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OFFICE OF HEARINGS AND APPEALS
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In the Matter of

DEMARGE COLLEGE,

Respondent.

Docket No. 04-49-SF

Federal Student Aid Proceeding

Appearances: Peter S. Leyton, Esq., Gerald M. Ritzert, Esq., and Dana M. Fallon, Esq., Ritzert & Leyton, P.C., Fairfax, Virginia, for Respondent.

Russell B. Wolf and Steven Z. Finley, Office of the General Counsel, United States Department of Education, Washington, D.C., for the Office of Federal Student Aid.

Before: Richard I. Slippen, Administrative Judge.

Respondent DeMarge College ("DeMarge" or the "College") operated as a proprietary institution of higher education in Oklahoma City, Oklahoma, and, until its closure in 2004, participated in the federal student aid programs authorized under Title IV of the Higher Education Act ("HEA") of 1965, as amended ("Title IV"), 20 U.S.C. § 1070 *et seq*. and 42 U.S.C. § 2752 *et seq*. and administered by the Office of Federal Student Aid ("FSA" or the "Department"), U.S. Department of Education. On November 5, 2004, FSA issued DeMarge a combined notice of emergency action and termination/fine ("Notice"). In that Notice, FSA informed the College it intended to terminate its eligibility to participate in Title IV programs and assess a fine under 34 C.F.R. § 668.84 totaling $3,547,000 for 129 instances of alleged misconduct and breach of fiduciary duty. See also 20 U.S.C. § 1094(c). DeMarge filed a timely appeal of the fine action. In November 2004, DeMarge ceased operation.

Procedural History

The procedural history of this case is long and protracted. This tribunal issued the first Order Governing Proceedings on December 15, 2004, setting up the initial briefing schedule. FSA filed a Motion for an Extension of Time and also requested to incorporate by reference certain

exhibits involved in a contemporaneous case involving DeMarge before the Office of Hearings and Appeals. This tribunal granted the extension and denied the request to incorporate exhibits by reference, citing the importance of having a full and complete record on the matter. FSA timely filed its initial brief and witness list on February 11, 2005.[1] DeMarge timely filed its initial brief and exhibits on March 30, 2005. On April 8, 2005, DeMarge submitted its witness list. On May 27, 2005, this tribunal scheduled an evidentiary hearing in the matter for November 14-18, 2005 in Oklahoma City, Oklahoma and ordered the parties to file updated witness lists and any additional exhibits on or before September 30, 2005. Both parties timely filed.

On October 14, 2005, DeMarge filed a motion to continue the hearing due to a serious medical condition affecting the health of the College's owner, whose input was essential to the College's case. On October 18, 2005, this tribunal ordered the evidentiary hearing in the matter cancelled and scheduled a conference to discuss possible dates for rescheduling. DeMarge subsequently provided an update regarding the health condition of its owner and requested an indefinite stay in the proceeding. FSA opposed an indefinite stay and proposed instead that the tribunal order each party to file contemporaneously written testimony of their witnesses so that the matter could proceed. DeMarge objected to FSA's proposal, arguing that it was improper and self-serving. DeMarge contended that FSA's proposal amounted to an expedited hearing under 34 C.F.R. § 668.88, a denial of its right to confront FSA witnesses and an attempt to effect discovery where none would be permissible by altering the sequence in which evidence would be presented. If DeMarge were required to submit its evidence contemporaneously with FSA's, rather than subsequently and in response, this would provide FSA with a strategic advantage by effectively shifting the burden of persuasion from FSA to the College, according to DeMarge. DeMarge reiterated its contention that the poor health of its owner compromised counsel's ability to prepare for trial and that FSA would suffer no prejudicial harm by a further stay in the matter.

On April 12, 2006, the tribunal issued an Order re: Further Proceedings, finding that FSA's proposal did not constitute a request for an expedited hearing and laying out a schedule for moving forward. Consistent with the authority granted under 34 C.F.R. § 668.89 to regulate hearing proceedings and effect appropriate measures to facilitate the process, this tribunal ordered that FSA file by June 12, 2006 a short opening statement or brief and written testimony from its witnesses. DeMarge was ordered to file its short opening statement or brief, along with written testimony from its witnesses, by August 11, 2006. Then, each party was ordered to file by September 13, 2006 a statement identifying which opposing witnesses it wished to cross-examine and naming any rebuttal witnesses. After filing a Motion for an Extension of Time, which was granted, FSA timely filed its Opening Statement and the testimony of three witnesses.

On August 11, 2006, the deadline for DeMarge to file its Opening Statement and witness testimony, DeMarge instead filed a request to amend the Order Governing Further Proceedings or, in the alternative, have a Decision on the Record.[2] On August 21, 2006, FSA filed its response, opposing DeMarge's request for an additional extension but concurring with the alternate proposal to proceed to a judgment based on the existing record. On August 25, 2006

[1] FSA also moved for permission to file its exhibits no later than February 15, 2005. They were received by this tribunal on February 14, 2005.

[2] The motion also included an attachment, Exhibit 29, which DeMarge requested the tribunal accept as part of the record in the matter, but it did not include DeMarge's opening statement or any written witness testimony.

and after careful consideration of DeMarge's arguments, as well as the procedural history of the matter, this tribunal denied DeMarge's request to amend the proceedings and granted its request for a decision on the record. Subsequently on September 8, 2006, DeMarge filed a Motion to Reconsider the denial of its request to amend the Order re: Further Proceedings along with a clarification of its original motion of August 11, 2006. FSA opposed DeMarge's Motion to Reconsider. This tribunal found that DeMarge provided no basis for reconsideration of its August 25, 2006 Order and denied DeMarge's request on September 20, 2006.

The emergency action and termination proceeding were superseded by the subsequent closing of the College, rendering them moot; this tribunal will not address the merits of the two issues. The sole issue before this tribunal is the fine assessed by the Department. In its filings, FSA declined to pursue allegations in the cases of five students.[3] This leaves 124 remaining cases where FSA has alleged that DeMarge abandoned its fiduciary duty under the regulations by falsifying documents to misrepresent its eligibility for Title IV, HEA program funds.

Fines in Subpart G Proceedings

Under 34 C.F.R. § 668, Subpart G, the Secretary is authorized to impose a fine up to $27,500 for each violation of program regulations. 34 C.F.R. § 668.84 (a)(1). The purpose of a fine is to punish the school for its violations and to deter it and other similarly-situated schools from engaging in future misconduct.[4] In determining the amount of a fine, the Secretary is required to consider the gravity of the violations as mitigated by the size of the institution.[5] As to the gravity of the violations, fraudulent conduct is considered to be a serious breach of a school's fiduciary responsibilities, and the Secretary has ruled that the maximum allowable fine is appropriate in cases involving fraudulent conduct.[6] The Secretary is also required to consider the size of the institution in assessing a fine for purposes of mitigation.[7] To determine the size of a school, the Secretary considers the amount of Title IV, HEA program funds received by a school on behalf of its students. A school cannot be considered "small" if it received more than the median amount of Pell Grant funds when compared to all schools, in the most recent year for which complete data is available.[8] Thus, size is not a mitigating factor for a school that receives a high amount of Title IV funding in comparison to other Title IV participants. The Secretary may also consider other mitigating circumstances such as the school's cooperation and good faith effort to rectify the problem[9]; whether the violations are intentional[10]; and the totality of the circumstances, including a strong past record of compliance.[11]

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[3] *See*, "Opening Statement" (hereafter referred to as "ED Opening Statement"), p. 2, contained in "The Department of Education's Federal Student Aid, Opening Statement and Witness Testimony" (June 16, 2006) (hereafter referred to as "ED Opening/Witness Testimony").

