THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

COLLEGE AMERICA-DENVER,

Docket No. 06-24-SP
Federal Student Aid Proceeding

Respondent.

DECISION OF THE SECRETARY

This matter comes before me on appeal by the office of Federal Student Aid (FSA) of the Initial Decision issued by Judge Richard F. O'Hair on April 3, 2007. FSA requests that I reverse Judge O'Hair's finding that FSA has no authority to collect liabilities from Respondent "on the basis that it violated a Dear Colleague Letter," and that I confirm that Respondent must "repay [its] liability in full. For the reasons set forth below, I find that Respondent must return $8,561 to the Department for its failure to make timely refunds.

Students withdraw from school for a variety of reasons, but, when a student who has received Federal student financial assistance withdraws, the school must determine the amount of Federal aid, if any, that must be returned to the Federal government as unearned Federal funds.[1] The question presented by this case is whether Respondent failed to return to the government unearned Federal funds within the timeframe required by law. The timely return of Federal funds is important for two significant reasons: institutions are not entitled to keep Federal funds that are not earned, and a timely return of Federal funds allows access by other students in need to a necessarily limited supply of student financial assistance. In this respect, the answer to the question presented depends upon the date that triggers the commencement of the timeframe for returning unearned funds to the Federal government.

At least two dates are critical to the assessment of whether funds were timely returned to the Federal government when a student drops out or withdraws - the date the student withdrew or the institution became aware that the student withdrew, and the date when the time period expires for returning funds; the latter timeframe depends upon the former timeframe. Section 668.22(j)(2), of 34 C.F.R., establishes a timeframe for returning unearned Federal funds. For institutions required to take attendance, unearned Federal funds must be returned within 30 days of the *date* an institution has determined that a student has withdrawn or ceased attendance (this

[1] 20 U.S.C. § 1091b (Federal student financial assistance programs are 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. § 2751 *et seq.*).

is also known as the R2T4 date).[2] The date the institution makes the determination that a student has withdrawn or ceased attendance should be within 14 days of the last date of academic attendance as determined from an institution's attendance records (this is known as the Date of Determination or DoD).

Respondent argues that the timeframe used by FSA to determine Respondent's DoD is (1) unconstitutionally vague; (2) provides FSA with unfettered discretion to impose differing standards on institutions; and (3) is implemented under "sub-regulatory" guidance in a Dear Colleague letter that is not legally enforceable. Judge O'Hair agreed with Respondent that FSA is attempting to enforce a DoD timeframe that is not legally enforceable.

Opposing Respondent's view, FSA argues that using the end of the payment period as the R2T4 date for every instance in which a student withdraws from Respondent is not appropriate because Respondent is an institution required to take attendance. In this respect, according to FSA, the 30 days from the end of the payment period is a ceiling or outer limit for measuring a timely R2T4 date; the end of the payment period constitutes the last point in time that a timely refund of unearned Federal funds may be made for all institutions. In cases where an institution is required to record and document the attendance of its students, however, the 30-day period commences as soon as the institution becomes aware that the student ceased attendance. Recognizing that the point in time when an institution becomes aware a student ceased attendance is less than precise guidance on when to determine the DoD, FSA informed institutions required to take attendance, in a Dear Colleague letter, to make the DoD determination within 14 days of the student's last date of academic attendance. Mindful of this guidance and in keeping with the 30-day R2T4 timeframe, FSA determined that Respondent failed to timely return Federal funds.

