



**UNITED STATES DEPARTMENT OF EDUCATION**  
**OFFICE OF HEARINGS AND APPEALS**  
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In the Matter of

**NATIONAL COLLEGE**

Respondent.

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Docket No. 19-17-SP

Federal Student Aid Proceeding

PRCN: 2013-2-07-28230

Appearances: Jeffrey R. Fink, Esq. of Thompson Coburn LLC for National College.

Steven Z. Finley, Esq. for the Office of the General Counsel, U.S. Department of Education, Washington, DC for Federal Student Aid.

Before: Robert G. Layton, Administrative Law Judge

**DECISION**

This decision involves an appeal by National College (National), a proprietary college in the State of Tennessee offering various programs of which the highest degrees available are at the Associates level. National participates in numerous federal student aid programs, including the Federal Pell Grant, Federal Supplemental Opportunity Grant, Federal Work Study and the Direct Loan Programs authorized by Title IV of the Higher Education Act of 1965 (Title IV).<sup>1</sup> Within the U.S. Department of Education (the Department) the office having jurisdiction over and oversight of these programs is the Office of Federal Student Aid (FSA).

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<sup>1</sup> 20 U.S.C. § 1070 *et seq.*

On January 8, 2019, FSA issued a Final Program Review Determination (FPRD), of which only one finding (Finding #6) assessing liabilities was appealed by National. Finding #6 concerned the award of federal student aid to students who were not making satisfactory academic progress (SAP) according to National's revised SAP policy in violation of 34 C.F.R. § 668.34. From February 11 – 14, 2013, FSA conducted a program review of National for the 2011-2012 and 2012-2013 award years. The Department provides grants, loans, and work-study funds to eligible students attending institutions of higher education through Title IV. National participated in Title IV programs through a Program Participation Agreement (“PPA”).

Subpart H proceedings allow institutions to appeal the results of a final program review determination. Typically, and as was the case in the instant proceeding, the Department first issues a program review report and then FSA and the institution engage in a collaborative process to further define the scope of any alleged violations, delineate corrective actions and assess any potential liabilities for violations of the rules governing an institution's participation in the Title IV federal student aid programs. The respondent has the burden of proving by the preponderance of the evidence that the Title IV funds it received were lawfully disbursed.<sup>2</sup> If the respondent does not establish that its expenditures of federal funds were correct, it has to return the funds to the Department. Once the respondent is given adequate notice of the demand by FSA in its FPRD, the respondent must meet its burden.

### **ISSUE**

The sole FPRD finding at issue in this proceeding is Finding # 6 of the FPRD, which concerns the alleged failure to adequately monitor satisfactory academic progress standards. In

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<sup>2</sup> 34 C.F.R. § 668.116(d).

this finding, FSA alleges that National awarded funds to students who were not making satisfactory academic progress. After the program review, FSA determined that National's existing SAP policy did not comply with Departmental regulations and guidelines. Subsequently, FSA and National engaged in a dialogue regarding a revised SAP policy that was amenable to FSA and its criteria. FSA then directed National to conduct a full file review of its student files utilizing the revised SAP policy.

The issues to be resolved in this decision are:

- 1. Has the Department presented a prima facie case for assessing liabilities under Finding #6?**
- 2. Is it within the scope of the tribunal to determine whether it was permissible for FSA to direct National to revise its SAP Policy?**
- 3. Were federal student aid funds awarded to students not making satisfactory academic progress under the revised policy?**
- 4. Even if National's old SAP policy were applied to the students at issue in the full file review, has National met its evidentiary burden demonstrating that federal student aid funds were awarded to eligible students who were making satisfactory academic progress?**

### **SUMMARY OF DECISION**

The Department has met its burden of production for asserting that federal student aid funds were disbursed to ineligible students who were not making satisfactory academic progress. It is beyond the scope of the tribunal's authority to determine whether FSA could direct National to revise its SAP policy to one that FSA asserted was in compliance with regulatory requirements and its sub-regulatory guidance. Federal student aid funds were awarded to students not making satisfactory academic progress under National's revised SAP policy. National did not demonstrate that the students at issue were making SAP under the institution's old policy and thus did not meet its evidentiary burden that it disbursed federal student aid funds

to eligible students.

## **FINDINGS OF FACT**

### **I. FSA PROGRAM REVIEW**

FSA conducted a program review at National from February 11, 2013 to February 14, 2013.<sup>3</sup> The program review was conducted by Mr. Roy Chaney, Ms. Kathy Feith, and Mr. Christopher Thompson of the School Participation Team from the Department's Kansas City Regional Office.<sup>4</sup>

The program review focused on an examination of National's compliance with the regulations governing the institution's administration of the Federal student aid programs.<sup>5</sup> Specifically, the review examined National's policies and procedures regarding institutional and student eligibility, individual students' records including their (1) financial aid and academic files, (2) attendance records, (3) account ledgers and (4) fiscal records.<sup>6</sup>

FSA identified a sample of 32 files for review from the 2011-2012 and 2012-2013 award years from the total population of students who received federal student aid funds for each award year and an additional 55 files were selected for review based on their federal funds drawdown characteristics.<sup>7</sup> On November 7, 2013, FSA issued its program review report (PRR).<sup>8</sup> On February 7, 2014, National submitted its written response.<sup>9</sup> On July 1, 2014, FSA issued its Request for a Completed Response to the Program Review Report letter.<sup>10</sup> On December 4, 2015, National responded to FSA's Request for a Completed Response.<sup>11</sup>

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<sup>3</sup> Final Program Review Determination (FPRD) letter at 1.