[4] *In the Matter of Teachers College, Columbia University*, Dkt. No. 04-44-SF, U.S. Dep't of Educ. (Sept. 16, 2005).

[5] *In re Puerto Rico Technology and Beauty College, and Lamec, Inc.*, Docket Nos. 90-34-ST, 90-38-ST, U.S. Dep't of Educ. (Decision of the Secretary on Remand) (June 11, 1993) (The Secretary issued a joint opinion in these two cases.).

[6] *In the Matter of Teddy Ulmo Institute*, Dkt. No. 03-42-SF, U.S. Dep't of Educ. (April 5, 2005).

[7] *In re Western Beauty College*, Dkt. No. 960145-ST, U.S. Dep't of Educ. (Aug. 14, 1997).

[8] *In re Bnai Arugath Habosem*, Dkt. No. 92-131-ST, U.S. Dep't of Educ. (Decision of the Secretary) (August 24, 1993).

[9] *See, e.g., In the Matter of Bnai Arugath Habosem*, Dkt. No. 92-131-ST, U.S. Dep't of Educ. (Decision of the Secretary) (August 14, 1997); *In the Matter of North American Education Center*, U.S. Dep't of Educ. (Decision of

In a fine proceeding, the burden of persuasion lies with the Department. 34 C.F.R. § 668.88(c)(2). To prevail, the Department must present evidence that supports the conclusion that its "view of the facts is *more plausible* (as opposed to being simply just as plausible) than the view offered by the school or arising from commonsense" (emphasis in original).[12] Thus, the burden is on FSA to show that it is more likely than not that DeMarge engaged in the improper behavior; FSA must also present sufficient facts to support its claim that the maximum fine is warranted in each case.

Discussion

As noted above, after the original hearing date for this case was cancelled and numerous requests for extensions were granted, oral argument was never presented. Ultimately, in August 2006, this tribunal granted DeMarge's request, with which FSA concurred, for a decision on the existing record. Accordingly, this case is decided based on the evidence in the record, which is substantial.[13]

The College's closure renders moot the emergency action and the termination proceeding, which are hereby dismissed.[14] The sole issue remaining before this tribunal is a fine action in the amount of $3,410,000, which represents a maximum fine of $27,500 for each of the 124 remaining cases of alleged misconduct. The fine was levied in accordance with the procedures that the Secretary has established for assessing fines against institutions participating in Title IV, HEA programs. 34. C.F.R. § 668.84. Taking into consideration the size of DeMarge[15] and the nature of the violations, the Department argues that the full fine amount for each alleged violation is warranted. I concur with FSA's conclusion that DeMarge cannot be considered a small institution for purposes of mitigating any fines.

Specifically, FSA asserts that DeMarge falsified numerous documents to establish eligibility to obtain Title IV, HEA program funds for students who never attended DeMarge or who attended

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the Secretary) (Feb. 23, 1989); *In the Matter of Teachers College, Columbia University*, Dkt. No. 04-44-SF, U.S. Dep't of Educ. (Sept. 16, 2005).

[10] *See*, *In the Matter of Neosho County Community College*, Dkt. No. 97-158-SF, U.S. Dep't of Educ. (Jan. 12, 1999).

[11] *See*, *In the Matter of Hollywood School of Beauty Culture & Advanced Hair Design*, Dkt. No. 98-37-SF, U.S. Dep't of Educ. (June 10, 1998).

[12] *In the Matter of Northeast Center for Judaic Studies*, Dkt. No. 94-55-ST, U.S. Dep't of Educ. (May 2, 1995).

[13] As noted above, this matter was decided on the record. No hearing was held. However, this tribunal ordered opening statements and written testimony of witnesses be submitted in lieu of oral argument. FSA submitted its Opening Statement and the written testimony of three witnesses, which was presented in writing as testimony would be presented orally -- with questions by counsel and responses by the witness. For this reason, evidence presented by the three FSA witnesses is referred to as "testimony" and "testimonial evidence" in this decision.

[14] *See*, *e.g.*, *In the Matter of Bliss College*, Dkt. No. 93-15-ST, U.S. Dep't of Educ. (February 23, 1994) (noting that a case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy).

[15] FSA argues that DeMarge should not be considered a small school, which is a mitigating factor in assessing fines, because the institution's funding levels are above the median amounts. *See*, correspondence from FSA to Mrs. Dee Hoshall, President, DeMarge College (November 5, 2004) (hereafter referred to as the "Notice document" or "Notice"), p. 11.

for a much shorter time than the College claimed. Further, FSA states, "By falsifying hours of attendance and other Title IV documents, DeMarge illegally obtained Title IV, HEA program funds. DeMarge's creation of these false files to deceive the Department renders meaningless the requirement that a school maintain complete and accurate records for each student enrolled in its programs."[16] By doing so, DeMarge breached its fiduciary responsibility under 34 C.F.R. § 668.82[17], according to FSA and is therefore subject to a fine action under 34 C.F.R. § 668.82(c)(1). FSA supports its claims by identifying 87 students in a "Change Log Report"[18] where allegedly improper changes to students' records were made and by itemizing 42 additional cases that involved falsified documents.[19] Of these, the Department is pursuing the original 87 cases from the Change Log Report and 37 of the other 42 cases of misconduct, for a total of 124 allegations.

In response, DeMarge generally asserts that any allegations that it manufactured fictitious documents are false. The College denies that it intentionally forged student signatures and claims that the attendance records were not falsified but rather the result of miscommunication between staff, faculty and students. DeMarge further contends that the fine issue is moot because the College closed; that FSA has not met its burden of proof because the facts behind its allegations of misconduct regarding the Change Log Report are incorrect; and that the amount of the fine imposed is excessive.[20]

As to DeMarge's first contention, that the fine issue is moot because the school has closed, it is without merit. Although the Secretary has found that issues relating to the functioning of the school, such as emergency actions and eligibility terminations, may be rendered moot by that institution's closing, not all pending actions will automatically be dismissed in such an event.[21] The purpose behind a fine is still relevant, and because the College may still have assets, the fine action is still germane. DeMarge's second argument about the factual basis of the FSA's allegations is the focus of the discussion below. Finally, the College claims that the amount of the fine imposed is excessive. However, DeMarge fails to proffer any legal arguments or factual evidence to support this assertion. As discussed above, this tribunal concurs that DeMarge is not a small institution deserving of consideration for mitigation based on its size. While DeMarge maintains that "it did not intend to avoid its obligations"[22], it makes no legal arguments that support mitigating the fine on others bases. Therefore, this tribunal has nothing before it to consider in assessing the fine, other than the gravity of the misconduct and the school's size.