Judge O'Hair concluded that FSA was without "authority to collect liabilities from Respondent" by application of the Department's ruling in *In re Baytown Technical School (Baytown),* Dkt. No. 91-40-SP, U.S. Dep't of Educ. (January 19, 1993), which rendered it improper to use policy statements to amend an "unambiguous set of time standards" found in existing regulations. The judge was convinced that the 14-day timeframe supported by FSA improperly shortened the 30-day timeframe in section 668.22(j)(2), which allows institutions to hold onto unearned Federal funds until the end of the payment period -- the maximum time allowed by the Department's regulations.[3] If correct, this view would allow institutions to hold onto unearned Federal funds for at least 60 days more than allowed under FSA's 14-day

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[2] For institutions required to take attendance, the date a student has withdrawn without actually notifying the institution is the date the institution "becomes aware that the student ceased attendance." 34 C.F.R. § 668.22(l)(3)(ii). Ostensibly, section 668.22(l)(3)(ii) creates a constructive notice timeframe for institutions in Respondent's circumstance.

[3] The 14-day rule adopted by FSA in a Dear Colleague letter (GEN-04-03) is intended to provide specific guidance on the practical meaning of 34 C.F.R. § 668.22(l)(3(ii), wherein the regulation prescribes that the DoD is the date an institution "becomes aware" that a student has ceased attendance of an institution required to take attendance.

timeframe.[4] I find reliance on the maximum timeframe not only at odds with the regulatory goal of returning unearned funds to the Federal government as soon as possible, but directly at odds with the statutory mandate that institutions required to take attendance return unearned Federal funds within a timeframe based on "attendance records."[5] Notably, this mandate applies in the absence of actual notice of a student's withdrawal.[6]

FSA's reliance on the 14-day timeframe as guidance on the DoD does not run afoul of *Baytown*. *Baytown* requires that FSA seek recovery of funds based upon a violation of a statutory provision or regulation. Here, FSA seeks recovery of funds based on the allegation that Respondent violated 34 C.F.R. § 668.22(j)(2) by failing to return Federal funds within 30 days of the date the institution determined that a student ceased attendance. The untimely refunds are the basis for the calculation of liability.[7] For example, in some instances, the institution used a DoD within the 14-day timeframe for a particular student; nonetheless, the institution was still liable because Federal funds were not returned within the 30-day timeframe of the applicable R2T4 date. Therefore, since there is no dispute that Respondent failed to comply with section 668.22(j)(2), the recovery of funds premised on an institution's regulatory violation of section 668.22(j)(2) is fully compatible with *Baytown*.[8]

FSA argues that the 14-day rule announced in the Dear Colleague letter is a reasonable interpretation of section 668.22(l)(3)(ii). As applied in this case, I agree that the 14-day timeframe is a reasonable, commonsense guideline for determining when Respondent should have made the DoD. The Dear Colleague letter means what it says; it serves to provide institutions with guidance on the Department's expectation that an institution required to take attendance would make the DoD within 14 days of a student's last date of academic attendance. Undoubtedly, an institution could overcome this expectation with applicable facts showing why two calendar weeks is insufficient time to make the DoD. Given that the appropriate timeframe may require a fact-intensive analysis of an institution's attendance record-keeping procedures, an institution's particular circumstances may render the Department's expectations set out in the Dear Colleague letter entirely implausible. More directly, the Dear Colleague letter does not

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[4] The maximum timeframe allows institutions to use up to 30 days at the end of the period of enrollment within which to make the determination that a student has withdrawn; thereafter, an institution may hold onto unearned Federal funds for up to an additional 30 days before returning the funds to the Federal government. Under the timeframe FSA seeks to apply to Respondent, unearned funds must be returned considerably sooner, if a student ceased attendance during an earlier point in time of the period of enrollment.

[5] 20 U.S.C. § 1091b(c)(1)(B) and 34 C.F.R. § 668.22(l)(3(ii). Judge O'Hair's holding leaves the Department with no basis to enforce section 668.22(l)(3(ii) and the statutory mandate is rendered superfluous. Under these provisions, there must be some reasonable basis to conclude what the DoD timeframe is and when it should apply to institutions. FSA's answer in this case is a 14-day timeframe applied to institutions required to take attendance.

[6] The regulations allow for exclusions, not applicable here, when students are determined to be on a leave of absence.

