



THE SECRETARY OF EDUCATION  
WASHINGTON, DC 20202

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In the matter of

**KEVOSNIK SCHOOL OF HAIR DESIGN,**

Respondent.

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**Docket No. 13-04-SP**

Federal Student Aid Proceeding

**DECISION OF THE SECRETARY**

This matter comes before me on appeal by the KeVosNik School of Hair Design (KSHD) of the May 28, 2014, Decision by Administrative Judge Richard F. O’Hair (AJ).<sup>1</sup> The Decision addressed a January 13, 2013, Final Program Review Determination (FPRD) issued to KSHD by the office of Federal Student Aid (FSA). The sole issue KSHD has appealed to me is the AJ’s ruling on Finding One of the FPRD. In Finding One, FSA stated that KSHD miscalculated the number of clock hours completed by six students and distributed excess Pell Grant funds to them. Therefore, FSA found KSHD liable to the Department to repay \$13,513. On appeal, the AJ affirmed FSA’s Finding One as modified in its brief.<sup>2</sup>

Based on the following analysis, I affirm the AJ’s Decision.

I. Background

A. Educational Programs Measured in Clock Hours

Under Department regulations implementing Title IV of the Higher Education Act at 34 C.F.R. § 668.8, educational programs must meet a minimum number of either clock hours or credit hours to be eligible for participation in Title IV student aid.<sup>3</sup> KSHD’s cosmetology program at issue in this case is measured in clock hours.<sup>4</sup>

The regulatory definition of a “clock hour” is a period of time consisting of 50–60 minutes of class or shop training “in a 60-minute period.”<sup>5</sup> The FSA Handbook clarifies that a “clock hour is based on an actual hour of attendance (though each hour may include a 10-minute

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<sup>1</sup> The AJ acted as the hearing official assigned under 34 C.F.R. § 668.114(a).

<sup>2</sup> As discussed herein, FSA reduced its finding of liability to \$13,347.

<sup>3</sup> 34 C.F.R. §§ 600.2, 668.8, Federal Student Aid Handbook 2010-2011, p. 1-4.

<sup>4</sup> Georgia’s Board of Cosmetology does not specifically require cosmetology programs to be described in clock hours. State rules generally provide that 1 credit hour = 1 clock hour for cosmetology programs in the state of Georgia. GA. COMP. R. & REGS. 130-3 (2016).

<sup>5</sup> 34 C.F.R. § 600.2, *clock hour*.

break).”<sup>6</sup> The Secretary has previously held that an institution may not determine a day’s clock hours by adding the number of minutes of instruction to the number of minutes of breaks and dividing by 60.<sup>7</sup> Rather, each clock hour must be contained within a discrete 60-minute period.<sup>8</sup>

In the context of this legal framework, I now turn to FSA’s review of KSHD’s program.

## B. FSA’s Review and Findings

KSHD is an institution in Atlanta, Georgia offering a 1,500 clock hour cosmetology program.<sup>9</sup> FSA conducted a file review of KSHD’s records in March 2012.<sup>10</sup> I will limit the discussion of FSA’s review process to the facts relevant to the issue on appeal: FSA’s Finding One. In the Program Review Report, FSA recited the definition of a clock hour.<sup>11</sup> FSA then stated that KSHD had miscalculated the clock hours of its program based on several break periods required by KSHD’s program guide.<sup>12</sup>

In that guide, KSHD described its full time program as running for 50 weeks, from 9:00 a.m. to 4:30 p.m., Monday through Thursday, with a ten-minute morning break, 15-minute afternoon break, and a 30-minute lunch period.<sup>13</sup> KSHD described this program as having 7.5 clock hours per day, for a program total of 1,500 clock hours.<sup>14</sup> During the program review, FSA added together the described break periods to conclude that each day of instruction lacked 55 minutes of its stated clock hour time.<sup>15</sup> Subtracting 55 minutes from each day of instruction, FSA concluded that KSHD’s program was only a 1,320 clock hour program.<sup>16</sup> Thus, FSA required KSHD to conduct a full file review, to remove 180 clock hours from each student’s attendance, and engage an independent auditor to determine the amount of money owed to the Department for overpayment of Pell Grant funds.<sup>17</sup>