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[16] Notice, p. 11.
[17] Which requires "the highest standard of care and diligence in administering the programs".
[18] *See*, FSA exhibits 43-14 through 43-206. Hereafter, all exhibits submitted by FSA will be designed as "ED", followed by the exhibit number. All exhibits proffered by DeMarge will be designated as "R", followed by the exhibit number.
[19] These 42 students were assigned numbers in the Notice document and are identified as students # 1-42. The students listed in the Change Log Report were not assigned numbers.
[20] *See*, "Respondent's Initial Brief" (March 29, 2005) (hereafter referred to as "Res. Init. Brief").
[21] *In the Matter of Fischer Technical Institute*, Dkt. No. 92-141-ST, U.S. Dep't of Educ. (Decision of the Secretary) (January 27, 1995) (stating, "I very obviously did not intend for the Bliss decision to stand for the proposition that any time a school closes, pending actions against it become moot."), as cited in *In the Matter of Lanin School of Aesthetics*, Dkt. No. 94-191-SF, U.S. Dep't of Educ. (March 27, 1995) (finding that the closure of the school and the death of its owner did not render moot the pending fine action).
[22] Notice, p. 13.

A thorough examination of the briefs, arguments, and evidence proffered by both parties reveals that the 124 allegations which resulted in the fine action fall into four specific categories. The first is those cases which FSA has declined to pursue; there are 5 such cases.[23] The second group comprises cases where FSA has made general allegations regarding the Change Log Report but provided no explanatory or corroborating evidence; 85 cases fall into this category.[24] The third group consists of cases where FSA has made specific allegations and has provided corroborating evidence, but DeMarge has provided nothing to refute the allegations; 25 cases fall into this category.[25] The fourth group includes cases where FSA has made specific allegations, supported by evidence in the record, and DeMarge has produced evidence to respond to the claims; there are 14 such cases.[26]

Regarding group one, although FSA included these 5 cases in its original Notice document, counsel for FSA indicated in its Opening Statement[27] that the Department would not be pursuing the charges or the fines. Accordingly, the fines assessed based on the allegations surrounding students numbered 1, 6, 14, 31 and 39 are hereby dismissed.

Group two consists of allegations of breach of fiduciary duty as evidenced by improper changes made to the Change Log Report.[28] In the Notice document, FSA asserts that the Change Log Report demonstrates that DeMarge fraudulently increased the hours of attendance for the students therein identified to draw down student aid funds in their names.[29] In addition to the Change Log Report, FSA introduced sworn declarations by former staff of the College[30] and statements by other officials which support FSA's general charges. In response, DeMarge provided sworn declarations by former staff[31] of DeMarge, including Demetra C. Hoshall, who was the College's President, that no improper changes were made to student attendance records; that all modifications in the computer system were done in good faith; and that the records in the Change Log Report were not used to verify attendance for Title IV purposes.[32]

To prevail on this charge, FSA must show that it is more likely than not that the changes in the Change Log Report were improper and in breach of DeMarge's responsibilities as a fiduciary. An examination of the Change Log Report reveals immediately that there are numerous status changes for the students listed. In support of the allegations of the impropriety of these changes, FSA's witnesses provided testimonial evidence of general misconduct regarding the keeping of

[23] The 5 cases not being pursued by FSA include the following students: # 1, 6, 14, 31, and 39.
[24] The 85 cases include of the original 87 students listed in the "Change Log Report" minus students Alltizer and Carson. Although Alltizer and Carson are identified by name in the record, they are not assigned numbers. Hereafter, Alltizer is referred to as "Student A", and Carson is referred to as "Student B".
[25] This group includes the following students: # 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30.
[26] This group includes the following students: A, B and # 5, 19, 32, 33, 34, 35, 36, 37, 38, 40, 41, and 42.
[27] ED Opening Statement, p. 2.
[28] The "Change Log Report" is a computer-generated record that details all the changes made to students' enrollment status. "Testimony of Nan C. Shepard" (June 8, 2006), p. 38, contained in ED Opening/Witness Testimony.
[29] Notice, p. 5.
[30] Including Wanda L. Smith, former Registrar at DeMarge, and Renee Williams, former Default Manager.
[31] Including Amy Brown, who served in the positions of Default Manager and Registrar, Ellen Tomlinson, Director of Financial Aid, and Regina Bobo, former Receptionist.
[32] "Declaration of Demetra C. Hoshall" (March 26, 2005), R-21, p. 4.

students' records and the use of the computer system. For example, Ms. Wanda L. Smith stated that Ms. Hoshall asked her to alter dates in the system to reflect longer periods of attendance than actual for six students[33], and Ms. Renee Williams stated that a former registrar at the College admitted to her that she had altered a student's file to add weeks of attendance to the record.[34] However compelling this testimony may be, it does not specifically address the 85 cases at issue. Indeed, FSA does not provide testimony to explain how each of the changes in the Change Log Report was improper, nor does FSA submit documentary evidence to show that the Change Log Report entries were even incorrect. Absent this context, the entries in the Change Log Report merely raise questions but do not support any conclusions.

In its defense, DeMarge asserts that no improper changes were made to student attendance records. The College's explanation for the numerous status changes in the Change Log Report is simply that the software program that maintained the student records only allowed updates when a student's status was "active" in the system.[35] Therefore, whenever staff needed to modify information to a student's record, that student needed to be reactivated in the system, regardless of his or her actual enrollment status.[36] Ms. Hoshall explains: "The changes from 'inactive' to 'active' were not done to manipulate whether or not they were an active student or not but merely to allow other modifications to the data base such as updating attendance records when new information became available."[37] Ms. Hoshall further states that all changes were made in "good faith" and for legitimate purposes.[38]

This tribunal also notes that there seem to be potential alternate explanations behind the numerous status changes in the Change Log Report. FSA's witness, Ms. Smith, states that an inactive student's record in the computer system could be automatically reactivated by the system -- changing the student's status to "active" -- under two separate sets of conditions: (1) if the student had not been completely and properly unenrolled from all of his or her classes[39] or (2) if someone entered attendance for that student.[40] Given this testimony, it is clear that some of the changes reflected in the Change Log Report might have been the result of these system limitations and programmatic anomalies in the software, rather than intentional or unintentional data manipulation by DeMarge officials.

Accordingly, DeMarge has provided a plausible explanation for the numerous changes in the Change Log Report. Further, FSA has failed to provide specific corroborating evidence to show that the changes in these 85 cases[41] were the result of misconduct. Therefore, absent further testimonial or documentary evidence that the changes found in the Change Log Report were the result of malfeasance or otherwise improper, I find that FSA has not met its burden of persuasion. I find in favor of DeMarge regarding the allegations that DeMarge fraudulently

[33] "Testimony of Wanda Smith" (June 14, 2006), p. 8, contained in ED Opening/Witness Testimony.
[34] ED 59-4, ¶ 30.
[35] Res. Init. Brief, p. 5.
[36] Hoshall, at 3.
[37] *Id*.
[38] *Id*.
[39] Smith, at 6.
[40] Smith, at 18.
[41] The 85 cases consist of all of the students listed in the Change Log Report, except Students A and B.

increased the hours of attendance for the 85 of the 87 students[42] identified in the Change Log Report.

The third group of allegations that this tribunal has identified consists of 25 cases where FSA has made specific charges of misconduct and has provided corroborating evidence but DeMarge has provided nothing to refute the claims. This group includes the following students: # 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30.