[7] FSA's calculation of liability is based on imputed interest and special allowances on unearned funds held beyond the time allowed.

[8] Respondent recasts its argument based on *Baytown* as a due process argument by urging that it "cannot be asked to repay any Title IV funds" because the Final Program Review Determination cited the wrong regulation. For the same reason noted above, Respondent is subject to liability. More directly, FSA identified the correct regulation during the proceedings, and Respondent's vigorous defense of its position throughout the proceedings undermines any notion that it was not on adequate notice of the allegations against it.

alter the fact that an institution may show that the 14-day timeframe is not reasonable under its given circumstance, and that a different timeframe renders it otherwise in compliance with section 668.22(l)(3)(ii). Of critical importance to a reasonable timeframe for the DoD is the statutory mandate that institutions, like Respondent, that are required to take attendance, make their determinations on the basis of "attendance records."[9]

As required, Respondent documented the last date of attendance of students who withdrew, even when the student failed to provide actual notice of withdrawal. As the record shows, Respondent made DoD determinations among a range of timeframes, including occasionally within a 14-day time period.[10] Consequently, there is no basis on the facts to determine that applying the 14-day timeframe is unreasonable or incompatible with Respondent's particular circumstances. As such, I find the 14 days a reasonable assessment of when Respondent should have determined that a student ceased attendance.

Respondent also argues that I should invoke my "plenary power" to void section 668.22(j) and section 668.22(k)(3)(ii) as unconstitutionally vague, and void enforcement of these regulations as a denial of equal protection. In Respondent's view, the requirements in sections 668.22(j) and 668.22(k)(3)(ii), respectively, that refunds be made "as soon as possible" and that the withdrawal date be "the date that the institution becomes aware that the student ceased attendance" are sufficiently vague as to lack clear guidance for institutions seeking to calculate and submit timely refunds. Similarly, Respondent takes the view that the distinction in section 668.22(b) between institutions that are required to take attendance and those that are not draws an impermissible inequality among the nation's postsecondary institutions. I do not agree.

First, the reach of my plenary power is not at issue here. At issue is whether Respondent must comply with duly promulgated regulations that are explicitly derived from unambiguous language in the governing Federal statute. It is axiomatic that agencies are bound by such regulations.[11] Congress drew the distinction between attendance-taking institutions and those that are not required to take attendance for refund purposes, and the Department is categorically bound to follow what Congress lays down in plain language.[12] As such, I find that Respondent failed to return to the government unearned Federal funds within the timeframe required by law.

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[9] 20 U.S.C. § 1091b(c)(1)(B).

[10] Judge O'Hair noted and the parties agree on appeal that there are no pertinent facts in dispute.

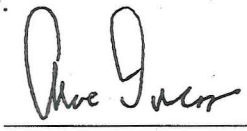
[11] *See, A.D. Transp. Express, Inc. v. United States, 290 F.3d 761, 766 (6th Cir. 2002)* ("When an agency promulgates regulations it is ... bound by those regulations."); *Ctr. for Auto Safety v. Dole, 828 F.2d 799, 806 (D.C. Cir. 1987)* (recognizing "the principle that a court will require an agency to follow the legal standards contained in its own regulations despite the fact that a statute has granted the agency discretion in the matter").

[12] By enacting 20 U.S.C. § 1091B(c), Congress made clear that the "day the student withdrew…for institutions required to take attendance, is determined by the institution from [] attendance records."

ORDER

ACCORDINGLY, the Initial Decision issued by Administrative Judge Richard F. O'Hair on April 3, 2007, is REVERSED and Respondent shall repay the U.S. Department of Education the sum of $8,561.

So ordered this 6th day of May 2009.



Arne Duncan

Washington, D.C.

SERVICE LIST

Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Glen Bogart, J.D.
1228 15th Avenue South
Birmingham, AL 35205

Steven Z. Finley, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-2110