In response, KSHD asserted that FSA was using an erroneous definition of a clock hour.<sup>18</sup> Nevertheless, KSHD provided the audit of its records as FSA requested, including a figure of \$13,513 as the Pell Grant overpayment using the methodology required by FSA in the program review report.<sup>19</sup>

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<sup>6</sup> Federal Student Aid Handbook 2010-2011, p. 2-27.

<sup>7</sup> *In the Matter of Instituto de Education Universal*, Dkt. Nos. 96-28-ST, 96-93-SP, 96-103-SA, U.S. Dep’t of Educ. (Decision of the Secretary) (Oct. 28, 1997), pp. 4-5, *aff’d Instituto De Education Universal, Inc. v. U.S. Dep’t of Educ.*, 341 F. Supp. 2d 74 (D.P.R. 2004).

<sup>8</sup> *Id.*

<sup>9</sup> Brief of Federal Student Aid (FSA Hearing Brief), ED Ex. 3-9.

<sup>10</sup> *Id.* at 1-8.

<sup>11</sup> *Id.* at 2-5.

<sup>12</sup> *Id.*

<sup>13</sup> These are the lengths of time FSA cited. The KSHD catalogue inconsistently describes its breaks. On page nine, the catalogue lists ten minute breaks in both the morning and evening and a 30 minute lunch for full time students. On page 12, the catalogue describes only a 15 minute break in the morning and a 30 minute lunch for full time students. ED Ex. 3-9, 3-12.

<sup>14</sup> *Id.* at 3-9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2-5 to 2-6.

<sup>18</sup> *Id.* at 1-10.

<sup>19</sup> *Id.*

FSA subsequently issued the FPRD. In the FPRD, FSA acknowledged that KSHD's response focused on the "definition of a clock hour," but stated that "[t]his finding has nothing to do with the definition of a clock hour," while finding that the school failed to correctly calculate the clock hours in question.<sup>20</sup> FSA accepted KSHD's overpayment figure and held KSHD liable to repay \$13,513.<sup>21</sup> KSHD then appealed the FPRD, and the AJ reviewed it.

In his decision, the AJ restated the background laid out herein and characterized the arguments of each party. Of particular note, on appeal counsel for FSA stated that FSA had modified its position from what it originally stated in the FPRD.<sup>22</sup> Rather than finding KSHD liable for overstating the clock hours each day by 55 minutes, FSA found each day's overstatement to be only 25 minutes.<sup>23</sup> FSA indicated that ten minutes of the morning break, ten minutes of the lunch break, and the entire ten-minute afternoon break each fit alongside 50 minutes of instruction within discrete 60-minute clock hour periods.<sup>24</sup>

The AJ concluded that KSHD "offered no evidence sufficient to rebut the liabilities assessed in Finding[] 1," as adjusted by FSA during the appeal.<sup>25</sup> His analysis of the facts comprised his conclusion that "KSHD misconstrued the definition of a 'clock hour'" and his determination that no evidence existed that KSHD students often skipped the breaks listed in the program guide.<sup>26</sup> Therefore, the AJ upheld the entire amount of liability.<sup>27</sup> KSHD then filed the current appeal.

I now turn to the arguments of the parties in the appeal before me.