In each of these 25 cases, FSA provides numerous documents from the students' files and corroborating testimony from Ms. Wanda L. Smith, Ms. Nan Shepard of the Department of Education's Administrative Actions and Appeals Division and/or Ms. Kim Elston, a Senior Compliance Specialist with the Oklahoma Guaranteed Student Loan Program ("OGSLP"). These individuals all have personal knowledge of the student files for which they provided testimony, and this tribunal has no reason to doubt their credibility or credentials.

After a thorough review of the materials presented by FSA for the above-listed 25 students, it is clear that DeMarge officials engaged in serious acts of misconduct and breach of its fiduciary duty by manufacturing fictitious documents, reporting false information to lenders and drawing down unearned financial aid funds. An examination of the record and testimonial evidence supports FSA's claims that DeMarge fabricated documents such as false attendance records and transcripts; altered withdrawal checklists and leave of absence forms; and completed erroneous refund calculation worksheets in order to retain unearned financial aid funds in the names of students. Further, DeMarge reported incorrect information to lending institutions, to the OGSLP and to the Department of Education's National Student Loan Data System ("NSLDS"), or simply failed to report information at all, as in the cases where students cancelled their enrollment.

Among the most egregious acts of document falsification are the numerous incidents of forgery, which are supported by evidence in the record. In addition to the 4 incidents where students signatures[43] were forged by College officials, there are an additional 10 cases[44] where former DeMarge employee, Ms. Smith, testified that her initials had been forged on documents to give the appearance that she had reviewed or authorized various actions when she had not.

Given that DeMarge has failed to respond specifically to any of the above 25 allegations, FSA need only present evidence that supports its charges as more plausible than not. Accordingly, for the 25 cases in this third group, after a thorough review, I find that FSA has met its burden in demonstrating the plausibility of the 8 charges of creating a fictitious Leave of Absence ("LOA") form[45], the 4 charges of forgery of a student's signature[46] and the 23 charges of creating fictitious attendance records for a student.[47] Moreover, for these 25 cases, I find that DeMarge engaged in overt acts of misrepresentation, as supported by the evidence submitted by FSA and not refuted by the College. As previously stated, the Secretary has found that the maximum fine

[42] All of the students listed in the Change Log Report, except Students A and B.
[43] Students # 2, 12, 20, and 21.
[44] Students # 7, 10, 11, 17, 20, 21, 27, 28, 29, and 30.
[45] Students # 2, 12, 18, 20, 21, 22, 23, and 30.
[46] Students # 2, 12, 20, and 21.
[47] Students # 2, 3, 4, 7, 8, 9, 10, 11, 13, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30.

is appropriate in cases of fraudulent conduct. Accordingly, I concur that the maximum fine be assessed for each of the above-identified 25 cases.

The fourth and final group of charges consists of cases where FSA has made specific allegations, supported by evidence in the record, and DeMarge has produced evidence to refute the claims; 14 cases fall into this category.[48] It should be noted that the record is replete with contradicting documents. Without exception, the students' files here under examination contain documents which are inconsistent and irreconcilable with other documents, thus bringing into question the veracity of much, if not all, of each student's file. As the Secretary held in *In the Matter of Romar Beauty Schools*, Dkt. No. 90-90-ST, U.S. Dep't of Educ. (September 7, 1994) ("Romar"), the presence of falsified documents in an institution's student files gives rise to a presumption that the documents were falsified by the institution. The force of the inference is not lost simply because FSA cannot produce affirmative evidence that an employee of the school or an individual acting on behalf of the school falsified the files. Further, evidence of internal inconsistencies in the student files is considered probative corroborating evidence supporting the allegation of falsification.[49] This tribunal has waded through the morass of materials in the record in an attempt to discern what documents are credible and which are not. Weight was given to witnesses' sworn statements, particularly where witnesses' recollections were specific, detailed and consistent with other evidence. After an examination of the record, I find as follows.

Student A:
FSA contends that DeMarge manufactured fictitious records for this student, as evidenced by status changes in the Change Log Report, and improperly drew down and retained $1500 in Pell Grant funds. In response, DeMarge asserts that the attendance in the system is correct and matches the student's Attendance Detail Listing. DeMarge does not deny that it received Pell Grant funds in the student's name. Indeed, the College contends that the $1500 in Pell Grant funds was properly disbursed to the student.

The record includes pages from the Change Log Report; testimony by Ms. Smith and Ms. Shepard, who spoke directly with the student; enrollment and financial aid documents; the student's Detail Ledger Listing noting her status as "dropped"[50]; the student's Attendance Detail Listing and transcripts.

It is clear from the record that the student completed the paperwork to enroll in classes. Documentary evidence supports this and is uncontested. DeMarge also submits computer-generated attendance records to support its assertion that the student attended class and earned the Pell Grant funds. This contention is belied by Ms. Shepard's testimony. Ms. Shepard states that she spoke with the student on November 14, 2004, and at that time, the student informed her that she went to the school and took a test but decided not to attend and never took any classes.

[48] This group includes the following students: A, B and # 5, 19, 32, 33, 34, 35, 36, 37, 38, 40, 41, and 42.
[49] *See*, Romar.
[50] The status is "dropped" refers to a student who has attended class long enough to receive a grade before withdrawing from the school. Smith, at 6.

Ms. Shepard further testifies that when the student informed the College official that she had decided not to attend, the student was told not to worry about her financial aid.[51]

Although neither FSA nor DeMarge present conclusive evidence to support their cases, this tribunal is persuaded by Ms. Shepard's testimony of her conversation with the student that the student did complete the enrollment process but did not attend the school. Absent further evidence, DeMarge's computer-generated records of the student's attendance are insufficient to overcome Ms. Shepard's specific testimony to the contrary. Furthermore, if the student did not attend DeMarge, it follows that any funds the College received and retained in her name would be improper. Accordingly, I find that FSA has met its burden of proof on these charges.

Student B:
FSA contends that DeMarge manufactured fictitious records for this student, as evidenced by status changes in the Change Log Report. The record includes printouts of entries in the Change Log Report and testimony by Ms. Shepard, who spoke directly with the student on October 13, 2004. According to Ms. Shepard, the student completed the enrollment paperwork in February, 1999 but changed her mind and never attended the school.[52] The student later attempted to matriculate in another school but was told she was ineligible for financial aid funds because she had defaulted on her student loan for DeMarge.

DeMarge provides no evidence to refute this allegation. The only reference to this student in the College's exhibits is her name listed in a charge summarizing the Change Log Report entries.[53] This chart contains five entries for this student and lists two last days of attendance for her: April 23, 1999 and July 23, 1999.

I am persuaded by Ms. Shepard's testimony that the student never attended the school. DeMarge presents no evidence to the contrary. It follows that if the student never attended, any records the College might have that show her status as "active" would be improper. Further, the entries for the student's two last days of attendance must be fictitious as well. Accordingly, I find that FSA has met its burden of proof on the charge of fictitious records.

