THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

TECHNICAL CAREER INSTITUTE,

Respondent.

Docket No. 12-66-SP
Federal Student Aid Proceeding

DECISION OF THE SECRETARY

This matter comes before me on appeal by both Technical Career Institute (TCI) and the office of Federal Student Aid (FSA). The appeals arise from the December 16, 2014, Decision by Chief Administrative Judge Ernest C. Canellos (CAJ). The Decision addressed a September 28, 2012, Final Program Review Determination (FPRD) issued to TCI by FSA. Each party has appealed a different portion of the CAJ's Decision: FSA appealed the determination that TCI can offset its liability against other amounts; TCI appealed the determination regarding Title IV eligibility and Selective Service registration. I will address each party's appeal in turn.[1]

Based on the following analysis, I affirm as modified the CAJ's Decision.

I. Background

TCI is an institution of higher education in New York, New York offering courses of study leading to Associate degrees.[2] In 2008, FSA conducted a program review at TCI and ordered TCI to conduct two full file reviews: one review of the records for all students who unofficially withdrew during the 2007-2008 and 2008-2009 award years, and one review of all male Title IV recipients who had failed to register with the Selective Service.[3] After TCI provided the requested reviews, FSA issued the FPRD in 2012, assessing liability for erroneous distribution of Title IV funds.

On appeal, the CAJ considered each basis of liability separately. First, he considered a liability of $182,735.16 for miscalculated refunds based on erroneous withdrawal dates for students.[4] That amount of liability was based on TCI's recalculation, in conformance with the

[1] On the issue of applying an offset, FSA filed an appeal and TCI filed a reply brief. Citations to these briefs are to "FSA Appeal" and "TCI Reply," respectively. On the issue of Selective Service registration exemptions, TCI filed an appeal and FSA filed a reply brief. Citations to these briefs are to "TCI Appeal" and "FSA Reply," respectively.
[2] Decision, p. 1.
[3] *Id.*, pp. 1–2.
[4] *Id.*, pp. 2–3.

regulations, of withdrawal dates for students who unofficially withdrew.[5] Second, he considered liabilities for three categories of Selective Service exemptions which FSA found TCI failed to establish: $111,454.00 for the first exemption, $686,056.00 for the second, and $652.764.00 for the third.[6]

Next, I will consider each issue separately below in my analysis.

II. Analysis

A. Calculating Refunds for Withdrawn Students

When a recipient of Title IV student aid withdraws from an institution during a payment period, the institution must determine the amount of grant or loan money that the student earned as of the student's withdrawal date.[7] After determining the withdrawal date, the institution must determine the amount of Title IV funds earned by the student based on what percentage of the payment period the student completed.[8] The institution must then return the unearned percentage of Title IV funds.[9] Likewise, the institution may make a post-withdrawal disbursement to the student of any funds earned but not yet paid.[10]

When an institution is not required to take attendance, the institution must establish "the mid-point of the payment period or period of enrollment" as the date of withdrawal for students who withdraw without notifying the institution.[11] Alternatively, the school may use the last day of attendance at an academically related activity if the activity was properly documented—or, in other words, the last known day of attendance. In this case, TCI used its own absence policy, allowing up to 21 absences before a student would be automatically withdrawn.[12] Thus, TCI set each student's withdrawal date at 21 days after the student's last known day of attendance.

The CAJ found the parties in agreement that TCI's calculation—which essentially added on a 21-day grace period after the last known attendance date—did not comply with the regulatory framework for establishing a withdrawal date.[13] Therefore, the CAJ upheld the amount of $182,735.16 as the correct shortfall from TCI's erroneous calculations. However, the CAJ also noted that after correcting all refund calculations, TCI found it had "returned more Title IV funds than it would have if it utilized the correct withdrawal date." TCI found the difference was in the amount of $95,839.58.[14]

