It is important to note, as VKSC confuses the two calculations in its brief, that the calculation of hours completed as of the student's withdrawal date as contemplated under 34 C.F.R. § 668.22(f) is merely a component of determining the percentage of Title IV funds earned by the student who has not completed more than 60 percent of the clock-hours in his or her program.[10] In its brief, FSA refers to the calculation performed under 34 C.F.R. § 668.22(f)(ii) as a "good attendance bonus" because students may, in some instances, be paid for more clock-hours than were actually completed if the student completed 70 percent of the clock-hours scheduled to be completed by the time the student withdrew. The "good attendance bonus" cannot be used to then conclude that the student actually completed more than 60 percent of the clock-hours in his or her program.

It is the responsibility of the school to return the lesser of (1) the total amount of unearned

[9] *See* 34 C.F.R. § 668.22(f).

[10] As previously indicated, a student who actually completes more than 60 percent of the clock-hours in his or her program is deemed to have earned 100 percent of the Title IV disbursed. *See* 34 C.F.R. § 668.22(e)(2)(ii)(B). Thus, the school would not have to calculate the specific amount of Title IV funds to be returned.

Title IV funds or (2) the amount equal to the total institutional charges[11] incurred by the student for the payment period or period of enrollment multiplied by the percentage of Title IV funds not earned by the student. 34 C.F.R. § 668.22(g)(1). After the school has allocated the funds it is responsible to return, it is the student's responsibility to return the remaining Title IV funds disbursed. To determine the student's share, subtract the amount of unearned Title IV funds the school is required to return from the total amount of unearned Title IV funds disbursed. 34 C.F.R. § 668.22(h)(2).

Issue No. 1

For five students, VKSC used what it identifies as "attempted clock-hours" in assessing the return to Title IV funds calculations. The tribunal notes that VKSC appears to use the phrase "attempted clock-hours" in lieu of "scheduled clock-hours".

Student No. 1

According to both FSA and VKSC, this student was enrolled in a 450 clock-hour payment period and completed 186.5 clock-hours as of her last date of attendance. VKSC contends that because this student completed 186.5 of 263 attempted clock-hours, which equals 71 percent, its use of the "good attendance bonus" in its calculation was correct. According to the school's attendance records, FSA states that 278 were scheduled to be completed at the time the student stopped attending; therefore the student only completed 67 percent of the scheduled clock-hours and the school was required to use the actual hours completed by the student as of the student's withdrawal date, which would have resulted in a return of $1,181 in Pell funds.

The record demonstrates that the number of hours scheduled to be completed as of the student's withdrawal date was 278 hours.[12] Student No. 1 actually completed less than 70 percent of the hours scheduled to be completed as of her withdrawal. Consequently, to determine the percentage of the payment period completed, VKSC was required to use the actual number of hours completed by the student. Therefore, VKSC remains liable for the $1,181 in Pell funds it should have returned for this student.

Student No. 8

According to both FSA and VKSC, this student completed 580 clock-hours as of her last date of attendance on April 28, 2000. VKSCU argues that because the student completed 580 clock-hours out of a scheduled 742 clock-hours, which equals 78 percent, its use of the "good attendance bonus" was correct. FSA states that when this student withdrew, VKSC had not yet implemented the then new return to Title IV calculations.[13] According to FSA, Student No. 8's

[11] For 34 C.F.R. § 668.22, institutional charges are tuition, fees, room and board (if applicable), and other educationally-related expenses assessed by the school. 34 C.F.R. § 668.22(g)(2).
[12] *See* ED Ex. 1.
[13] Schools were required to implement the new return to Title IV funds regulation by October 7, 2000, although a school could implement the regulations sooner. If implemented before October

refund was made under the prior regulation and is not, therefore, entitled to the "good attendance bonus" contemplated under the revised regulation. Under the prior regulation, the return calculation allowed a school to round the *pro rata* amount to be returned downward in 10 percent increments.[14]

Section 668.22 was revised in 1999.[15] VKSC did not implement the revised provisions of the regulation until October 7, 2000. The record demonstrates that the refund calculation for Student No. 8 should have been performed using the prior regulatory provision. As such, VKSC is not entitled to use the "good attendance bonus" to perform the return to Title IV calculation for this student. Therefore, VKSC remains liable for $520 it should have returned.