Student #5:
FSA contends that DeMarge manufactured fictitious attendance records for the period of August 20 through November 6, 2001. The record includes an Attendance Detail Listing from the student's file for three classes[54] running from August 20 through November 7, 2001 (printed on November 7, 2001) and reflects perfect attendance until the student "dropped" on that date[55]; an undated Academic File Summary Sheet for Withdrawals which indicates the student's last date of attendance was November 6, 2001[56]; and written testimony by Ms. Shepard that she spoke with the student who stated that she withdrew from the College in August and that it was impossible that she would have attended in November.[57]

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[51] Shepard, at 39.
[52] *Id*.
[53] R-294.
[54] Specifically: Pediatric Nursing, Med-Surg Nursing I and Clinical II.
[55] ED 5-94 and ED 5-95.
[56] ED 5-63.
[57] Shepard, at 5.

In response, DeMarge provides attendance sheets from several classes[58] that are signed by the student and dated, the last of which is from August 28, 2001.[59]

This tribunal notes that the sign-in sheets provided by DeMarge indicate that Student 5 was attending some classes until August 28, 2001. However, the classes for which these attendance sheets were provided do not match the classes in which the student was purportedly enrolled per the November 7th Attendance Detail Listing. Accordingly, DeMarge's evidence does not speak to the allegation of the fictitious Attendance Detail Listing, nor does it contradict the testimony that the student withdrew in August. I am persuaded by Ms. Shepard's testimony that the student clearly knew that she withdrew from the College in August. For these reasons, I find that FSA has met its burden of proof on this charge.

Student #19:
FSA contends that DeMarge manufactured a fictitious Leave of Absence for the student, forged the student's signature on it and fabricated fictitious attendance records for the period of July 7 through August 9, 2000. The record includes copies of the LOA in question; an Attendance Detail Listing showing the student's attendance for June 19 through August 14, 2000[60]; and a sworn affidavit from the student[61] who states that she attended the College through July 15th but never requested nor signed a LOA. Further, the student states that she examined the signature on the LOA, that it is forged, and she "would not spell [her] name wrong". She also stated that the attendance records for July 17 through August 9, 2000 were false because she was confined to bed rest during that time.[62]

In response, DeMarge suggests that the LOA may have been requested over the phone[63], and the College's Director of Financial Aid, Ellen Tomlinson, stated that she did not sign the student's name to any form.[64]

Nothing the College has provided refutes the student's sworn affidavit supporting FSA's allegations or even calls into question FSA's evidence. I am particularly persuaded by the student's observation that she would not spell her name incorrectly. For these reasons, I find that FSA has met its burden of proof on these charges.

Student #32:
FSA contends that DeMarge manufactured fictitious attendance records for the period of March 31 through June 26, 2003. The record includes Detailed Attendance Reports indicating that the student attended DeMarge between February 10 through June 27, 2003[65]; a notice of termination due to lack of attendance dated April 21, 2003[66]; testimonial evidence by Ms. Shepard and Ms.

[58] Specifically: Gerontology, Anatomy and Physiology, Fundamentals of Nursing, and Pharmacology.
[59] R-60 through R-66.
[60] ED 19-105.
[61] ED 53-1 through 53-8.
[62] ED 53.
[63] R-108.
[64] R-23, ¶ 20.
[65] ED 32-7 through 32-11.
[66] ED 32-2.

Elston, both of whom spoke with the student directly; and a signed declaration by the student[67] who stated that she stopped attending classes in March.

In response, DeMarge contends that the student's memory is unreliable because she did not remember correctly when she started attending the school. Further, DeMarge states that the student had appealed the termination decision and cites a Student Status/Address Change Report ("SSACR"), ED exhibit 32-14, as support of its contention that the student continued classes until after July 7, 2003.[68] The only evidence of its own that the College offers is Ms. Hoshall's statement that she spoke with the student who told her that her (the student's) recollection was poor and that she had accepted the dates that were told to her when she was interviewed.[69]

In this tribunal's view, Ms. Hoshall's general statement, absent further evidence, is insufficient to belie that of Ms. Shepard, Ms. Elston and the student herself. DeMarge has introduced no documentation to support its contention that the student even appealed the termination letter, let alone was reinstated. Mere assertions that the student's memory is unreliable are insufficient to negate the student's signed declaration. For these reasons, I find that FSA has met its burden of proof on this charge.

Student #33:
FSA contends that DeMarge manufactured fictitious attendance records for the period of July 11 through August 14, 2003. The record includes testimonial evidence from Ms. Shepard and Ms. Elston, both of whom spoke directly with the student, on April 6, 2004 and June 16, 2004 respectively; a signed declaration from the student herself who stated she ceased attending the school during the third week of classes in mid-July[70]; Detailed Attendance Reports (printed December 22, 2003) showing attendance from June 16 through August 14, 2003[71]; class sign-in sheets (dated July 10, July 14 and July 15, 2003)[72]; an instructor's attendance/grade book[73]; an Academic File Summary sheet listing August 14, 2003 as the student's last day of attendance[74]; and other documents.

In response, DeMarge cites the class sign-in attendance sheets and the instructor's attendance/grade book to prove that "this student attended past the date she apparently told the reviewer."[75] The College further asserts that the "attendance/grade book was maintained contemporaneously as the class was conducted and is an accurate and more reliable record of the student's attendance."[76]

[67] ED 49.
[68] Res. Init. Brief, p. 9.
[69] Hoshall, at 4.
[70] ED 50-4.
[71] ED 33-34 and 33-35.
[72] ED 33-2 through 33-6.
[73] ED 33-8.
[74] ED 33-37.
[75] Res. Init. Brief, p. 9.
[76] *Id*.

Although the student stated that she stopped attending classes sometime during the week starting July 7th, the instructor's attendance/grade book for the "Fundamentals of Nursing"[77] course shows her as "present" for July 8th, July 14th and July 15th. It is also clear from the sign-in sheets that this student attended class as late at July 15, 2003. There are no entries in the instructor's book indicating attendance or absence for July 16th and July 17th; the boxes under these dates are simply blank. The instructor's book reflects that the student was present on July 21st and is marked "X" for July 22-24th. There is no grade entered for "Exam II", which is listed following the attendance entries for the week of July 21st and was ostensibly given during that period. The attendance entries for July 28, 29 and 30th are unclear but appear to indicate that the student was present those dates; she is listed as "dropped" as of July 31, 2003.

It is clear that the student attended class through July 15, 2003, as evidenced by her signature on the class sign-in sheets. I further accept the College's assertion that the instructor's attendance/grade book is "an accurate and more reliable record of the student's attendance" because the instructor would have recorded attendance for each class as it was convened. Given that this instructor's book is the only evidence to contradict the student's recollection that she stopped attending DeMarge in mid-July[78], I reconcile the two by accepting the unaltered, distinct attendance markings in the instructor's book. Based on this book, I am persuaded that the student attended class on July 21st. However, the entries for July 28-30th appear to be written over and are not clear. This book further shows that the student dropped the class no later than July 31, 2003. Thus, the instructor's book contradicts the College's Detailed Attendance Report, which lists the student as having attended the Nursing course through August 13, 2003.[79] Furthermore, the Detailed Attendance Report shows the student as in attendance for this course on July 22, 23 and 24 while the instructor's book clearly shows the student as absent.

Based on this evidence, I find that FSA has met its burden of proof on the charge of fictitious attendance records for the period of July 22 through August 13, 2003.

