UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

NATIONAL TRAINING SERVICE, INC.

Respondent.

Docket No. 92-101-SP

Student Financial
Assistance Proceeding

DECISION

Appearances:

Michael Brustein, Esq., Kristin E. Hazlitt, Esq., Brustein & Manasevit, of Washington, D.C., for the Respondent.

Sarah L. Wanner, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Office of Student Financial Assistance Programs.

Before:

Thomas W. Reilly, Administrative Law Judge.

BACKGROUND

On July 8, 1992, the Region III (Philadelphia, PA.) Office of Student Financial Assistance (OSFA), U.S. Department of Education (ED), issued a Final Program Review Determination letter (FPRD) to the Respondent, National Training Service, Inc. (NTS or school), containing nineteen findings culminating in the demand for the return of $5,899,828 in Federal student financial assistance funds which was disbursed to NTS during fiscal years (FY) 1987-88, 1988-89, and 1989-90, under the Pell Grant program, the Stafford Loan/Guaranteed Student Loan (GSL) program, and the Supplemental Loans to Students (SLS) program.1/ On August 20, 1992, NTS timely appealed the FPRD, pursuant to 34 C.F.R. § 668.113.

The amount demanded by ED represents the full amount of student financial assistance received by NTS over the subject three-year period 2/, under Title IV of the Higher Education Act, 20 U.S.C. § 1070 et seq., as amended. Additionally, the FPRD notified NTS that OSFA intended to impose an informal fine in the amount of $253,700 for certain alleged violations. The amount of that informal fine is not in issue for this appeal.

NTS requests that the FPRD be dismissed with prejudice, arguing that the monetary finding requiring the return of every dollar of Federal student financial aid even though a large part of those funds "are currently in repayment status. is unjustly severe in consideration of the limited findings of the Department." (NTS Brief, at 2.) NTS further argues that since only 20 student files were reviewed, ED has failed to establish a prima-facie case justifying the return of all financial aid funds ever received by NTS. NTS points out that since the 1990 cohort default rate for NTS was only 45.6%, that indicates that an estimated 54.4% of the Stafford and SLS loans in question were in proper repayment status, and if NTS were required to repay the full amount demanded, the Department would be receiving an undeserved and illegal windfall and double payment, rather than mere compensation for actual loss. NTS asserts that as opposed to the across-the-board demands for return of 100% of all funds received contained in broad, very general allegations under Findings 1 and 3, only four findings (11, 15, 16 and 17) (3/) are based upon specific monetary allegations, and these total only $25,024.99 versus the $5,899,828 demanded.

EFFECT OF N.T.S. BANKRUPTCY

Before discussing the merits of the FPRD findings, however, there is a preliminary threshold matter that must be resolved. This is the matter of NTS's bankruptcy and the impact it may have on this proceeding.

In August 1994, NTS filed for Chapter 7 bankruptcy (U.S. Bankruptcy Court, District of New Jersey, case no. 94-13922). On December 14, 1994, a Final Decree in Bankruptcy was issued under Chapter 7 of the Bankruptcy Laws. (Copy of decree received by Office of Hearings and Appeals on March 29, 1995.) Both sides have served and filed separate briefs addressing the impact of bankruptcy on this proceeding. 4/

NTS argues, inter alia, that a bankruptcy court has issued a final decree in bankruptcy and closed the case as of December 14, 1995, and therefore, as of that date, NTS "no longer exists and its debts have been liquidated."

Thus, pursuant to bankruptcy law, although corporations cannot be fully discharged of their debts, any collection of the liability which SFAP is attempting to litigate is permanently barred. ... Thus, where there is no longer a valid debt nor a valid debtor, there is no longer a case at issue for the Administrative Law Judge to consider. Any claims by the Department of Education would have to have been resolved in the bankruptcy proceeding... (NTS) no longer exists and the liability at issue no longer exists, there simply is no claim for SFAP to pursue herein. (NTS Bankruptcy Brief, at 2-3, March 22, 1995.)