Student No. 32

According to FSA and VKSC, this student completed 69.88 percent of the clock-hours scheduled to be completed when the student withdrew.[16] VKSC argues that the 69.88 completion rate should be rounded up to 70 percent to qualify for the "good attendance bonus". FSA argues that there is no provision in the regulation allowing for the completion rate to be rounded upwards.

The return to Title IV funds calculation does not provide for the rounding up of percentages. *See* 34 C.F.R. § 668.22. Therefore, because Student No. 32's percentage falls below the 70 percent provision, the return to Title IV calculation must be performed using the number of actual clock-hours completed by the student. As a result, VKSC remains liable for the $163 in Pell funds it should have returned.

Student Nos. 43 and 77

FSA and VKSC agree that these two students completed more than 70 percent of the hours scheduled to be completed when they withdrew. VKSC argues that because these students completed more than 70 percent of their clock-hours, the school's calculations are correct, and the students were entitled to 100 percent of the Title IV funds disbursed. FSA concedes that these students are entitled to the "good attendance bonus", and this bonus was already included in its determination of the amount of Title IV funds to be returned. FSA states, however, that because these students actually completed less than 60 percent of their clock-hours, they are not entitled to earn 100 percent of the Title IV funds awarded.

FSA is correct in its assertions regarding these two students. VKSC apparently confuses

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7, 2000, the Secretary stated this regulatory provision must be implemented in its entirety. *See* 64 Fed. Reg. 59016 (November 1, 1999).

[14] *See* 34 C.F.R. § 668.22(c) (1999).

[15] *See* 64 Fed. Reg. 59016 (November 1, 1999).

[16] Although VKSC and FSA dispute the number of clock-hours completed as well as the number of clock-hours scheduled to be completed, both parties agree on the percentage of clock-hours scheduled to be completed.

and/or substitutes one component of the formula (i.e. the good attendance bonus) for calculating the percentage of the program completed as return of Title IV funds. Under 34 C.F.R. § 668.22, the full amount of Title IV funds earned is only equal to 100 percent of the Title IV funds awarded when the student completes more than 60 percent of the actual clock-hours. When a student attends less than 60 percent of the actual clock-hours, the school must determine the percentage of the program completed. Then, and only then, is the "good attendance bonus" factored in to determine the percentage of the program completed. Here, VKSC incorrectly states that meeting the 70 percent good attendance mark means the student actually attended more than 60 percent of the program and was thus, was entitled to receive 100 percent of the Title IV funds awarded. VKSC remains liable for the $1216 it should have returned for these two students.[17]

Issue No. 2

In its second argument, VKSC argues that disbursement of FFEL loan funds are determined by payment periods and thus, are not governed by the return of Title IV funds calculation laid out in 34 C.F.R. § 668.22. FSA argues that the school fails to explain how the disbursement rule for student loan funds would mitigate the specific the liability laid out for the students listed in the FPRD.

The tribunal finds no merit in VKSC's argument regarding the student loan disbursement rules. VKSC does not demonstrate how this rule would impact the calculations for students who withdrew prior to completing their programs. Disbursement of student loan funds under 34 C.F.R. § 668.4 is not pertinent to a determination on whether Title IV funds were properly returned for withdrawal students under 34 C.F.R. § 668.22.

Issue No. 3

VKSC next argues that mitigation principles should apply if students reenter and continue in their programs. According to the school, two students (Student Nos. 41 and 55) returned to school, completed their programs and are currently repaying their student loans. FSA contends that VKSC's argument is wrong because the regulation already specifies when a school may not consider a student to have withdrawn under the regulation and Student Nos. 41 and 55 do not fall within those parameters.

The tribunal finds VKSC's argument without merit. The regulation sets forth when and how return to Title IV calculations should be performed for withdrawal students. In accordance with 34 C.F.R. § 668.22(d), a school does not have to treat a student who takes an approved leave(s) of absence as a withdrawal. Beyond the leave of absence provision contained in this regulation, a school must treat a student's absence as a withdrawal and calculate what amount of Title IV funds should be returned.[18] A school is not permitted to simply retain Title IV funds

[17] As noted in Footnote No. 4 of this decision, the FPRD includes $461 in liability for Student No. 77 in the body of the document. FSA inadvertently left out the $461 for this student in its Attachment B to the FPRD and in its final calculation of liability.