### C. Arguments of the Parties

On appeal, KSHD again argues that FSA's interpretation of the definition of a clock hour is erroneous and without precedent.<sup>28</sup> The representative of KSHD indicates that in his previous experience, including employment with the Department, FSA has not calculated other programs' clock hours the way it is calculating KSHD's clock hours.<sup>29</sup> Rather, KSHD argues its students should be attributed 7.5 clock hours per day if they signed in at 9:00 a.m. and signed out at 4:30 p.m., regardless of their actual schedules during the day.<sup>30</sup> KSHD argues that this calculation of clock hours is approved by its accreditor, the National Accrediting Commission of Career Arts and Sciences, and the Georgia State board.<sup>31</sup> KSHD argues that FSA's definition of a clock hour "is not an interpretation of regulation and no other authority is mentioned."<sup>32</sup> KSHD also

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Decision, pp. 3-4, n. 1.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, p. 6.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> KSHD Brief, unpaginated (unp.) 2, 3.

<sup>29</sup> *Id.*, unp. 2.

<sup>30</sup> *Id.*, unp. 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* unp. 2.

questions whether the rule from *In the Matter of Instituto de Education Universal* applied to the 2010-2011 and 2011-2012 award years.<sup>33</sup> Finally, KSHD argues that FSA failed to establish that its interpretation in this case is based on any legitimate authority, so FSA still bears the burden of persuasion, not KSHD.<sup>34</sup>

FSA repeats the AJ's conclusion that KSHD bore the burden of persuasion before OHA and failed to meet that burden.<sup>35</sup> FSA also asserts its revised calculation of clock hours was correct, finding 25 minutes of time should have been excluded per day.<sup>36</sup>

Having considered the law, facts and arguments of the parties, I now turn to my analysis.

## II. Analysis

### A. Adequacy of Notice

The first issue I must address is whether the AJ properly allowed FSA to change its position on Finding One during the course of the hearing process. A departmental decision must provide proper notice of the issues so the respondent may attempt to rebut the Department's position during subsequent proceedings.<sup>37</sup> Proper notice, along with a meaningful opportunity to be heard, is a basic requirement of procedural due process.<sup>38</sup> Due process is flexible and calls for such procedural protections as a particular situation demands.<sup>39</sup> Due process in an administrative proceeding is not the same as in a judicial proceeding, because administrative and judicial proceedings are inherently different.<sup>40</sup> Each administrative proceeding must be carefully assessed to determine what process is due based on the circumstances.<sup>41</sup>

FSA originally asserted in the FPRD that KSHD overstated its clock hours by 55 minutes per day. FSA's method for calculating clock hours is unclear in the FPRD. It appears that FSA calculated KSHD's clock hours by subtracting the total minutes of scheduled breaks from the total minutes in the daily schedule. KSHD responded to this initial finding. Although that response does not appear in the record, according to FSA, KSHD challenged FSA's definition of a clock hour. FSA's method of calculating a clock hour was wrong, but it nevertheless dealt with KSHD's response by asserting that its finding had nothing to do with the definition of a clock hour. FSA imposed liability based on the erroneous calculation.

Before the AJ, KSHD again argued that FSA incorrectly calculated its clock hours. In its brief, FSA's counsel changed Finding One through two short statements in footnotes. In footnote one on page one, FSA stated that "the liability for Finding 1 has been revised as

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<sup>33</sup> *Id.* unpag. 3.

<sup>34</sup> *Id.*

<sup>35</sup> Appeal Response of Federal Student Aid (FSA Appeal Brief), pp. 3, 6–7.

<sup>36</sup> *Id.*, pp. 5–6.

<sup>37</sup> See *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1012 (D.C. Cir. 2005).

<sup>38</sup> *Sharma v. DEA*, 511 Fed. Appx. 898, 902 (11th Cir. 2013); see *Bolton v. Potter*, 198 Fed. Appx. 914, 917 (11th Cir. 2006).

<sup>39</sup> *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

outlined below.”<sup>42</sup> In footnote three on page five, FSA stated, “the Department subtracted 55 minutes per day from the students’ totals. The correct reduction should have been 25 minutes. The liabilities have been adjusted to reflect that change.”<sup>43</sup> FSA recalculated the liability to be \$13,347. The footnote referenced an exhibit, a one page chart reflecting a reduction of the ineligible break time from 55 minutes to 25 minutes per day.<sup>44</sup>

The AJ did not consider whether FSA’s modification of its position was proper. He only concluded that KSHD failed to rebut Finding One “as adjusted accordingly in the FSA brief.”<sup>45</sup> Because of this failure to rebut the finding, the AJ upheld it.