<sup>4</sup> FPRD at 4.

<sup>5</sup> FPRD at 4.

<sup>6</sup> FPRD at 4.

<sup>7</sup> FPRD at 4.

<sup>8</sup> FPRD at 4 and Appendix B.

<sup>9</sup> FPRD at 4 and Appendix C.

<sup>10</sup> FPRD at 4 and Appendix D.

<sup>11</sup> FPRD at 1 and Appendix E.

After the program review period but before the issuance of the FPRD, FSA and National engaged in a process to correct the two areas of concern regarding National's SAP policy where FSA determined that the policy did not meet the regulatory requirements:

*“Failure to adhere to graduation standards in relation to SAP:* As stated in National's 2012-13 student catalog and evidenced in student financial aid files, National does not require students to meet SAP standards for graduation until the student has attempted 150 percent of a program. A review of the 2012-13 academic catalog indicates that regardless of program type and length, National does not require students to maintain graduation standards by the end of the published length of the program.

According to the catalog, the SAP standards for students pursuing a 24-credit hour program include:

- (1) For the period of 1-12 hours, students must have a cumulative GPA of 1.0 and have successfully completed 33 percent of the hours attempted;
- (2) For the period of 13-24 hours (the payment period that normally includes graduation, based on program length), students must have a cumulative GPA of 1.5 and have successfully completed 50 percent of the hours attempted;
- (3) For the period of 25-36 hours (the period considered to be 150 percent of the allowed timeframe), students must have a cumulative GPA of 2.0 and have successfully completed 66 percent of the hours attempted.

National appears to use this SAP methodology for all its programs. However, because the Department's graduation standard is a 2.0 GPA, students are required to have this by the accepted graduation date of the program. National is permitted to allow a student a longer period of time to complete a program if the student needs it, but the Department's SAP standards must still be maintained, including its GPA standard for students who reach the accepted graduation point.

It is worth noting that the manner in which National has written its GPA standards suggests that program lengths are actually longer than described in student catalogs. The programs also appear to be longer than the curricula approved by accreditors and state agencies.

*Failure to adhere to minimum pace standards in relation to SAP:* As stated in National 2012-13 student catalog and evidenced in student files, National's student completion requirements also do not meet Department standards. A review of National's pace standards reflects students are only required to complete 66 percent of their program by the scheduled graduation date for each of its degree programs. However, the Department's standards require a student to complete at least 67 percent of their program by the scheduled graduation date.”<sup>12</sup>

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<sup>12</sup> FPRD at 61 - 62.

FSA noted these two systemic deficiencies in National's SAP policies and procedures in several student files (Students #1, #6, #10, #11, #21, and #24).<sup>13</sup> As a result, FSA determined that National must review and revise its SAP policies and procedures to correct these two deficiencies and submit a copy of its revised SAP policies and procedures with its response to the PRR.<sup>14</sup> FSA also directed National to review each student's file who received federal student aid funds during the 2011-2012, 2012-2013 and 2013-2014 award years and provide information regarding the students' academic progress in a spreadsheet format.<sup>15</sup> In its PRR, FSA indicated that under National's SAP policy, as stated in the institution's catalog, and evidenced in the students' financial aid files, National does not require its students to meet SAP requirements until they have completed 150 percent of a program.<sup>16</sup>

National did not concur with this finding in the PRR and asserted that its SAP policy was proper and complaint in relation to both the adherence to graduation standards and to minimum pace requirements.<sup>17</sup> National asserts that the SAP regulations cited by FSA do not contain a requirement that students have a 2.0 GPA by the end of the published length of the program and that the regulations only require that if a student is enrolled in an educational program of more than two academic years, the SAP policy specifies that at the end of the second academic year, the student must have a GPA of at least a "C" or its equivalent, or have an academic standing consistent with the institution's requirements for graduation.<sup>18</sup> As cited by National in its PRR response, the 2013-14 FSA Handbook at page 1-9, merely states that "[h]aving a standing consistent with the requirement for graduation means you could use an escalating GPA instead of

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<sup>13</sup> FPRD at 33.

<sup>14</sup> FPRD at 33.

<sup>15</sup> FPRD at 33.

<sup>16</sup> FPRD at 87.

<sup>17</sup> FPRD at 62.

<sup>18</sup> FPRD at 62-63, and 87. See also 34 C.F.R. § 668.34 and 2013-2014 FSA Handbook

a fixed one. For example, if your school uses a 4-point scale, it could require students to have a 2.0 average by graduation but allow their average to be lower earlier in the program."<sup>19</sup>

National states that its SAP policy utilizes an escalating GPA which is consistent with its requirements for graduation.<sup>20</sup> Specifically, National asserts that at any point in the student's academic progression through a program the student is required to maintain a GPA which will ensure that it is possible for him or her to graduate with the required 2.0 GPA by the end of the program's maximum timeframe for graduation, as set forth in the college's quantitative SAP standard.<sup>21</sup> National points to guidance from the National Association of Student Financial Aid Administrators (NASFAA) that points out that the Department has informally acknowledged that a student is found to not be making satisfactory academic progress and, thus becomes ineligible for student aid funds, whenever it becomes mathematically impossible for the student to achieve the grades and/or the timeframe required to graduate under the institution's SAP policy.<sup>22</sup>

National also challenged FSA's determination that its policy as practiced by the institution failed to adhere to the minimum pace standards in relation to SAP.<sup>23</sup> National argues that the Department's standard that require a student to complete at least 67 percent of their program by the scheduled graduation date – rather than the 66 percent required by National's SAP policy - is not a requirement contained in 34 C.F.R. § 668.32.<sup>24</sup> National argues that the regulations only require that its SAP policy specifies the pace at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe, which its prior policy did.<sup>25</sup>

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<sup>19</sup> FPRD at 63.