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[5] Final Audit Determination, p. 7.
[6] Decision, pp. 4–7.
[7] 34 C.F.R. § 668.22(a)(1).
[8] *Id.* § 668.22(e)(2)(i).
[9] *Id.* § 668.22(g). If it is a lesser amount, the institution must instead return an amount equal to the total institutional charges incurred by the student for the payment period multiplied by the percentage of title IV grant not earned by the student. *Id.* § 668.22(g)(1)(ii).
[10] Student Aid Handbook 2007-2008, p. 5-78.
[11] Decision, p. 3. An institution may be required to take attendance for a variety of reasons prescribed in the regulations, including when it is required to do so by an outside entity or when the institution self-imposes a requirement that its instructors take attendance. 34 C.F.R. § 668.22(b)(3).
[12] Decision, p. 3.
[13] *Id.*
[14] *Id.*

The CAJ cited a statutory provision governing Title IV program participation agreements which states that when an institution is entitled to receive grants or funds, but does not actually receive the funds, the institution can offset that amount against any sums owed by the institution to the Department.[15] Citing *In the Matter of Nettleton Junior College*, the CAJ held that TCI was entitled to offset its overpayments with underpayments. Accordingly, the CAJ credited it with a $95,839.58 offset,[16] setting the final liability at $86,895.58.[17] FSA appealed the CAJ's ruling on this issue.

In *Nettleton*, the presiding judge held that the HEA provides a "right of offset" to an institution to net "over-awards based on two payments" against "under-awards based on three payments" to recognize "the true financial effect of the two payment system versus the three payment system."[18] He specifically described the calculation as allowing an offset of "Title IV funds to which [the institution] was entitled but did not receive against any Title IV funds determined to be owed by the institution."[19]

In the case before me, FSA asserts that the institution obtained all the Title IV funds it was entitled to receive, and that it is required to refund some of those funds to the Department based on student withdrawals. Therefore, the argument goes, the offset provision does not apply and *Nettleton* is distinguishable.[20]

FSA argues that overawards and underawards are distinct matters that require distinct processes addressing each, citing *In the Matter of St. Petersburg* in support.[21] In *St. Petersburg*, FSA found that a school failed to perform required verification of student eligibility for Title IV funds.[22] The school chose to allow FSA to extrapolate its liability from the records sampled in the audit which resulted in $217,217 of liability.[23] The school argued that FSA should also extrapolate an offset from those records in the audit that reflected underawards.[24] The presiding judge disagreed, holding that underawards must be addressed in a separate process and could not be offset against overawards. Mechanically, the school would need to disburse the additional money to the student and then request reimbursement from the Department.[25] The judge in *St. Petersburg* held further that refusing to allow an offset in those circumstances did not result in a windfall for the Department.[26]

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[15] 20 U.S.C. § 1094(c)(7).
[16] *Id.*; *In the Matter of Nettleton Junior College*, Dkt. No. 93-29-SP, U.S. Dep't of Educ. (June 8, 1994).
[17] Decision, p. 3.
[18] *Nettleton*. The regulations generally describe a two payment system for each half of a program which is either measured in clock hours or does not have an academic term. *See* 34 C.F.R. § 668.4(b)-(c). However, for programs measured in credit hours which use standard terms or nonstandard terms of substantially equal length, the payment period is the academic term, e.g. each semester, trimester, or quarter. *Id.* § 668.4(a).
[19] Decision, p. 5.
[20] FSA Appeal, p. 5.
[21] *In the Matter of St. Petersburg College*, Dkt. No. 08-19-SP, U.S. Dep't of Educ. (July 9, 2010), p. 5.
[22] *Id.*, p. 2.
[23] *Id.*
[24] *Id.*, pp. 3–4.
[25] *Id.*, pp. 4, 5.
[26] *Id.*

FSA also cites *In the Matter of Fisk* as controlling authority regarding how to remedy underawards. In *Fisk*, FSA found a school liable to repay $294,000 for, among other things, overawards given to students.[27] The school argued that $28,539 of Pell Grant overawards "should be offset by the Pell Grant underawards to other students."[28] Rejecting that argument, the presiding judge found that the IHE "could have awarded" the funds to students but did not.[29] Because the funds "were never provided to students, Fisk is not entitled to offset them under 20 U.S.C. § 1094(c)(7)."[30] Consistent with *St. Petersburg, Fisk* reinforces the notion that underawards must be remedied by the IHE first disbursing the previously unawarded funds to the student and then requesting reimbursement from the Department for those funds.