The question here is whether OHA denied KSHD due process because the FPRD did not provide sufficient notice to allow KSHD to attempt to rebut Finding One. KSHD’s argument before the AJ focused primarily on whether institutions can include any “break” time in their calculations of clock hours. This argument seeks to refute FSA’s position in the FPRD that all 55 minutes of break time must be discounted which, as discussed above, was erroneous. However, in this appeal, KSHD continues to argue that the proper method for calculating clock hours is to add up the total minutes of instruction and minutes of break time and divide that figure by 60—a method at odds with prior Secretarial decisions.

I conclude that KSHD has sufficient notice of the facts and findings at issue in Finding One—namely, that FSA believed KSHD reported more clock hours than students actually attended. FSA’s failure to calculate the clock hours properly in the FPRD or provide its methodology for recalculating was not ideal. Likewise, FSA’s minor adjustment to liability in footnotes of its brief is not a conspicuous way to highlight the change in FSA’s position. Nevertheless, my review of this matter constitutes part of the Department’s hearing process.<sup>46</sup> At this point in that process, KSHD has received sufficient notice of FSA’s definition of a clock hour and the method it used to determine that KSHD overreported clock hours by 25 minutes per day.<sup>47</sup> KSHD has recognized FSA’s position and advocated for an alternative method of calculation. I will render a final decision for the agency, with KSHD fully on notice as to FSA’s position and reasoning for the \$13,347 liability.<sup>48</sup>

I next turn to the issue of which party bears the burden of persuasion.

## B. Burden of Persuasion

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<sup>42</sup> FSA Hearing Brief, p. 1, n. 1.

<sup>43</sup> *Id.* p. 5, n. 3.

<sup>44</sup> *Id.*, ED Ex. 4.

<sup>45</sup> Decision, p. 6.

<sup>46</sup> 34 C.F.R. § 668.121(a) (the Secretary’s decision is the final decision of the Department).

<sup>47</sup> *See Space Mark, Inc. v. U.S.*, 45 Fed. Cl. 267, 276 (1999) (agencies have a right to correct their errors, even reversing final decisions, during the course of an administrative review process).

<sup>48</sup> *IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F. 3d 1003, 1009–10 (10th Cir. 2000) (a subordinate division does not bind an agency, and courts apply their deferential standard of review to the agency’s final decision maker). *Ass’n. of Admin. Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984) (the Secretary’s decision is final for an agency, and that decision is the one reviewed by a court on appeal, not a decision of a subordinate officer).

In a program review, FSA first bears the burden of establishing a prima facie case that an institution is not in compliance with the requirements of Title IV. In general, FSA begins 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 constitutes a prima facie case, and the institution bears the burden of demonstrating on appeal that it complied with the requirements of Title IV. Thus, the AJ found that KSHD bore the burden of persuasion before him and held that KSHD failed to meet that burden.<sup>49</sup>

On appeal before me, KSHD asserts that FSA actually bears the burden of persuasion because FSA never established that its methodology for defining and calculating clock hours is supported by any regulation or other authority. FSA responds by arguing that KSHD bears the burden of persuasion.

I find that FSA established a prima facie case in Finding One of its FPRD. A program with a continuous 30 minute break period within a 7.5 hour daily schedule cannot have 7.5 clock hours of daily instruction. As I will discuss in the next section, the maximum length of continuous break time that would not create a fraction of a clock hour would be 20 minutes.

KSHD is correct in asserting that FSA incorrectly calculated its liability in the FPRD. Three break periods totaling 55 minutes does not support a finding that the program lacked 55 minutes from its clock hour total. Each clock hour in a program must exist in a discrete 60-minute period, but a complete clock hour need only have 50 or more minutes of scheduled instruction. Whether the remaining time of ten or fewer minutes is described as a "break" and whether such "breaks" are mandatory or optional is not relevant. Any 60-minute period containing at least 50 minutes of scheduled instruction constitutes a full clock hour. Therefore, FSA had no basis to instruct KSHD to reduce its clock hour totals by 55 minutes per day for the award year.