[18] *See* 34 C.F.R. § 668.22(d)(3).

because the student may, at some future date, return to school. Although VKSC argues that Student Nos. 41 and 55 returned to school, it does not demonstrate whether these students were on approved leaves of absence consistent with the regulation and, as such, may not be treated as withdrawal students. Therefore, VKSC remains liable for the $1436 in FFEL liability for Student Nos. 41 and 55.

Issue No. 4

VKSC argues that it should only be required to pay the actual loss accruing to the Department for the FFEL funds at issue in this proceeding.[19] VKSC argues it is unfair that the school be required to return loan funds distributed to the student with no direct benefit to the school. According to FSA, the use of "actual loss" would be unfair because it would shift the responsibility to the student to repay loan funds that the school improperly retained and would, therefore, be prohibited under 34 C.F.R. § 668.22.

The estimated loss formula sometimes referred to as the actual loss formula, measures the estimated loss to the Department that has or will result from FFEL loans improperly certified by the school.[20] According to the formula's guidelines, the formula is not applicable when student refunds are due. By analogy, the formula would not be appropriate when the school retained FFEL loan funds that were not earned by a student. Moreover, when a student withdraws, the student is allowed to repay unearned loan funds under the existing loan repayment terms. 34 C.F.R. § 668.22(h)(3). A school is required to return all unearned loan and grant funds that were used to pay tuition or other institutional charges, and those unearned loan funds are then credited to reduce the student's loan debt. 34 C.F.R. § 668.22(g) and (i). Consequently, VKSC's argument that "actual loss" be used to reduce the liability owed by the school is rejected.

Issue No. 5

VKSC argues that its "total contract period", as laid out in the school's enrollment agreements with its students, should be used to determine the disbursement of FFEL loan funds.[21] As previously discussed, the return to Title IV regulation allows a school to consistently use either payment period or period of enrollment for making its calculations. Nowhere in the regulation does it say that a school may use its "total contract period". The tribunal also notes that VKSC did not demonstrate or explain how using its "total contract period" would mitigate the specific liabilities alleged in the FPRD for Student Nos. 41 and 55. Consequently, VKSC's argument that its "total contract period" be used to calculate the return of Title IV funds is rejected.

Issue No. 6

[19] VKSC again challenges the FFEL liability assessed for Student Nos. 41 and 55.
[20] *See In re Christian Brothers University*, Dkt. No. 96-4-SP, U.S. Dep't of Educ. (January 8, 1997) for a full discussion of the estimated loss formula.
[21] VKSC once more challenges the FFEL liability assessed for Student Nos. 41 and 55.

VKSC argues that it has corrected the payment periods it previously reported in its reimbursement requests and that these corrected payment periods should be used in lieu of the payment periods reported and documented in the student files. Specifically, VKSC challenges the liability for Student Nos. 18 and 52. For both students, VKSC states that the correct payment period is 450 clock-hours, which results in the school's refund calculations being correct. In support of its argument, VKSC submits a copy of a June 20, 2000 letter it sent to FSA's Kansas City regional office stating that the school is adopting a 900 clock-hour academic year beginning with the 2000-2001 academic year.[22]

FSA argues that the school used a 1050 clock-hour academic year for Student Nos. 18 and 52 despite its assertion that it switched to a 900 clock-hour academic year. FSA argues that because VKSC used a 1050 clock-hour period, as documented in its student files, this was the period upon which Title IV aid was awarded and disbursed. FSA asserts that VKSC now claims its academic year was only 900 clock-hours because every student who withdrew would have completed a larger percentage of the payment period, and thus, a smaller amount would consequently be owed by the school under the return to Title IV regulation.

The evidence submitted by VKSC does not demonstrate that it properly calculated the return of Title IV funds for the two students at issue. For Student No. 18, an October 22, 2001, reimbursement request indicates the student was approved for Title IV aid based on a 525 clock-hour payment period.[23] For Student No. 52, the student's contract and a March 30, 2001 reimbursement request both indicate that the student's academic year was 1050 clock-hours and the payment period was 525 clock-hours.[24] The evidence offered by VKSC, a copy of a letter it allegedly sent to FSA in 2000, is not credible. Moreover, VKSC's submission does not controvert the evidence identified in the FPRD. Title IV aid was awarded and disbursed to these students based on a 1050 clock-hour program. Consequently, VKSC remains liable for the Title IV funds it should have returned on behalf of Student Nos. 18 and 52.