FSA argues further that it is not possible to administratively complete the offsets that TCI seeks. To complete the offsets, the Department would have to "obtain the 'excess' returns from some of the students" to pay lenders for Federal Family Education Loans initiated outside the Department.[31] FSA also asserts it would be impossibly burdensome for the Department to adjust the records for students who received Pell Grants and Federal Direct Loans.[32]

Finally, FSA disputes that the underawards create a windfall for the Department here. The liability asserted in the FPRD is allocated per each student's account and cannot be interchanged. FSA considers it "patently unfair" to increase the student loan debts of certain students, including students who already paid off their loans, almost ten years later because of TCI's calculations.[33] The increases would also affect students' lifetime cumulative Pell awards and could affect their Pell Grant eligibility.[34]

TCI responds that its underawards are instances where it "refunded more Title IV funds than required" or "returned too much money on behalf of certain students."[35] TCI also asserts that in this case it "seeks offset as to the same individual students for whom TCI returned too much money."[36] TCI also counters that it should not be unduly burdened for willfully instigating this controversy, because its original calculations were based on a good faith understanding of the applicable regulations.[37] TCI supports the CAJ's reliance on *Nettleton*, arguing that FSA's "retroactive application of a Title IV return recalculation" in this case is similar to that in *Nettleton*.[38]

TCI also argues that *In the Matter of Edmonson* stands for the proposition that where an institutional error "saved federal money," an offset should be applied.[39] TCI questions why administratively managing the offset would create an insurmountable burden for the Department

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[27] *In the Matter of Fisk University*, Dkt. No. 94-216-SP, U.S. Dep't of Educ. (Oct. 5, 1995).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] FSA Appeal, pp. 6–7.
[32] *Id.*, p. 7.
[33] *Id.*, p. 8.
[34] *Id.*, p. 9.
[35] TCI Reply, pp. 5, 7.
[36] *Id.*, p. 9.
[37] *Id.*, pp. 2–3.
[38] *Id.*, p. 7.
[39] *Id.*

absent any specific evidence of the burden.[40] Finally, TCI argues that the Department failed to cite specific students who would be harmed by the imposition of an offset, whereas clear harm would befall TCI if no offset is given.[41]

After reviewing the authority cited by the parties and the evidence in the record, I find that because underawards and overawards are distinct concepts, they need not be aggregated across all students to create an offset to liability. Underawards are funds that a student *could have* properly received but *did not*, while overawards are funds that a student *did receive*, albeit improperly.[42] To be sure, underawards to an individual student can offset overawards to that same student.[43] However, an institution's aggregate underawards do not offset its aggregate overawards across all students.[44] An institution is liable to reimburse the Department for the total amount of overawards.[45] If the remedy is available to it, an institution may address underawards by first paying student accounts the unawarded funds and then applying for reimbursement from the Department.[46] Remedying underawards is a separate and distinct process from repaying overawards. The argument that an underaward should create an offset because it "saved federal money" conflicts with the existence of a process to address underawards by making payments to student accounts.

Nettleton is distinguishable from the case before me. In *Nettleton*, FSA required the institution to retroactively impose a three payment system where it had previously disbursed Title IV funds in a two payment system.[47] In this case, FSA required TCI to recalculate individual students' withdrawal dates to comply with the regulations. Therefore, TCI is not attempting to "achieve the true financial effect of the two payment system versus the three payment system" as in *Nettleton*. The issue is whether students received the correct amount of Title IV funds. The decisions in *Fisk* and *St. Petersburg,* both of which were decided after Nettleton, are controlling for the issues in the case before me.

Although TCI claims both that it actually disbursed "underaward" funds to student accounts and that it seeks to offset underawards against overawards within the same individual student accounts,[48] I find that TCI has not provided evidence establishing that to be true. Therefore, it does not qualify for any offsets in light of the holdings in *Fisk* and *St. Petersburg*.[49] TCI is not entitled to an offset of its liability here. Therefore, I will amend the CAJ's Decision to remove the offset and reinstate the full liability of $182,735.16.