Student #34:
FSA contends that DeMarge manufactured fictitious attendance records for the period of January 13 through April 11, 2003. The record includes Detailed Attendance Reports indicating that the student attended DeMarge between January 13 through March 19, 2003 with a "drop date" of April 11, 2003[80]; NSLDS enrollment reports that show that DeMarge reported the student as "withdrawn" on three separate dates (January 13, 2003, March 19, 2003 and April 11, 2003)[81]; testimonial evidence by Ms. Shepard and Ms. Elston, both of whom spoke with the student directly; and a signed declaration by the student[82] who stated that he attended for no longer than a week, withdrew from the school on or around January 13, 2003 and never signed any forms for financial aid.

[77] The instructor's book lists the course title as "Foundations of Nursing". However it is clear from the class sign-in sheets, the exam and the Detailed Attendance Report that the correct title of the course is "Fundamentals of Nursing".
[78] ED 50-1.
[79] ED 33-34.
[80] ED 34-1 and ED 34-2.
[81] ED 34-15.
[82] ED 51.

In response, the College stated that the student began classes on January 13, 2003; the withdrawal date of January 13th was erroneous and later corrected to March 19, 2003 as the last date of attendance. April 11, 2003 is the "drop date" for the student. DeMarge states that a change was made in the NSLDS "to reflect the date of determination or the student's drop date"[83] and contends that the last entry correction to the NSLDS does not support the conclusion that the College manufactured or entered fictitious attendance. Further, the College argues that the student's loans are in repayment which begs the question of why a student would repay loans when he did not attend the school.

There are conflicting claims concerning when Student 34 began at DeMarge. The College asserts that he started on January 13, 2003, and the attendance records reflect that. The NSLDS report, however, reveals that this student's status was "full time" at DeMarge, as of December 27, 2002.[84] The student himself states that he enrolled at the school "on or about January 13, 2003",[85] but he also states that he dropped out on January 13, 2003 or "very close to the date".[86] While Student 34 may be confused about the actual date he began classes, he does recall that he attended for less than a week because he never had an instructor[87] and states definitively that the March 19, 2003 withdrawal date is false.[88]

This tribunal notes that DeMarge reported to NSLDS three different withdrawal dates for this student, which raises questions as to which dates are accurate. Although the evidence is inconclusive as to when the student began classes at DeMarge, the College has presented no evidence to suggest that the student's recollection about attending for no longer than one week is fallacious. Therefore, I place credence in the student's statement that he withdrew after one week. Additionally, this tribunal is not persuaded that the mere fact that a student is repaying his loans is evidence of his attendance at the school, especially given that the student appears to be in repayment for loan debt for other schools listed on his loan history. For these reasons, I find that FSA has met its burden of proof that the College created a fictitious attendance record for this student for the period of January 21 through April 11, 2003.

Student #35:
FSA contends that DeMarge manufactured a fictitious Enrollment Agreement which changed the program in which the student was enrolled from the night program to the day program. The record includes two copies of the student's Enrollment Agreement (an unaltered copy reflecting enrollment for 72 weeks[89] and an altered copy reflecting enrollment for 48 weeks[90]); testimonial evidence from Ms. Shepard and Ms. Elston; and a signed declaration[91] from the student stating that she enrolled as a night student, never requested a change to the day program and that the altered enrollment contract reflecting this change is false.

[83] Res. Init. Brief, p. 10.
[84] ED 34-15.
[85] ED 51-1, ¶ 1.
[86] ED 51-2, ¶ 6.
[87] ED 51-1, ¶ 2.
[88] ED 51-2, ¶ 6.
[89] ED 52-3, R-127.
[90] ED 52-5, R-129.
[91] ED 52-1 and 52-2.

DeMarge replies that the Enrollment Agreement is not fictitious. The College explains that one copy of the Enrollment Agreement is maintained in the student's academic file, and one is maintained in the Financial Aid office; the version on which a change was made was the one for the student's academic file.[92] DeMarge further asserts that it "did not create a false record with a 'second' Enrollment Agreement to wrongfully reduce the amount of Title IV funds earned by this student."[93] The College also provides an affidavit by an instructor, Ruby Smith, attesting that Student 35 attended her evening class through April 21, 2003[94] and copies of the instructor's attendance/grade book.[95] The College asserts that it used the correct dates to calculate the Title IV funds to be returned so it is not subject to any liability for this student.

The record clearly shows that there are two Enrollment Agreements. Indeed, FSA and DeMarge each have included both versions in their exhibits. Student 35 states that the unaltered version, reflecting enrollment of 72 weeks, is the contract she signed and that the altered version, reflecting 48 weeks of enrollment, is false.[96] DeMarge does not explain the existence of two versions of the Enrollment Agreement, and the College's submissions about the student's attendance are irrelevant to the charge that it manufactured a fictitious Enrollment Agreement in breach of its fiduciary duty that requires "the highest standard of care and diligence in administering the programs."[97] Based on the evidence, the only conclusion this tribunal can arrive at is that the College improperly altered the original Enrollment Agreement. For this reason, I find that FSA has met its burden of proof on this charge.

Student #36:
FSA contends that DeMarge forged the student's signature and affixed a fictitious date on the Enrollment Agreement. The record contains the Enrollment Agreement dated April 27, 2003[98]; two documents with the student's signature dated May 2004[99]; testimony by Ms. Elston; and a signed declaration by the student who stated that the signature on the Enrollment Agreement was not hers, nor did she authorize anyone to sign on her behalf.[100]

DeMarge's evidence consists solely of documents relating to the student's grades and confirming her attendance at the school in 2004. Nothing DeMarge introduces pertains to the forgery charge.

An examination of the signatures on the documents reveals that the one on the Enrollment Agreement is markedly different for those on the other documents, as well as the one on the signed declaration. This comparison and Student 36's statement that she did not sign the Enrollment Agreement satisfies this tribunal that FSA has met its burden of proof on these charges.

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[92] Res. Init. Brief, p. 10.
[93] *Id*.
[94] R-131.
[95] R-133.
[96] ED 52.
[97] 34 C.F.R. § 668.82.
[98] ED 36-2.
[99] ED 36-3 and ED 36-5.
[100] ED 61-1 through 61-3.

Student #37:
FSA contends that DeMarge forged the student's signature on the Enrollment Agreement. The record contains the Enrollment Agreement dated June 16, 2004[101]; two other documents with the student's signature[102]; testimony by Ms. Shepard; and a signed statement by the student that the signature on the Enrollment Agreement was not hers.[103]

DeMarge's evidence consists solely of documents relating to the student's grades and attendance. Nothing DeMarge introduces pertains to the forgery charge.

An examination of the signatures on the documents reveals that the one on the Enrollment Agreement is markedly different for those on the other documents as well as the one on the signed statement. This comparison and Student 37's statement that she did not sign the Enrollment Agreement satisfies this tribunal that FSA has met its burden of proof on this charge.