Nevertheless, FSA cited to the regulatory definition of a clock hour and correctly found that KSHD's program did not abide by that definition. Accordingly, FSA established a prima facie case of noncompliance with Title IV. On appeal, KSHD has the burden to demonstrate its compliance.

I will now consider FSA's calculation of liability, which the AJ upheld.

### C. Appropriate Liability Calculation

FSA asserts that it "look[ed] at each discrete 60-minute block of time and how it is structured" when it concluded that KSHD miscalculated its clock hours by 25 minutes.<sup>50</sup> However, I find no evidence in the record that KSHD ever actually produced a daily schedule showing how each discrete 60-minute period was blocked on a day of instruction. Absent such

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<sup>49</sup>*Id.*, pp. 2, 6.

<sup>50</sup> FSA Hearing Brief, pp. 5-6.

evidence, I cannot determine that FSA looked at each 60-minute block of time in KSHD's daily schedule.

A daily schedule showing how breaks are overlaid on clock hours could impact the outcome of FSA's analysis. FSA is incorrect in its suggestion that only ten minutes of a 15 minute break and ten minutes of a 30 minute break could possibly be included in KSHD's schedule without reducing the amount of clock hours. Logically, in a schedule entirely comprised of full clock hours, the maximum length of a continuous break is 20 minutes: a 20-minute break fits in such a schedule if one clock hour ends with a ten minute break and the immediately succeeding clock hour begins with a ten minute break. If blocked properly, a schedule could include a full 15-minute break without creating fractions of clock hours, or could count 20 minutes of a 30-minute lunch break.

FSA required KSHD to produce a schedule showing the actual breakdown of students' daily clock hours in the Program Review Letter. However, there is no evidence that KSHD ever produced such records. KSHD had an opportunity to do so in response to the Program Review Letter, FPRD, or during the proceedings before the AJ. Rather, KSHD continues to contend that student sign-in sheets showing the time students arrived in the morning and the time they left in the evening are sufficient to demonstrate the clock hours actually attended. Under these circumstances, it was reasonable for FSA to conclude that no hourly breakdowns exist showing KSHD's clock hours in discrete 60-minute blocks. KSHD has failed to provide any evidence establishing that its 15-minute and 30-minute breaks spanned across two clock hours to ensure that the maximum number of minutes of instruction occurred in each clock hour. Absent such evidence, I defer to FSA's conclusion that KSHD miscalculated its clock hour total by 25 minutes per day.

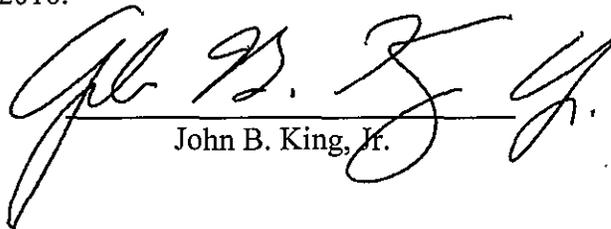
### III. Conclusion

Based on the foregoing analysis, I conclude that KSHD failed to demonstrate that it complied with Title IV by accurately calculating the number of clock hours its students attended. I also conclude that KSHD bore the burden of maintaining records demonstrating how it blocked the breaks within its program's clock hours. Absent such records, I will affirm the AJ's decision finding the program deficient by 25 minutes per day, and I will uphold the finding of liability.

### ORDER

ACCORDINGLY, the Decision by Chief Administrative Judge Ernest Canellos is HEREBY AFFIRMED, and KSHD is liable to the Department for \$13,347.

So ordered this 6<sup>th</sup> day of May 2016.

  
John B. King, Jr.

Washington, D.C.

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