<sup>20</sup> FPRD at 63.

<sup>21</sup> FPRD at 63.

<sup>22</sup> FPRD at 63.

<sup>23</sup> FPRD at 63.

<sup>24</sup> FPRD at 63.

<sup>25</sup> FPRD at 63.

National references an institution's ability to use a graduated completion percentage for each year of an educational program such that its policy permitted its students to complete a lower percentage of their classes in the first academic year but require them to complete an increasing percentage in subsequent years so that they finish their program in time.<sup>26</sup> A student is ineligible when it becomes mathematically impossible for him to complete his program within 150 percent of program's length. National's position is that it is not necessary that a student complete 67 percent of the required credits by the scheduled graduation date in order for it to be possible to complete the program: "[g]iven the length of National's programs, and the reality that all courses are 4 credit hours (or a multiple of 4 credit hours) in length, a student timeframe (150% of the scheduled program completion time.) Given the length of National's programs, a student must have satisfactorily completed between 50% and 55.56% of the attempted credits at the 100 percent of scheduled time for completion of the program."<sup>27</sup> Thus, National maintains that its quantitative standards far exceed these requirements.<sup>28</sup>

National notes that although 34 C.F.R. § 668.34(a)(5)(ii) defines the way that a student's progress is to be measured as dividing the cumulative number of hours successfully completed by the cumulative number of hours attempted, the regulations do not require that the student must have successfully completed the same proportion of earned credits to attempted credits attempted by any certain point other than so long as it still remains mathematically possible for a student to graduate within the maximum time frame.<sup>29</sup> According to National, under its original SAP policy, it is not necessary that a student have completed 2/3 (or 66.6666%) of the program's

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<sup>26</sup> FPRD at 63.

<sup>27</sup> FPRD at 63.

<sup>28</sup> FPRD at 63-64.

<sup>29</sup> FPRD at 64.

attempted credits in order to graduate.<sup>30</sup> Rather it is required that the institution's SAP policy require that it be mathematically possible for the student to complete the program within the maximum timeframe. Similarly, National asserts that “it is readily apparent that application of the college's 66% requirement at 150% of the scheduled time for completion will result in the student completing the program with at least the required number of credits for graduation.”<sup>31</sup>

National asserts that its explanation of the institution’s policy makes clear that the SAP policy in use by the institution either meets or exceeds federal requirements.<sup>32</sup> Therefore, National argues that its use of this policy to determine students' SAP status in relation to their eligibility to receive Title IV disbursements is and was appropriate.<sup>33</sup> As such, the institution initially did not conduct a review of Title IV disbursements made during the 2011-12, 2012-13 and 2013-14 award years.<sup>34</sup> National states that it understands the importance of measuring satisfactory academic progress (SAP) in an accurate, compliant and timely manner; and that it believes its current policy is fully compliant with Title IV regulations and the institution will continue to implement it scrupulously.<sup>35</sup>

On July 1, 2015, the Department issued its Request for a Completed Response to the Program Review Report. It stated that National’s response failed to address the issue of what the published length of its programs represented in relation to SAP. It also asserted that the federal regulations governing the maximum length requirement for SAP purposes considered the published length of an educational program to represent the 100 percent completion point and the maximum timeframe constituted an additional 50 percent beyond the program’s published

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<sup>30</sup> FPRD at 64.

<sup>31</sup> FPRD at 64.

<sup>32</sup> FPRD at 64.

<sup>33</sup> FPRD at 64.

<sup>34</sup> FPRD at 64.

<sup>35</sup> FPRD at 65.

length. FSA, in the PRR, contends that National's existing SAP policy effectually treated the additional 50 percent as part of the published program length since the institution's escalating SAP policy didn't require a student to meet graduation requirements until the 150 percent completion point was reached. According to FSA, National's de facto SAP policy assumed that all students would complete their academic programs at the 150 percent maximum completion point rather than at the 100 percent completion point.<sup>36</sup>

In conclusion, National was advised that it must proceed with the required SAP review of all Title IV recipients that was discussed in the PRR, and that the file review must also include the 2014-15 award year, in addition to the 2011-12, 2012-13, and 2013-14 award years identified in the PRR.<sup>37</sup> The file review was to be submitted with the attestation of an Independent Public Accountant.<sup>38</sup> On December 4, 2015, National responded to the Department's Request for Completed Response letter.<sup>39</sup> In that response, National stated that it had reviewed and revised its SAP policy as required by the PRR and that a new SAP policy was developed and submitted to FSA's Kansas City School Participation Team before being employed to perform the SAP file review discussed in the PRR.<sup>40</sup> National's revised SAP policy clarified that students must earn a 2.0 GPA prior to completing 100 percent of the program's length and that the institution was now using one-third as the evaluation checkpoint for measuring SAP.<sup>41</sup>

FSA approved the use of this revised policy and National applied the approved SAP policy to all Title IV recipients in the 2011-2012, 2012-2013, 2013-2014, and 2014-2015 award

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<sup>36</sup> FPRD at 84 – 90.

<sup>37</sup> FPRD at 112.

<sup>38</sup> FPRD at 112.