NTS further asserts that:

(S)ince NTS's debts have been discharged in bankruptcy, the possibility of SFAP ever recovering funds from NTS has been negated, ... and ... in such a situation it is proper for this tribunal to dismiss this case as moot, the issues of NTS's questionable expenditures or program compliance are never reached.... The question for this tribunal is whether the Department should continue to

expend time and resources in a futile attempt to collect nonexistent money from a nonexistent institution. (NTS Bankruptcy Brief, at 2.)

SFAP argues, however, that this proceeding is live and ready for decision, and that NTS's filing for bankruptcy has no bearing on the quantum of its liability, since such filing does not fulfill NTS's burden of persuasion 5/, and also because Chapter 7 bankruptcy does not wipe out the debts of a corporation. 6/ (SFAP's Bankruptcy Brief, at 1, February 16, 1995.)

SFAP further argues that:

An institution's bankruptcy has no tendency to show that the questioned expenditures were 'proper,' or that the institution 'complied with program requirements.'... The amount of liability owed by NTS therefore is not affected by respondent's bankruptcy. (SFAP Bankruptcy Brief, at 2.)

NTS appears to rely heavily upon the Secretary's decision in the Bliss College case 7/ and an ALJ's decision in Pikeville 8/ (more probably dicta) to bolster its argument that the Department should not pursue funds from a bankrupt institution, and that to do so would be "a waste of Department's resources." However, Pikeville was later vacated by the Secretary (a fine proceeding had been held to be moot in view of Bliss), and a series of similar cases were reversed and remanded "for full adjudication below" 9/ with the Secretary pointing out that the "extreme result" of Pikeville "would thwart the statutory responsibility of the Department to preserve the fairness, efficiency, and integrity of the student financial assistance programs." 10/ As argued by SFAP, if Bliss no longer mandates dismissal of fine and termination actions against closed schools, it certainly does not mandate dismissal of a Subpart H appeal, something not even discussed in Bliss. 11/

For this and other reasons set forth in the SFAP bankruptcy briefs, I am not persuaded that NTS's argument on the impact of bankruptcy is a valid one. I cannot conclude that NTS's liability has been eliminated or that the proceeding has become moot simply because NTS, a corporation, has filed for Chapter 7 bankruptcy protection, and I do not believe that an Administrative Law Judge has the authority to do so in a Subpart H proceeding. With regard to the practical difficulties or even impossibility of collection efforts, that is beyond the scope of the Judge , 5 review responsibilities here, and I gladly leave the matter of collection efforts and collection mechanics to the Department's offices concerned with such matters (and possibly to the Department of Justice).

I conclude that this Tribunal has no authority under the law or regulations to abandon, or order the abandonment of, collection efforts involving potential monetary liability to the Department based upon respondent's bankruptcy. Thus, I find and conclude that an assessment of the extent of NTS's liability is unaffected by its filing for bankruptcy. After due consideration, I am not persuaded that the Computer Processing Institute12/ decision requires a different result on the bankruptcy impact issue. Although the Judge dismissed the appeal in that case as being moot, alternatively he adopted the recomputation of monetary liability under the subject FPRD. Furthermore, that opinion explicitly relied on the Secretary's decision in Bliss 13/ which was

later substantially limited by the Secretary's Order reversing and remanding Fischer Technical Institute and consolidated cases14/.

FINAL PROGRAM REVIEW DETERMINATION

Discussion

In view of the extensive briefs from both sides 15/ plus voluminous attachments and exhibits, 16/ coupled with the FPRD and its appendices17/ reaching almost a foot high, in the interest of brevity this decision will consist of a brief summary discussion and then simply a list of findings and conclusions keyed to the specific FPRD Findings in issue.