Issue No. 7

VKSC argues that it made a sincere effort to follow the guidelines for using "actual institutional charges" instead of "funds disbursed" in its return to Title IV funds calculations and

[22] *See* Resp. Ex. 1.
[23] *See* April 13, 2004, FPRD submitted as an attachment to Respondent's appeal.
[24] *See id*.

it should be afforded "safe harbor"[25] because the Department did not establish its policy regarding these calculations until 2002, subsequent to VKSC's calculations. Based on this argument, VKSC contends that the liability for two students (Student Nos. 50 and 68) should be eliminated.

In determining the amount of Title IV funds to be returned, institutional charges are tuition, fees, room and board (if applicable), and other educationally-related expenses assessed by the school.[26] If a school chooses to calculate the treatment of Title IV aid on a payment period basis, but the school assesses its charges for a period that is longer than the payment period, the total institutional charges incurred by the student for the payment period is the greater of the prorated amount of institutional charges for the longer period or the amount of Title IV aid retained for institutional charges as of the student's withdrawal date.[27]

VKSC's assertion that the Department did not establish its policy on institutional charges until 2002 is baseless. The guidelines articulated above concerning the use of actual institutional charges in the return to Title IV funds calculation were finalized in November 1999. Schools were required to implement these changes on October 7, 2000.[28]

VKSC references the "safe harbor" doctrine contained in the tribunal's *Nettleton* decision. In *Nettleton*, the tribunal stated that in some instances, as specified by the Department, there should be no penalty for a school's actions if the school acted in a manner as instructed by the Department. This "safe harbor" doctrine is not applicable here. Section 668.22 details how to perform return to Title IV calculations and VKSC does not demonstrate that it received contrary guidance from the Department in how to perform its return to Title IV calculations. *See In re Tiger Welding Institute*, Dkt. No. 97-39-SP, U.S. Dep't of Educ. (July 2, 1998). Consequently, Respondent's argument that it should be afforded "safe harbor" is rejected.

Issue No. 8

VKSC argues that because some students were enrolled under an enrollment period contract and were not under a payment period contract, calculations should be based on award year. Specifically, VKSC states that the return to Title IV calculations for Student Nos. 2, 39, 41, 53, 76, and 79 should be based on award year because these students were enrolled prior to the school's adoption of the use of payment period to perform its calculations. FSA argues that VKSC was required to consistently use either period of enrollment or payment period to perform

[25] *See In re Nettleton Junior College*, Dkt. No. 93-29-SP, U.S. Dep't of Educ. (June 8, 1994) (*Nettleton*).
[26] *See* 34 C.F.R. § 668.22(g)(2).
[27] *See* 34 C.F.R. § 668.22(g)(3).
[28] The tribunal also notes that both students attended and later withdrew from the institution after October 7, 2000, the date by when VKSC was required to use actual institutional charges in its return to Title IV calculations.

the return to Title IV calculations. Although its enrollment contracts may specify some other term, FSA argues that VKSC must administer its programs in accordance with Title IV regulations.

The return to Title IV regulation clearly states that a school must consistently use either period of enrollment or payment period to perform its return to Title IV calculations. VKSC's argument that it is allowed to use some alternate period of time to perform its calculations is rejected. VKSC adopted the use of payment period to perform its return to Title IV calculations; therefore, it was required to consistently use payment period for all its calculations including those for the six students listed above. Additionally, VKSC does not indicate when it switched from period of enrollment to payment period for its students nor does it explain why a different period should be used for these particular students. The tribunal also notes that the enrollment contracts for four of the six students do, in fact, delineate payment periods.[29] Therefore, VKSC remains liable for the Title IV funds it failed to return for these six students.

Issue No. 9

Citing the regulation describing payment period, VKSC argues that an academic year should be determined by the number of hours a student is expected to complete during a set period of calendar time.[30] According to VKSC, FSA reviewers utilized an incorrect standard in defining academic year. As a result, VKSC contends that it was correct in its use of attempted hours instead of actual hours for refund calculations for certain students.[31] FSA argues that VKSC blurs the distinction between setting the number of clock-hours in the academic year and the standard for determining what percentage of Title IV funds must be returned for withdrawal students.