<sup>39</sup> FPRD at 112-113.

<sup>40</sup> FPRD at 112 – 113.

<sup>41</sup> FPRD at 112.

years.<sup>42</sup> National reviewed the files of 3,511 students and applied the new SAP policy.<sup>43</sup> National identified 115 student files that exhibited discrepancies between the original SAP status and new SAP status.<sup>44</sup> Those files were manually reviewed to determine the correct SAP status.<sup>45</sup> Of those students who were manually reviewed, National determined that 83 students did not meet SAP using the institution's revised SAP policy.<sup>46</sup> Once the students that did not meet SAP using the new policy were identified, National created a report identifying all aid that those students received.<sup>47</sup> The final step in the review process was to identify the terms and the amount of aid that a student was not eligible to receive based upon the application of the new SAP policy.<sup>48</sup> Once that spreadsheet review was completed detailing the disbursement history to the students with SAP issues was compiled and attested to by an independent public accountant, National submitted it to FSA on December 4, 2015.<sup>49</sup> This file review resulted in the identification of \$1,148,662.00 in unduplicated Title IV liabilities, which reduced to a sum of \$388,988 that FSA sought to be repaid to the Department in the FPRD.<sup>50</sup>

## **II. FPRD**

All but one of the findings identified in the PRR were resolved prior to the issuance of the FPRD because National took the corrective actions necessary.<sup>51</sup> Specifically, these findings concerned the late return of federal student aid funds (Finding #1), the improper return of federal

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<sup>42</sup> FPRD at 112.

<sup>43</sup> FPRD at 112.

<sup>44</sup> FPRD at 112-113.

<sup>45</sup> FPRD at 112-113.

<sup>46</sup> FPRD at 112-113.

<sup>47</sup> FPRD at 112-113.

<sup>48</sup> FPRD at 112-113.

<sup>49</sup> FPRD at 113.

<sup>50</sup> FPRD at 113.

<sup>51</sup> FPRD at 5.

student aid funds, the late repayment of student credit balances (Finding #3), excess cash (Finding #4), federal funds not identified (Finding #5), inadequate NSLDS enrollment reporting (Finding #7), incomplete verification (Finding #8), improper origination of Direct Loan funds (Finding #9), failure to perform Direct Loan exit counseling (Finding #10), failure to provide proper notification of Direct Loan disbursements (Finding #11), improper Perkins Loan fund bank account (Finding #12), improper FSEOG selection process (Finding #13), consumer information requirements not met (Finding #14), crime awareness requirements not met (Finding #15), and drug and alcohol abuse prevention program requirements not met (Finding #16).<sup>52</sup>

For the aforementioned findings (Findings 1 – 5 and 7 – 16) in the FPRD, FSA closed these findings as resolved because National reviewed and revised its internal policies and procedures where appropriate and no liabilities resulted from the issues identified in each of these findings.<sup>53</sup>

The sole remaining finding at issue in this proceeding is the failure to adequately monitor satisfactory academic progress standards (Finding #6).<sup>54</sup> As detailed in 34 C.F.R. § 668.34, FSA asserted that an institution must establish a reasonable SAP policy for determining whether an otherwise eligible student is making satisfactory academic progress such that the student remains eligible and may continue to receive federal student aid assistance.<sup>55</sup> FSA states that the Secretary considers the institution's policy to be reasonable if the institution's policy is (1) at least as strict as the policy applied to a student who is not receiving federal student aid, (2) provides for consistent application of standards to all students with categories of students (e.g. full-time, part-time, etc.), (3) provides that a student's academic progress is evaluated at the end

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<sup>52</sup> FPRD at 5 – 6.

<sup>53</sup> FPRD at 5 - 6.

<sup>54</sup> FPRD at 6.

<sup>55</sup> FPRD at 7.

of each payment period for educational programs of one academic year in length or shorter than an academic year or for all other educational programs, at the end of each payment period or at least annually to correspond with the end of a payment period, (4) that the policy specifies the grade point average (GPA) that a student must achieve at each evaluation and for students enrolled in educational programs of more than two academic years, the policy specifies that at the end of the second academic year, the student must have a GPA of at least a “C” or its equivalent (i.e. a 2.0 GPA) or have academic standing consistent with the institution’s requirements for graduation, and (5) that the policy specifies the pace at which a student must progress through the educational program to ensure that the student will complete the program within the maximum timeframe allowed for the program and provides for measurement of the student’s progress at each evaluation and that the institution calculates the pace at which the student is progressing by dividing the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted.<sup>56</sup> The policy must also provide that at the time of each evaluation, a student who has not achieved the required GPA, or who is not successfully completing the educational program at the required pace, is no longer eligible to receive federal student aid assistance.<sup>57</sup>

National asserts that the Department’s regulations do not require its students to have a 2.0 GPA or C average by the time the students reach the 100 percent completion point of the program.<sup>58</sup> National further asserts that its existing SAP policy met the minimum regulatory standard and noted that 34 C.F.R. 668.34(a)(4)(ii) only required a student enrolled in a program of more than two academic years are required to have a GPA of at least a “C” or its equivalent or

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<sup>56</sup> FPRD at 7.

<sup>57</sup> FPRD at 7.