I next turn to the issue of Title IV eligibility based on Selective Service registration.

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[40] *Id.*, pp. 11–12.
[41] *Id.*, pp. 12–14.
[42] *St. Petersburg*, p. 3.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Nettleton.*
[48] TCI Reply, p. 9; TCI Request for Appeal of FPRD (Nov. 13, 2012), p. 2.
[49] Also, it is not practical to impose a remedy that would burden individual student accounts years after the students withdrew from school.

B. Selective Service Registration and Title IV Eligibility

One requirement for Title IV eligibility for male students is to establish that they registered with the Selective Service.[50] If a student has not registered, the institution may nonetheless find a student eligible for Title IV aid if the student falls within one of several exemptions to the general rule.[51]

In its file review, TCI flagged 303 students for not registering with the Selective Service to qualify for Title IV in the two years at issue.[52] TCI and FSA disagreed on how many of those students' issues had been resolved by TCI. FSA ultimately concluded that TCI erroneously provided Title IV aid to 70 students who neither registered with Selective Service nor demonstrated an exemption from registration.[53]

The CAJ considered three categories of exemption that are possible, that TCI students allegedly did not qualify for: 1) students who entered the United States on a valid non-immigrant visa and remained in the United States on that visa until their 26th birthdays; 2) students who submitted clear and unambiguous evidence that they were over 26, and between ages 18 and 26 did not knowingly and willfully fail to register; and 3) students who entered the United States after their 26th birthdays, evidenced by either an entry date stamp on a passport or a letter from the U.S. Citizenship and Immigration Service.[54]

The CAJ considered the evidence presented by TCI. Ultimately, he found all four students who attempted to qualify based on the first exemption to be ineligible, resulting in $111,454.00 in liability to the Department.[55] He found 15 of 31 students who attempted to qualify under the second exemption to be ineligible, resulting in $266,356.00 of liability.[56] He found all 32 students who attempted to qualify under the third exemption to be ineligible, resulting in $652,764.00 of liability.[57] TCI appealed the CAJ's ruling on these Selective Service exemptions.

In a program review, FSA bears the burden of establishing a prima facie case that an institution is not in compliance with the requirements of Title IV. FSA creates a case by first conducting an audit of a sample of an institution's records. Then, if FSA finds errors, FSA may order the institution to conduct a complete audit of its records and respond to FSA's initial findings of errors. If FSA is not satisfied that the institution's responses refute the initial findings, FSA will issue an FPRD assessing liability. The institution may appeal, but the FPRD

[50] 34 C.F.R. § 668.37(a).
[51] *Id.* § 668.37(d), (e).
[52] Decision, p. 4.
[53] *Id.* FSA found three of these students exempt during the briefing of the case before the CAJ, thus reducing the number of students at issue to 67. *Id.*, n. 3.
[54] *Id.*, pp. 4–7.
[55] *Id.*, p. 4.
[56] *Id.*, pp. 5–6.
[57] *Id.*, pp. 6–7.

constitutes a prima facie case, and the institution bears the burden of demonstrating that it complied with the requirements of Title IV.[58]

In this case, FSA established a prima facie case finding that TCI failed to establish, through sufficient evidence, that it properly distributed Title IV funds to students who claimed three categories of Selective Service registration exemptions. I will consider each exemption, and TCI's attempt to refute the prima facie case, in turn.

First, TCI claimed four students were exempt because three entered the United States on valid non-immigrant visas and remained in the United States on those visas until their 26th birthdays, while the fourth possessed a request for political asylum.[59] TCI claims it adequately established this exemption by providing to FSA certificates of naturalization and the request for political asylum.[60] Because these students had to satisfy Selective Service registration requirements to obtain these documents, TCI argues it properly relied on them to establish their Title IV eligibility.[61] Furthermore, TCI accuses FSA and the CAJ of attempting to retroactively enforce sub-regulatory guidance published well after the events leading to this appeal.[62]