Student #38:
FSA contends that although the student enrolled but did not attend DeMarge, the College drew down Pell Grant funds and Federal Family Education Loan ("FFEL") Program funds in the student's name. The record contains testimonial evidence from Ms. Shepard and Ms. Elston; a signed declaration by the student stating that she began but did not complete the enrollment process and never attended the school[104]; and various documents from the student's file, including printouts of NSLDS records.[105]

DeMarge responds that the student did enroll and requested to start classes on February 19, 2001 in the evening, as evidenced by the Enrollment Agreement[106] and the signed Student Status/Address Change Report respectively[107]. Moreover, the student attended classes from February through July 13, 2001. The College confirms that a Pell Grant of $1650 was disbursed for this student, as were FFEL funds. However, the FFEL funds were not posted to the student's ledger because the loan was cancelled. DeMarge explains why the student was reported as "never attended" in the records: "When a student's loan was cancelled, the financial aid office would report to the lender that the student never attended..."[108] Finally, DeMarge admits that the College did not return the FFEL funds as requested and attributes this oversight to "human error".[109] Nothing in the record shows that DeMarge has ever returned these funds.

DeMarge's evidence includes the student's Attendance Detail Listing for the period from February 26 through August 13, 2001 (printed on March 12, 2002); the Academic File Summary Sheet showing the student's last date of attendance as July 14, 2001; the student's SSACR changing her enrollment from morning to evening classes; the Detail Ledger Listing showing the student's status as "dropped" (printed December 26, 2002); an enrollment status change

[101] ED 37-6.
[102] ED 37-14 and ED 37-15.
[103] ED 55-2.
[104] ED 62.
[105] *See generally*, ED 38.
[106] R-146.
[107] R-145.
[108] Res. Init. Brief, p. 12.
[109] *Id*.

summary reflecting the status of "never attended" (effective January 28, 2001)[110]; a change request summary page showing "full cancellation" of the student's FSL[111] loan (cancelled January 28, 2001)[112]; and other documents.

The record clearly shows that the College received a Pell Grant and FFEL funds for this student. DeMarge admits that the FFEL funds were retained by the College when they should have been returned but cannot explain this "oversight" other than as a result of simple human error. As to the Pell Grant, the question remains as to whether these funds were "earned" through the student's attendance. The College cites attendance records, the Enrollment Agreement (purportedly signed and dated December 4, 2000) and the Student Status/Address Change Report (also purportedly signed by the student) as evidence of her attendance.

Contrary to DeMarge's assertion, the record contains no signed Enrollment Agreement. Exhibit R-146 is the first page of the College's Enrollment Agreement; however, the second signature page is not included. This undated, unsigned Enrollment Agreement indicates a start date of February 19, 2001 in the 72 week (evening) Practical Nursing program for this student. In contrast, the Student Status/Address Change Report (dated December 4, 2000) reflects a change of enrollment for the student from a morning program with a start date of December 11, 2000 to an evening program with a start date of February 19, 2001; it was purportedly signed by the student. This tribunal is troubled by these two documents. First, the Enrollment Agreement would be the first document the student would complete to matriculate. Despite DeMarge's assertions to the contrary, it is neither signed nor dated. Furthermore, it states that the student matriculated in the evening program. The Student Status/Address Change Report would be completed subsequent to the enrollment forms; however this SSACR document shows the student's original enrollment status as "morning" (day student) to be changed to "evening". This program change sequence is illogical when the original enrollment form shows the student as matriculating in the evening program. Thus, these two documents do not support the College's narrative of the student's enrollment changes.

Further, this tribunal finds the signature on the Student Status/Address Change Report to be suspect for three reasons. First, it raises the question as to why the student's signature was affixed where none is required on the form, nor is there any line for the student's signature. What purpose does the student's signature serve in this case? Second, after a review of other students' Student Status/Address Change Reports in the record, this tribunal finds no other instances where the student signed the SSACR. To the contrary, there are numerous examples where the report was processed without any signature from the student.[113] The student's signature on this particular SSACR is an anomaly which again raises the question as to why the signature was affixed. Finally, this tribunal notes that the student's name is misspelled and then corrected in the signature. All of these irregularities raise doubts about the authenticity of the Student Status/Address Change Report, and one might suspect that it was affixed to provide the document with the indicia of authenticity. This tribunal does not draw any conclusions about the purpose of the signature on this form but notes the anomaly.

[110] R-161.
[111] Federal Stafford Loan.
[112] R-162.
[113] *See*, *e.g.*, ED 5-75, 17-59, 18-84, 19-137, 30-10, 33-35, and 35-3.

DeMarge's records are further belied by the student's own signed declaration in which she states conclusively that she did not complete the enrollment process at DeMarge, nor did she attend a single class.[114] This tribunal has no cause to doubt the student's statement or her memory. Indeed, it strains credulity to believe that a student would forget attending a school for several months or lie about her attendance when she clearly stated that she decided not to attend upon learning that DeMarge credit hours could not be transferred to the community college she wished to attend later.[115]

Given the many weaknesses in DeMarge's evidentiary production, especially in light of the student's statement that she never attended the school, I find that FSA has met its burden of proof on these charges that the student did not attend the school and that the College improperly drew down Pell Grant and FFEL funds in the student's name.

Student #40:
FSA contends that although the student enrolled but did not attend DeMarge, the College drew down and retained $2230.08 FFEL funds in the student's name. The record includes testimonial evidence from Ms. Shepard, who spoke with the student on September 23, 2004, and from Ms. Elston; as well as NSLDS, OGSLP and Sallie Mae records, among other documents.

In response, DeMarge states that no Pell or FFEL funds "would be disbursed" and that the College cancelled FFEL payments from the lender issued on May 22, 2000 and October 6, 2000.[116] Further, the loans were refunded in full to Sallie Mae in December 2002.[117]

The student's file shows that she enrolled in DeMarge in March, 2000[118] and completed paperwork to request student aid.[119] However, Ms. Shepard testified that this student said that she never attended the school.[120] On May 22, 2000, the College received the first disbursement of $1115.52 in FFEL funds.[121] On October 6, 2000, DeMarge received the second disbursement of $1161 of FFEL funds.[122] Ms. Elston, examining the OGSLP "Claim Package of Default and Claim for Reimbursement Record"[123] for this student, testified that the College certified to the lender on May 8, 2000 that the student was enrolled fulltime; that the College received $1115.52 FFEL funds on May 22, 2000; on May 23, 2000, DeMarge certified to NSLDS that the student never attended; and on October 6, 2000, DeMarge received the second FFEL disbursement of $1161. The College did not return any loan funds. On April 26, 2001, the student notified Sallie Mae that she had never attended DeMarge and spent several months attempting to resolve the issue with the school. On July 3, 2001, Sallie Mae contacted Ellen Tomlinson, Director of Financial Aid for DeMarge, about the loans; Ms. Tomlinson indicated she would investigate the

[114] ED 62.
[115] ED 62-1.
[116] Res. Init. Brief, p. 12.
[117] R-246.
[118] ED 40-23, 40-30.
[119] ED 40-29, 40-34.
[120] Shepard, at 33.
[121] ED 40-2.
[122] ED 63-7.
[123] ED 63.

issue and call the Sallie Mae representative back. Despite follow-up calls by Sallie Mae on July 10, July 18 and July 24th, Ms. Tomlinson did not respond to the inquiry. DeMarge did not return the first loan disbursement to Sallie Mae until January 14, 2002[124] and only after involvement by the Sallie Mae inquiry. The second disbursement for this student was not refunded until October 14, 2002 and only after the College was advised during a program review in April 2002 that they remained outstanding and must be returned.[125]

This tribunal accepts that the College had returned the FFEL funds in full by October 2002 but notes that the funds were disbursed in 2000, some two years earlier. The NSLDS record shows that the College reported that the student did not attend; clearly the school was on notice that the FFEL funds should be cancelled and returned. Despite this, DeMarge does not explain why the funds were not returned when the student cancelled. Further, the record shows that this issue was resolved only when Sallie Mae intervened on the student's behalf and made numerous attempts to contact the College's Director of Financial Aid. Although DeMarge has repaid the FFEL funds to Sallie Mae, the two-year delay in repayment and lack of responsiveness by College officials are inexcusable. I believe that the circumstances in this case constitute a breach of the College's fiduciary obligations, despite its eventual return of the money. For these reasons, I find that FSA has met its burden of proof on these charges.