A careful review of the documentary evidence leads to the inexorable conclusion that the Respondent school lacked a compliance disposition when it came to constructing and maintaining records required by law and ED regulations, when it came to conducting required verifications of student aid reports, income histories, dependency and non-dependency family status, the obtaining of Financial Aid Transcripts from prior schools attended by its students, properly certifying SLS loans, properly certifying cost of attendance figures for student loan purposes, and supplying upon ED request essential missing documentation that would allow ED authorities to more accurately assess the magnitude and extent of regulatory violations and the actual extent of the over-award of Federal student aid funds that could lead to extensive Government and lending institution liability for loan losses. The respondent school also failed to properly identify and document "Ability-To-Benefit" (ATB) student situations, where clearly required by the students' academic histories and ED regulations. The lack of administrative capability (or more probably a lack of interest in attempting to comply with regulations) was so pervasive that NTS was placed on the stricter "reimbursement system" of payment on April 11, 1990 (OSFA Ex. 1, at 2, FPRD letter).

Against an overwhelming record of sloppy record-keeping, absence of required records, evasion of record-keeping and verification requirements (e.g., the use of a blanket repeated "$4,000 per year for odd-jobs" on tax and income verification forms), the respondent school has mustered a wail of various defenses, none of which I find to be meritorious. After declining the opportunity (and ED demand) to produce further required documentation that would permit a more precise assessment of the magnitude of the monetary liability involved, and a blanket refusal to hire an accountant to do further audits required, the respondent urges that "the measure of recovery must be commensurate with the amount of the harm" (unknown, thanks to respondent's refusal to cooperate in supplying missing records or to compile missing ledgers); and argues that "the number of files reviewed by the Department ('only' 20) is not adequate to sup port a return of all Title IV funds ever received by NTS." NTS also argues that recovery is precluded because of the Doctrine of Laches (a less than six month delay between issuance of the first FPRD and the second more-detailed version based on the same audit); and further argues that respondent has been "improperly denied the ability to present a defense due to [alleged] violations of the Freedom of Information Act" (based upon demands for ED reviewers' work papers). However, the mountain of documentation from the school's own records constitute the case-in-chief against the respondent. The ED reviewers' thoughts, feelings, observations and internal notations have virtually no bearing on the legitimacy or reviewability of their findings and conclusions, which

must stand or fall as measured against copies of the school's own records appended as exhibits, appendices and attachments to ED briefs and the FPRD.

After due consideration of NTS's arguments, I simply find no merit in respondent's "laches" 18/ or Freedom of Information 19/ defenses. With regard to the respondent's position that ED cannot recover "all" the Title IV funds received by NTS based on the "limited" nature of the sample student files reviewed, I find that argument somewhat disingenuous in that the school blatantly refused to conduct a further audit requested by ED (believing it "unnecessary" to go to the further expense of hiring an accountant) or to supply more documentation that might possibly have diminished the overall extent of the school's liability under Title IV and the ED regulations, and would certainly have enabled a more precise quantification of the true extent of loan liability exposure. This being the case, the respondent school is hardly in a position to complain about a demand for all Federal loan funds jeopardized by its own clear disregard of verification requirements, record-keeping and record-supplying regulations, as well as unauthorized loans and over- awards made over the three-year period covered by the review.

FPRD FINDINGS

The key FPRD Findings in dispute are Findings 3, 5, 11, 15, 16, 17 and 1. Finding I is referred to last because it is wider in scope, more general, and incorporates subsidiary portions of other findings to arrive at its conclusion of administrative incompetence.