FSA responds that the certificates of naturalization are inadequate evidence because failure to register with Selective Service is not a permanent bar to obtaining a certificate of naturalization. Thus, FSA argues, while satisfying Selective Service registration is a general requirement for obtaining a certificate, failing to register can be remedied for purposes of obtaining a certificate. Therefore, possession of a certificate is not conclusive evidence that the student satisfied the Selective Service registration requirements. Likewise, FSA asserts that the request for political asylum "does not establish that the student was here on a valid visa at any point."[63] The CAJ agreed, holding "[i]t is abundantly clear that these documents fail to establish that any of the four students were in the United States on valid non-immigrant visas until their 26th birthdays so as to excuse their failure to register."[64]

I agree with FSA and the CAJ. I find that FSA's refusal to accept the documentation provided by TCI is reasonable. Possessing a non-immigrant visa on one's 26th birthday is not a necessary criterion for obtaining a naturalization certificate.[65] I find that FSA's refusal to accept the documentation provided by TCI is reasonable. Therefore, these certificates are not conclusive evidence that the students had non-immigrant visas through their 26th birthdays. I find no evidence that a request for political asylum would likewise be conclusive evidence,

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[58] *See, e.g., In the Matter of Martin University*, Dkt. No. 13-10-SP, U.S. Dep't of Educ. (Nov. 6, 2013), p. 3; *In the Matter of University of Texas at Tyler*, Dkt. No. 96-63-SP, U.S. Dep't of Educ. (Jan. 28, 1997) ("Once [FSA] has established a prima facie case, the burden then falls upon the institution to prove that the expenditures questioned in the FPRD were proper and that the school complied with program requirements.").
[59] *See* 2009-2010 FSA Handbook (Volume 1) at 1-59 to 1-61.
[60] TCI Appeal, p. 3.
[61] *Id.*, pp. 5–6.
[62] *Id.*, p. 5.
[63] FSA Reply, p. 6.
[64] Decision, p. 4.
[65] TCI has provided guidance about naturalization from the former INS. The guidance specifically states that "[f]ailure to register for Selective Service is not a permanent bar to naturalization." TCI Appeal, Attachment F, p. 2.

because seekers of political asylum in the appropriate age range are required to register for Selective Service.[66]

Second, TCI claimed exemptions for 31 students based on their purported submission of clear and unambiguous evidence that they were over 26, and between ages 18 and 26 did not knowingly and willfully fail to register.[67] The CAJ found that 16 students to whom the Selective Service did not send registration notices satisfied the exemption, particularly because these 16 students provided signed statements attesting to Selective Service's lack of notice to them. Regarding the other 15 students, the CAJ found that they failed to qualify for the exemption, noting that TCI failed to "exhaust all reasonable avenues of inquiry prior to excusing the students' non-registry."[68]

TCI argues that it needed only to rely on evidence that was "relevant and credible" to establish that the preponderance of the evidence supported its conclusion that students did not knowingly and willfully fail to register.[69] TCI argues the CAJ erroneously held that it had to exhaust all reasonable avenues of inquiry seeking evidence to support its decision, specifically because TCI was barred from denying a student access to Title IV aid if the *student* showed "by a preponderance of the evidence that [his] failure . . . to register was not a knowing and willful failure to register."[70] TCI asserts that its personal interviews with these 15 students constituted sufficient evidence to establish their eligibility for Title IV.[71]

FSA does not maintain its dispute regarding the 16 students who qualified for an exemption. Regarding the remaining 15, FSA asserts that the CAJ did not impose an overly burdensome evidentiary standard, but expressly used the appropriate preponderance standard.[72] FSA asserts the CAJ's reference to exhausting avenues of inquiry was merely intended to note that TCI failed to submit obtainable evidence that might have satisfied the preponderance standard.[73]

The underlying burden of proof on this matter first lies with the student. An institution may accept the evidence offered by the student and provide aid or reject the evidence and deny aid. Where the institution accepts the evidence and provides aid, the institution must be able to demonstrate to the Department that its analysis is adequately supported by evidence. For instance, the exemption requires a student to provide the institution "an advisory opinion from the Selective Service System that does not dispute the student's claim that he did not knowingly and willfully fail to register."[74]