<sup>58</sup> FPRD at 9.

have academic standing consistent with its requirements for graduation.<sup>59</sup> National states that it used an escalating GPA which was consistent with the institution's requirements for graduation. National explains that through the academic program, a student was required to maintain a GPA, which will ensure that it is possible for the student to graduate with the required 2.0 GPA by the end of the program's maximum timeframe for graduation.<sup>60</sup>

The FPRD charged that in two systemic respects, National's SAP policy and administrative procedures did not meet the regulatory requirements.<sup>61</sup> First, National failed to adhere to graduation standards in relation to SAP.<sup>62</sup> Second, National failed to adhere to minimum pace standards in relation to SAP.<sup>63</sup> As stated in National's student catalogs and evidenced in student financial aid files, National did not require students to meet SAP standards for graduation until the student had attempted 150 percent of a program.<sup>64</sup> For example, for National students pursuing a 24-quarter credit hour program, the student was required to have a cumulative grade point average (GPA) of 1.5 and have successfully completed 50 percent of the hours attempted at the point where the end of the published length of the program-24 credit hours-was reached.<sup>65</sup> At the end of 36 hours (the termination of the period considered to be 150 percent of the allowed timeframe), students were required to have a cumulative GPA of 2.0 and have successfully completed 66 percent of the hours attempted.<sup>66</sup> At issue was the question of how a student with a 1.5 grade point average could be allowed to complete a 24-credit hour program that had an established graduation GPA requirement of 2.0.<sup>67</sup> National's policy allowed

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<sup>59</sup> FPRD at 9.

<sup>60</sup> FPRD at 9

<sup>61</sup> FPRD at 8.

<sup>62</sup> FPRD at 8.

<sup>63</sup> FPRD at 8.

<sup>64</sup> FPRD at 8.

<sup>65</sup> FPRD at 8.

<sup>66</sup> FPRD at 8.

<sup>67</sup> FPRD at 8.

this. Further, it was a SAP methodology that National used for all of its programs, with the apparent exception of the 180-credit hour programs.<sup>68</sup> This failed to adhere to minimum pace standards in relation to SAP, as stated in National's 2012-13 student catalog and evidenced in student files. National's student completion requirements also did not meet Department standards.<sup>69</sup> A review of National's pace standards reflected that students were only required to complete 66 percent of their program by the scheduled graduation date for each of the institution's degree programs.<sup>70</sup> However, the Department's standards require a student to complete at least 67 percent of their program.<sup>71</sup>

National has educational programs ranging from 24 to 180 credit hours with its highest level of educational offering being an associates' degree.<sup>72</sup> National's previous satisfactory academic progress (SAP) policy identified grade and completion rate requirements at various points within the institution's programs.<sup>73</sup> However, National's policy metrics revealed that their students' progress routinely was calculated on the predetermined completion of the program within 150% of the length of the program.<sup>74</sup> Consequently, the SAP policy was not designed or implemented in a way that corresponded to measuring satisfactory academic progress within the published length of the program.<sup>75</sup> After a February 2013 program review,<sup>76</sup> FSA and National engaged in a lengthy dialogue to develop a SAP policy that met the Department's regulatory standards and sub-regulatory guidance. After the revised policy was developed, FSA directed

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<sup>68</sup> FPRD at 8.

<sup>69</sup> FPRD at 8.

<sup>70</sup> FPRD at 8.

<sup>71</sup> FPRD at 8-9.

<sup>72</sup> ED Ex. 2 at 7-8 and FPRD at 3, 7-9.

<sup>73</sup> FPRD at 9-10.

<sup>74</sup> FPRD at 10.

<sup>75</sup> FPRD at 10.

<sup>76</sup> In the November 7, 2013 program review report, FSA noted that six students had SAP issues and that parts of National's SAP policy were misleading.

National to conduct a review of its student files utilizing the revised SAP policy for the award years at issue to determine whether the students were not making SAP and thus ineligible to receive disbursements of federal student aid funds.

Based on the file review, National determined that 83 students who were not making SAP in accordance with its revised policy were awarded federal student aid funds. An independent auditor reviewed National's file review results confirming these results. In its FPRD, FSA assessed an unduplicated liability of \$388,988<sup>77</sup> in Title IV funds disbursed to students who were not making SAP and thus were ineligible to receive said funds.

National's revised SAP policy as applied to the students at issue during the program review period demonstrated that National awarded federal student aid funds to students who were not making satisfactory academic progress and thus, were ineligible to receive such funds. National did not meet its evidentiary burden in demonstrating that the students at issue were eligible to receive federal student aid funds albeit under its revised or its original SAP policy – if said policy met the regulatory standards for a reasonable satisfactory academic progress policy under 34 CFR § 668.34.

### **PROCESS BEFORE OHA**

On February 22, 2019, National's counsel submitted a request for review challenging Finding #6 and its corresponding liability assessed in the FPRD. On March 18, 2019, the case was assigned to the undersigned as the hearing official. Also, on March 18, 2019, the Order Governing Proceedings was issued establishing the briefing schedule. After three motions for extension of time were granted, National filed its initial brief and exhibits. After an additional

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<sup>77</sup> The total liability identified was \$1,148,662 for the 2010-2011, 2011-2012, 2012-2013, and 2014-2015 award years. Based on this amount, FSA specifically found \$346,983 in Pell Grant funds, \$12,059 in FSEOG funds and an estimated loss for the Direct Loan funds in the amount of \$29,946.

extension was granted, FSA filed its responsive brief and exhibit and thereafter National submitted a reply brief.