Student #41:
FSA contends that although the student enrolled but did not attend DeMarge, the College drew down and retained Pell Grant funds in the student's name. The record contains testimonial evidence from Ms. Shepard, who spoke with the student, and Ms. Elston and a printout of the NSLDS Pell Grant History for the student showing that the College received $3125 in the student's name.[126] According to Ms. Shepard, the student may have signed some paperwork, but she notified the College to cancel her enrollment before classes began and never attended.[127]

In response, the College asserts FSA's assertions are incorrect; it returned $1563 of Pell funds.[128] DeMarge further states: "The College recognized that the Pell funds needed to be returned and attempted to do so. A copy of the prepared check is included but appears not to have been processed."[129] The College cites this check as evidence that it intended to take the necessary corrective action, and one cannot assign "intentional bad motive" to the College. Thus, DeMarge concedes that it retained the funds and only argues for mitigation of the fine based on its lack of ill intent.

The record clearly demonstrates that the College received $3125 in Pell Grant funding for this student.[130] However, DeMarge's response does not address whether or not the student attended the College and earned any of the Pell Grant funds. Indeed, the College's Detail Ledger Listing

[124] ED 40-1.
[125] "Testimony of Kim Elston" (June 13, 2006), p. 25, contained in ED Opening/Witness Testimony.
[126] ED 56-1.
[127] Shepard, at 35.
[128] Res. Init. Brief, p. 12.
[129] *Id*.
[130] R-250 and ED 56-1.

(printed April 16, 2002) lists the student's status as "cancellation"[131] which is consistent with FSA's testimonial evidence that the student never attended. If the student did not attend DeMarge, the financial aid funds should have been returned. However, the College failed to do so. DeMarge admits that a check representing a partial refund of the Pell Grant "appears not to have been processed", and this tribunal agrees that the lack of signature on the actual check[132] supports the conclusion that it was not. Furthermore, the College does not even address the issue of the remaining balance of $1562 in Pell Grant funds that it received. In sum, DeMarge has provided nothing to refute FSA's charges. For these reasons, I find that FSA has met its burden of proof that DeMarge improperly drew down and retained Pell Grant funds in the amount of $3125 for a student who never attended the school. As to DeMarge's assertion that no intentional bad motive can be assigned to this situation, I do not agree that a purported lack of an intentional bad motive constitutes the mitigating circumstance of a good faith effort to rectify the problem, nor does an unsigned check. The fact that none of the Pell Grant funds were returned suggests that, at best, the College made only a minimal effort. For this reason, I do not believe that any mitigating circumstances apply.

Student #42:
FSA contends that although the student enrolled but did not attend DeMarge, the College drew down and retained $2728.61 FFEL funds in the student's name. The record includes testimonial evidence from Ms. Shepard and Ms. Elston; a signed declaration[133] by the student herself that she enrolled and then withdrew without having attended the College; and NSLDS records, among other documents.

In response, DeMarge states that it returned $3633.96, representing the initial loan amount plus interest, to the Oklahoma Guaranteed Student Loan Program in September 2004.[134] The College contends that this situation was an "oversight", which it has since corrected, and maintains that "it did not intend to avoid its obligations."[135]

This tribunal accepts that the College returned the FFEL funds in September 2004 but notes that it took DeMarge three years to make the refund, given that the funds were disbursed in 2001. The College failed to explain why the funds were not returned when the student withdrew. Further, the record shows that the student was denied a car loan because she had allegedly defaulted on her school loans, was denied financial aid at another educational institution for the same reason, and her wages were garnished for lack of repayment. It was only after the OGSLP office contacted DeMarge about this matter that the College repaid the loans.[136] Although DeMarge has repaid the financial aid funds to OGSLP, it is clear that the College only returned the loans when OGSLP became involved. This delay in repayment is inexcusable. The College's failure to act inflicted a tremendous hardship on the student, which this tribunal finds appalling and absolutely reprehensible. Accordingly, I believe that the circumstances in this case

[131] "Cancellation" status refers to students who were scheduled to start a program but never attended class. Smith, at 5.
[132] R-247.
[133] ED 57.
[134] Res. Init. Brief, p.13 and R-251.
[135] Res. Init. Brief, p. 13.
[136] Elston, at 27.

constitute a breach of the College's fiduciary obligations, despite its eventual return of the money. For these reasons, I find that FSA has met its burden of proof on these charges.

As to DeMarge's assertion that this situation was merely an oversight, I cannot disagree more strenuously. The fact that the College characterizes this incident as an oversight demonstrates its cavalier disregard towards its students. If this case were truly an oversight and the College had no intention of avoiding its obligations, DeMarge could have rectified the situation when it was first brought to its attention, and without the intervention of OGSLP. Furthermore, this tribunal cannot accept DeMarge's assertion that it did not intend to avoid its obligations, given that the College only returned the loans after it had been notified of the outstanding funds twice by OGSLP, in February and August 2004.[137] For this reason, I do not believe that DeMarge acted in a manner that allows for any mitigating circumstances to be considered.

Accordingly, for the above-discussed 14 cases, I find that FSA has met its burden in all instances. In assessing the severity of the allegations here upheld, I find that DeMarge engaged in serious misconduct in violation of Title IV. The record clearly demonstrates that DeMarge acted contrary to the duty, trust, and confidence placed in it by the College's own students, by the lending institutions and by the Department of Education. For these reasons, and again noting that DeMarge offers no legal or factual arguments to support mitigation, I conclude that the maximum fine be assessed for each of the above-identified 14 cases.

Conclusion

As discussed above, this tribunal finds as follows. The 5 cases which FSA declined to pursue are dismissed. In the 85 Change Log Report cases, FSA did not carry its burden of proof, and I find in favor of DeMarge. In the 25 cases where DeMarge provided no rebuttal evidence, FSA has carried its burden. For the 14 cases where DeMarge provided a response to the charges, DeMarge was unpersuasive, and I find for FSA. Finally, for all of the cases where FSA carried its burden, it provided evidence that the maximum fine should be imposed. DeMarge failed to convince this tribunal otherwise.

Order

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is HEREBY ORDERED that DeMarge be fined $27,500 per each of the 39 sustained violations of Title IV for a total fine of $1,072,500.

Judge Richard I. Slippen

Dated: July 19, 2010

[137] *Id*.

SERVICE

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

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