For a program that is measured in clock-hours, the first payment period for a student enrolled in a program that is equal or less than one academic year in length is the period of time in which the student completes the first half of the program.[32] The second payment period is the period of time in which the student completes the second half of the program.[33] For example, the first payment period for a student enrolled in a 900 clock-hour program, would divide the program into two payments periods of 450 clock-hours each. The regulation describing what constitutes a payment period cannot be used, however, to override a calculation of actual clock-hours completed by the time a student withdraws. A student enrolled in a 900 clock-hour program may fall behind schedule with his or her clock-hours and subsequently withdraw without having completed 450 clock-hours by the time he or she was originally scheduled to

[29] The enrollment contracts specify three payment periods for Student Nos. 2, 39, 76, and 79. *See* Resp. Ex. 2.
[30] In 2000, this regulation may be found at 34 C.F.R. § 668.4. In its brief, VKSC cites 34 C.F.R. § 668.3.
[31] VKSC does not specifically identify any students for whom it believes liability should be eliminated for this reason; rather the school offers this as a generalized argument.
[32] *See* 34 C.F.R. § 668.4(b).
[33] *See id*.

have completed these hours during the first payment period. Therefore, VKSC's argument is rejected.

Issue No. 10

VKSC argues that its enrollment contracts establish term periods for students. According to the school, its contracts reflect an enrollment period based on individual terms with an established start and end date, similar to any other term-based school. Thus, VKSC argues that it created a term-based program. FSA argues that VKSC cannot use its enrollment contracts to establish its programs as term-based, rather than clock-hour based. FSA asserts that that VKSC has been approved to participate in the Title IV programs as a clock-hour school and is similarly accredited by its accrediting agency.

VKSC's argument is baseless. The school participates in the Title IV programs as a clock-hour program. Consequently, the tribunal finds that it must follow the return to Title IV regulation as prescribed for a clock-hour school and not as prescribed for a term-based school.

Issue No. 11

VKSC's argues that the different rules and policies established by the Department for different types of schools (i.e. term versus clock-hour) and their students violate the school's and its students' equal protection rights. FSA argues that it beyond the scope of the tribunal's authority to declare the Department's regulations invalid.

The authority of the tribunal is clearly prescribed. Under 34 C.F.R. § 668.117(d), the tribunal is bound by all applicable statutes and regulations and may not waive or rule these laws invalid.[34] Consequently, the tribunal is prohibited from finding the return to Title IV regulation unconstitutional. Therefore, VKSC's equal protection argument regarding the differing standards for clock-hour and term-based schools is rejected.

CONCLUSION

The tribunal recognizes that VKSC has already repaid $17,869 to the Department while prosecuting its appeal of the FPRD. It is highly unusual for a school to prospectively pay the liability assessed in an FPRD before its appeal is adjudicated.

VKSC states that the school believed it was in the parties' best interest to return the Title IV funds and seek reimbursement if its appeal is successful. Despite VKSC's stated intention, the tribunal notes that it does not have the authority to order an offset of liabilities or otherwise compel FSA to pay a reimbursement request from a school.[35] If VKSC's appeal had resulted in a

[34] *See In re Jett College of Cosmetology*, Dkt. No. 95-21-SP, U.S. Dep't of Educ. (October 19, 1995).
[35] *See In re Modern Trend Beauty School*, Dkt. No. 98-109-SP, U.S. Dep't of Educ. (August 15, 1996).

reduction of the liability already paid, the tribunal would not have had the authority to order FSA to reimburse the school. Typically, the tribunal does not have jurisdiction over an FPRD's findings when there no corresponding liability attached.[36] The tribunal acknowledges that VKSC clearly indicated its intent to challenge the findings contained in the FPRD and that the school did not pay the entire amount of the liability assessed in the FPRD. Consequently, the tribunal finds that the unique facts of this case allow it to retain jurisdiction. The tribunal also finds that VKSC is liable for the total liability at issue in this proceeding.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Vernon's Kansas School of Cosmetology pay the $180 balance of the $18,049 liability owed to the U.S. Department of Education, and pay to the current holders of the FFEL loans the sum of $1,436.

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Judge Richard I. Slippen

Dated: January 11, 2006

[36] *See Denver Academy of Court Reporting*, Dkt. No. 05-26-SP, U.S. Dep't of Educ. (September 27, 2005).

SERVICE

A copy of the attached document was sent to the following:

Frederick J. Laurino
CEO
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