### **PRINCIPLES OF LAW**

While National has the burden of proof in this proceeding, the Department has the prima facie obligation to show that it has provided adequate notice of its demand to the school.<sup>78</sup> Part of the burden placed on the Department is that it must provide sufficient legal support for its demand. When challenging a finding in an FPRD in a Subpart H proceeding, the Respondent has the burden of proving by the preponderance of the evidence that the Title IV funds received were disbursed properly and that the institution complied with program requirements.<sup>79</sup> Before participating in Title IV programs, institutions are required to sign program participation agreements.<sup>80</sup> When an institution enters into this agreement, it agrees to comply with the statutory and regulatory provisions applicable to the Title IV programs it administers, establish and maintain administrative and fiscal procedures and records “as may be necessary to ensure proper and efficient administration” of Title IV funds, and that it is liable for all improperly spent or unspent Title IV funds.<sup>81</sup>

One of the regulatory requirements for participation is to have a reasonable satisfactory academic progress policy in place at an institution that applies standards for quantitative and qualitative academic progress that are applied consistently within categories of students (i.e. full-time, part-time, undergraduate, graduate). The SAP policy must include the pace at which students must make progress through the program to ensure that the student will complete the

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<sup>78</sup> *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep’t of Educ. (July 26, 2016) at 2 and 34 C.F.R § 668.16(d).

<sup>79</sup> 34 C.F.R. § 668.116(d).

<sup>80</sup> 34 C.F.R. § 668.14(a).

<sup>81</sup> 34 C.F.R. §§ 668.14(b)(1), (4), and (25); 34 C.F.R. § 668.116(a) and (d).

program within the maximum timeframe.<sup>82</sup>

## ANALYSIS

### *DEPARTMENT'S PRIMA FACIE CASE*

In Subpart H proceedings, it is clear that FSA's burden is one of production while Respondent carries the burden of proof.<sup>83</sup> To sustain its burden, National must establish by a preponderance of the evidence, that the expenditure of Title IV funds was proper. Under 34 C.F.R. 668.34(a), an institution's SAP policy must specify the pace at which a student must progress through his or her educational program to ensure that the student will complete the program within the maximum timeframe allowed, which is 150% of the published program's length. An institution's SAP policy must provide for measurement of the student's progress at periodic evaluations. Progress is measured both in terms of the pace at which a student is progressing through the program as well as the student's academic achievement (i.e. grade point average). In terms of pace, an institution divides the cumulative number of hours the student has successfully completed by the cumulative number of hours the student has attempted.

A satisfactory academic progress policy is composed of both qualitative and quantitative elements. "A qualitative component consists of grades or comparable factors that are measurable against a norm. A quantitative component is the maximum timeframe in which a student must complete his or her educational program subdivided into increments and measurement of progress at the end of each increment." The maximum timeframe for completion cannot exceed 150% of the published length of the program but the guidelines do allow variations in enrollment status that would permit a student to complete a lower percentage of their classes in the first

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<sup>82</sup> 34 C.F.R. § 668.34(a)(3) and (b).

<sup>83</sup> 34 C.F.R. § 668.116(d); In re DeMarge College, Dkt. No. 04-39-SP, U.S. Dep't of Educ. (July 31, 2009); In re Sinclair College, Dkt. No. 89-21-S (September 26, 1991)

academic year thereby requiring them to complete an increasing percentage in subsequent years so that they finish their program in time. FSA asserts that if an institution's SAP review makes it clear that a student cannot mathematically finish the program within the maximum timeframe, the student becomes ineligible for federal student aid.

During the program review, National was directed to revise its SAP policies to correct systemic deficiencies noted by FSA in its program review report and then, perform a file review of all federal student aid recipients for the 2011-12, 2012-13, and 2013-14 award years to determine who received disbursements of funds without meeting SAP requirements. FSA asserts that under National's old SAP policy, according to its pace standards, a student might only complete 66% of his/her program by the scheduled graduation date. As a result, these students were not making SAP but were treated as if they were for the purposes of awarding federal student aid funds. FSA asserts that in creating an SAP policy that did not require or establish standards for meeting graduation requirements until the student reached the 150% length of the program, National was effectively altering the actual length of the academic program.

The Department's obligation to present a prima facie case is satisfied when it informs the institution that: (1) the school has a regulatory obligation to only disburse Title IV funds to eligible students and to document the basis for the determination that the student is eligible for the funds; and (2) the specific reason that the Department asserts that the school did not meet this obligation.<sup>84</sup> By virtue of the issuance of an FPRD<sup>85</sup> and its articulation of a violation of the regulation governing satisfactory academic progress and the corresponding liability associated with this alleged violation, FSA has presented a prima facie case in the instant proceeding.

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<sup>84</sup> See *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016) at 2 and *City University of New York, Lehman College*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (April 22, 2020).

<sup>85</sup> See *In*

### ***SCOPE OF TRIBUNAL'S REVIEW***

FSA states that the regulations require institutions to have a policy that establishes periodic student evaluations based on the pace at which a student must progress to complete the program within the maximum timeframe. At these periodic student evaluations, if a student fails to have made satisfactory academic progress, they lose their eligibility for federal student aid. According to FSA, National's SAP policy as communicated to its students only provided qualitative standards (i.e. GPA) for graduation or completion of the program within the 150% of the program's length and could be misleading to its students. FSA also argued that National's previous policy did not satisfy the minimum pace requirements in the regulations. FSA states that the differences between National's original and revised policies are small; however, in implementing the policy and reviewing the institution's files using the revised policy, instances were found where National continued to award funds to students not making SAP.