I agree with TCI that the standard is not whether it exhausted all relevant avenues of inquiry. Nevertheless, the burden remained with TCI to establish by a preponderance of the

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[66] Selective Service System, Who Must Register, https://www.sss.gov/Registration-Info/Who-Registration.
[67] 34 C.F.R. § 668.37(d)(2)(i).
[68] Decision, p. 6.
[69] TCI Appeal, p. 12.
[70] *Id.*, quoting 50 U.S.C. § 462(g).
[71] *Id.*, pp. 13–14.
[72] FSA Reply, p. 9.
[73] *Id.*
[74] 34 C.F.R. § 668.37(e)(1).

evidence that the 15 students in question did not knowingly and willfully fail to register. The CAJ found the evidence proffered by TCI insufficient to make this showing. For example, some students lacked the required letters from Selective Service, some failed to sign their statements, and some made statements that were not corroborated by any documentary evidence in their records.[75] I find no reason to overturn the CAJ's weighing of this evidence. Sworn statements constitute evidence, but alone do not necessarily satisfy the preponderance standard in the absence of any other evidence. I find it appropriate to uphold the CAJ's ruling that these 15 students did not qualify.

Third, TCI claimed exemptions for students who entered the United States after their 26th birthdays, evidenced by either an entry date stamp on a passport or a letter from the U.S. Citizenship and Immigration Service. TCI asserts it provided sufficient evidence in the form of the students' green cards.[76] TCI argues "a green card issued after the student's 26th birthday bolsters and supports the student's claim that he was not present in the United States as a lawful permanent resident prior to his 26th birthday."[77] TCI especially asserts this is the case when coupled with interviews and sworn statements from the students, which the CAJ stated were "strong evidence" with regard to the first category of exemptions.

FSA responds that green cards "only provide the date of issuance, not the date the individual entered the U.S."[78] Because the date of entry into the country is the significant factor that must be accounted for in this exemption, the green cards do not themselves establish that the students qualified.[79] The CAJ agreed and found that these students did not qualify for an exemption.

I agree with FSA and the CAJ. Without evidence showing the student's date of entry into the United States, TCI cannot establish qualification for the third category of exemptions. The exemption requires that the student entered the United States after his 26th birthday. The date of entry is of paramount importance to this analysis. Because the students' green cards do not contain this information, they are insufficient evidence on their own. TCI mischaracterizes the CAJ's statement about sworn statements being strong evidence. The CAJ stated that sworn statements are strong evidence regarding the issue of whether a student willfully and knowingly failed to register for Selective Service. The third category of exemptions has nothing to do with a student's state of mind. The sworn statements by students do not suffice as evidence to demonstrate when the students entered the United States, so I will uphold the CAJ's ruling on this issue.

Based on the above analysis, I affirm the CAJ's ruling on Title IV eligibility with regard to Selective Service registration in its entirety.

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[75] Decision, pp. 5–6.
[76] TCI Appeal, p. 10.
[77] *Id.*, pp. 10–11.
[78] FSA Reply, p. 10.
[79] *Id.*, pp. 10–11.

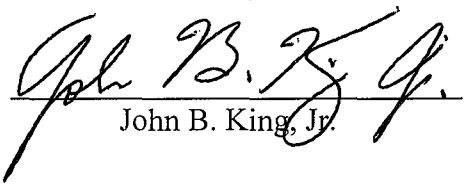
III. Conclusion

After reviewing the administrative record and arguments of the parties, I find that FSA correctly established TCI's liability with regard to overawards. I also agree with FSA that TCI is not entitled to an offset of its liability for overawards. Therefore, I will modify the CAJ's Decision to remove the offset, and reinstate the full liability of $182,735.16. I also affirm the CAJ's analysis of TCI's liability stemming from Selective Service registration: $111,454.00, $266,356.00, and $652.764.00 respectively for the first, second and third categories of registration failure.

ORDER

ACCORDINGLY, the Decision by Chief Administrative Judge Ernest Canellos is HEREBY AFFIRMED AS MODIFIED, as described above.

So ordered this 29th day of September 2016.



John B. King, Jr.

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