FSA argues that National does not dispute that federal student aid funds were awarded to students not making SAP according to the revised policy. Students that fail to make satisfactory academic progress through those periodic evaluations lose eligibility for Title IV grant and loan funds unless the institution takes certain actions, like placing a student on financial aid warning or probation, with the institution performing additional monitoring. 34 C.F.R. §668.34(c), §668.34(d). FSA argues that National did not question or dispute the calculation of liability for the students found not to be making SAP under the revised policy nor has it identified or provided evidentiary support for its assertion that the questioned disbursements under the revised SAP policy would have been permissible under the previous policy.

National argues that there is no basis for Finding 6 in the Departmental regulations and that it is factually and legally unsupportable. According to National, its "...SAP policy did not

comply with the Department’s SAP standards because National did not require students who (i) had attempted 100 percent of the hours of their program, and (ii) were not yet eligible to graduate, but (iii) could still complete their programs within the maximum timeframe, to (a) have a cumulative 2.0 grade point average (the GPA required to graduate), and (b) have completed at least 67 percent of their program.”<sup>86</sup> National counters that the “SAP regulations did not require National’s students to achieve National’s graduation requirement of a 2.0 cumulative GPA by the time they attempted 100 percent of the credit hours in their programs.”<sup>87</sup> National states that since the Department’s regulations only state that at the end of the second academic year, the student must have a GPA of at least a ‘C’ [(2.0)] or its equivalent, or have academic standing consistent with the institution's requirements for graduation.<sup>88</sup> National states that its original policy allowed a student with a lower GPA to continue progressing through the program with the minimum GPA of 2.0 being reached being reached after a student had attempted 100 percent of their academic program’s hours but still hadn’t satisfied the minimum GPA required for graduation. Further, National contends that the Department’s SAP regulations do not preclude students from taking more courses or retaking courses where less than a C grade was earned for the purpose of satisfying graduation requirements. Thus, students could take these additional courses to boost their overall GPA and become eligible to graduate. Consequently, National’s previous SAP policy complied with this regulatory requirement for its programs that lasted at least two academic years.

In its reply brief, National also argues that the Department conceded that there was nothing wrong with National’s original SAP policy because in its brief, FSA counsel stated that

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<sup>86</sup> See Resp. Brief at p.6.

<sup>87</sup> See Resp. Brief at p. 9.

<sup>88</sup> See Resp. Brief at p. 9 and 34 C.F.R. § 668.34(a)(4)(ii).

the “the substantive requirements of National’s original and revised SAP policies are similar and both appear to meet the SAP requirements in the Department’s regulations.”<sup>89</sup> Consequently, National’s position is that FSA should never have made Finding #6, never required the institution to revise its SAP policy, and should never have required the institution to perform the file review that was based on FSA’s mandate to revise National’s SAP policy and resulted in the identification of 83 students who were not making SAP and formed the basis for the liability in Finding #6. National also argues that the Department’s argument in its brief that the original SAP policy was misleading or failed to convey sufficient information was a new basis for the assertion of liability under Finding #6 and thus, the Department is precluded from making this assertion in its pleading as a fundamental position of administrative law and the Department cannot change the basis for Finding #6 on appeal.<sup>90</sup> National goes on to argue that since Finding #6 was based solely on two purported deficiencies with its original SAP policy: (1) the original policy did not require students to have a cumulative 2.0 GPA and that the original policy did not require students to have completed at least 67 percent of their program by the time the students had attempted 100 percent of the hours of their program, the Department cannot assert an alternative rationale for why the institution’s SAP policy was not reasonable. National further argues that the Department never claimed in the PRR or the FPRD that the original SAP policy was misleading and now FSA is backtracking on its initial assessment of the original SAP policy as having systemic deficiencies. National asserts that the Department’s position that there are “SAP standards for graduation” is inexplicable. National supports this assertion by contending that the function of a SAP policy is to set the requirements that a student periodically must meet

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<sup>89</sup> Respondent’s Reply Brief at 1, citing FSA’s Brief at 10.

<sup>90</sup> National cites *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 95 (1943) as support for its position. (“[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”.)

before graduation so that the student may continue to receive financial aid as that student works towards meeting the graduation requirements. National argues that nothing in the Department's regulations requires that a student must achieve a particular GPA to graduate. National concludes by arguing that it is not required to prove that the 83 students at issue in Finding #6 were making SAP because the Department has failed to make a prima facie case and thus has failed to meet its initial burden of production in presenting evidence that National violated the SAP requirement contained in 34 C.F.R. § 668.34.

The tribunal's authority in Subpart H proceeding are proscribed. The remedies available in Subpart H program review proceedings are contractual in nature and allow for recovery of misspent federal student aid funds only.<sup>91</sup> The dispute that underlies National's argument in this case is that its original SAP policy met the requirements of the regulations and that the Department had no authority to require changes to its existing policy. National and the Department entered a dialogue and what emerged was a revised SAP policy that was adopted by National. Pursuant to its authority to conduct program reviews and monitor the administration of the federal student aid programs, FSA ordered a file review to determine the extent of the awarding of federal funds to students not making satisfactory academic progress (i.e. payments made to students who were no longer eligible to receive this assistance). National complied with FSA's request and performed a file review which revealed that there were students that who were not making SAP who were awarded federal student aid funds after this occurred. Here, FSA determined that the SAP policy at National did not meet the regulatory standard for a reasonable SAP policy and it is only for the tribunal to determine whether funds were awarded to ineligible students not making satisfactory academic progress and it is the institution that bears

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<sup>91</sup> See 34 C.F.R. Part 668; *In re Macomb Community College*, Dkt. No. 91-80-SP, U.S. Dep't of Educ. (June 23, 1993); *In re Phillips Junior College, Melbourne*, Dkt. No. 93-80-SP, U.S. Dep't of Educ. (November 23, 1994).

the evidentiary burden of demonstrating that these funds were properly disbursed. Consequently, the tribunal cannot rule on whether FSA was permitted to direct National to revise its SAP policy. Moreover, even if it were in the scope of the tribunal’s review, National’s arguments that FSA changed its rationale for why the SAP policy was unreasonable because it was misleading has no basis in fact. The FPRD articulated that National’s policy had two systemic deficiencies and that was the basis for its FPRD finding. FSA’s arguments in its brief merely add gloss to the Department’s articulated deficiencies of the SAP policy and do not represent an alternative basis for the finding. Further, FSA’s concern – although not pertinent to this tribunal’s ruling – was communicated to National during the program review process and was contained in the FPRD.<sup>92</sup> Additionally, if the differences between the policy National originally had and the revised policy adopted at FSA’s direction made it such that these students would have been considered to be making SAP under the prior policy, National did not submit any evidence to support its implicit claim nor does National’s arguments undermine the reasonableness or authority of the FPRD’s finding. And, as addressed above, it is beyond the scope of the tribunal to make a determination that FSA was without the authority to direct a corrective action like revising a SAP policy.

***FEDERAL STUDENT AID FUNDS DISBURSED TO INELIGIBLE STUDENTS NOT  
MAKING SAP***

The parties do not dispute that federal student aid funds were awarded to students not making satisfactory academic progress under the revised policy. National conducted a full file review which was attested to by an independent accountant. That file review revealed that

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<sup>92</sup> FPRD at 62 (“It is worth noting that the manner in which National has written its GPA standards suggests that program lengths are actually longer than described in student catalogs.”); FPRD at 88 (“As noted in the PRR, the manner in which National has written its GPA standards suggests that program lengths are actually longer than described in student catalogs.”) The programs also appear to be longer than the curricula approved by accreditors and state agencies.

federal student aid funds were disbursed to students who were not making SAP and, thus, were ineligible to receive these disbursements of federal student aid. National did not submit any evidence that specifically challenged this data.

### ***NATIONAL'S EVIDENTIARY BURDEN NOT MET***

National bears the burden in this proceeding to demonstrate that it properly disbursed Title IV funds to the students at issue.<sup>93</sup> That means that National must show that these students were making satisfactory academic progress and National has not done so here. The file review conducted by National and reviewed and attested to by an independent auditor concluded that National awarded federal student aid funds to 83 students who were not making SAP under the revised policy. National has not brought forward any evidence that these students remained eligible under the Title IV regulations governing satisfactory academic progress – whether that be under the revised SAP policy, the original SAP policy or something else.

### **CONCLUSIONS OF LAW**

- 1. The Department provided a prima facie case for assessing liabilities under Finding 6.**
- 2. It is beyond the scope of the tribunal to rule on whether it is permissible for the Department to require an institution to revise its SAP policy.**
- 3. The full file review using the revised SAP policy uncovered instances where National continued to award funds to students not making satisfactory academic progress.**
- 4. National College has not met its evidentiary burden in establishing that it disbursed federal student aid funds to eligible students (i.e. students making satisfactory academic progress).**

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<sup>93</sup> *In re Sinclair Community College*, Dkt. No. 89-21-S, U.S. Dep't of Educ. (Sept. 26, 1991) (Decision of the Secretary); *In re Institute of Medical Education*, Dkt. No. 13-58-SP, U.S. Dep't of Educ. (January 13, 2014).

**ORDER**

National College is liable for and is **ORDERED** to repay to the United States Department of Education the sum of \$388,988 in liabilities assessed in Finding 6 with any appropriate interest.

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Robert G. Layton  
Administrative Law Judge

**Dated: October 16, 2020**

## **NOTICE OF DECISION AND APPEAL RIGHTS-SUBPART H**

This is the initial decision of the hearing official pursuant to 34 C.F.R. § 668.118. The regulation does not authorize motions for reconsideration. The following language summarizes a party's right to appeal this decision as set forth in 34 C.F.R. § 668.119.

An appeal to the Secretary shall be in writing and explain why this decision should be overturned or modified. An appeal must be filed within 30 days from receipt of this notice and decision. If an appeal is not timely filed, by operation of regulation, the decision will automatically become the final decision of the Department.

An appeal to the Secretary shall be filed in the Office of Hearings and Appeals (OHA). The appealing party shall provide a copy of the appeal to the opposing party. The appeal shall clearly indicate the case name and docket number.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system. Otherwise, appeals must be timely filed in OHA by U.S. Mail, hand delivery, or other delivery service. Appeals filed by mail, hand delivery, or other delivery service shall be in writing and include the original submission and one unbound copy addressed to:

Hand Delivery or Overnight Mail\*

Secretary of Education c/o Docket Clerk  
Office of Hearings and Appeals  
U.S. Department of Education  
550 12<sup>th</sup> Street, S.W., 10<sup>th</sup> Floor  
Washington, DC 20024

U.S. Postal Service\*

Secretary of Education c/o Docket Clerk  
Office of Hearings and Appeals  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington DC 20202

These instructions are not intended to alter or interpret the applicable regulations or provide legal advice. The parties shall follow the regulatory requirements for appealing to the Secretary at 34 C.F.R. § 668.119. Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.

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