I. Finding Three

FPRD Finding 3 concerns various failures relating to required verification of information in Student Aid Reports (SAR). Schools receiving Federal financial aid or loans under Title IV are required to verify information that students provide on their student financial aid applications, and, more specifically, schools are required to obtain verification on those student files selected on the basis of predetermined "edits" established by the Secretary. (34 C.F.R. §668.54(a)(1).) The school ascertains which student aid applications have been selected for verification by reviewing the SAR, the needs analysis tape, or the Pell Payment Summary. Those SARs requiring verification are marked by an asterisk in the student aid index. The items to be verified are set forth in 34 C.F.R. §668.56, e.g., adjusted gross income, income tax paid, household size, and factors relating to dependent or independent status. Documentation acceptable to provide such verification is set forth in 34 C.F.R. §668.57. NTS was required to maintain and keep current records showing the school's compliance with verification requirements, and the records were required to be kept systematically organized on site at the school. (34 C.F.R. §668.23(f)(1)(vii).) Records kept by NTS did not indicate compliance with those verification regulations. For example, verification of adjusted gross income and federal income tax paid was either missing or evasively answered so as to indicate that a large number of individuals came limited umbrella exception directed to individuals who need not and therefore will not be filing income tax returns for the base year. This exception was clearly and obviously abused by having a large number of students sign a form claiming to have made the identical $4000 20/ per year from "odd jobs," in the face of generally known IRS rules requiring many such individuals (depending on circumstances) to at least file income tax returns, whether or not there would be any net tax due and in order to obtain under a very a refund of withholding tax paid. Also, with

such an income it would still be necessary for such an individual to report the source or sources of such income to ED/OSFA.

There were three forms of NTS violation of ED regulations regarding verification: (1) in some cases a complete failure to conduct verification at all, (2) in some cases a failure to obtain adequate information regarding income sources from students claiming not to have filed income tax returns and to intend not to file a return, and (3) a failure to resolve conflicts between income and tax reported on SARs and the income and tax reported on relevant IRS tax returns.

Four students were selected for verification for award year '87-'88, forty for award year '88-'89, and sixty-one students for award year '89-'90. In the Program Review Report, OSFA directed NTS to supply the following information for all the students selected for verification for those three award years: (1) SAR or signed ESAR, (2) all items necessary to correctly verify the student's SAR information, (3) the student's contract, (4) the student's grades, and (5) the student's account card. NTS's response did not come until November, 1991, and none of the specifically requested information was contained in the files supplied. (See the requirements for student verification data in 34 C.F.R. § 668.23(f)(1)(vii).)

In many instances, NTS failed to verify at all students' income or income tax. (Two named students in award year '87-'88, ten students in award year '88-'89, and seven students in award year '89-'90.) 21/ In some cases, NTS did not obtain or even attempt to obtain income tax records for students subject to verification until well after the award year for which the student was enrolled. Such after-the-fact attempts at verification are useless for determining student eligibility for federal financial aid, and are simply blatant non-compliance with regulatory requirements. Verification is required to be done within a "reasonable period" but cannot extend beyond the last date the applicant is enrolled or June 30 of the award year, whichever comes first, unless the Secretary has specifically allowed an additional period for compliance. (34 C.F.R. §668.60, OSFA Brief, at 11 - 12, & exhibits cited therein, six named students.) The pointlessness of such after-the-fact "verification" is illustrated by the fact that the belated tax returns of the six subject students contradicted information in those students' SARS (income figures and reported income tax paid). The legal effect of NTS's failure to verify income and tax information is that the federal financial aid received by those students was disbursed in violation of regulations. (34 C.F.R. §§66'8.51, .54, .55, .56, .57, .60.)

With regard to the Guaranteed Student Loan (GSL) program, if a student does not supply required verification information within the required reasonable time, the school cannot certify the student's GSL application or process a GSL check to him, and must return to the lender any GSL check payable to that student. (34 C.F.R. §668.60(b)(1)(I)(C)&(D), (b)(1)(ii).) Schools also must notify student borrowers and GSL lenders of any ineligibility for GSL funds exceeding $200. (34 C.F.R. §668.61(b).)

With regard to Pell Grants, an applicant who does not provide the necessary documentation and, where necessary a reprocessed SAR, forfeits the Pell Grant for that award year and must return any Pell Grant payments already received for that year. (34 C.F.R. §668.60(c)(2).) Also, schools must eliminate Pell Grant overpayments discovered during verification by making restitution

from their own funds if they do not recoup them from students within a limited period. (34 C.F.R. §668.61(a).)

Respondent's certification of GSL loans, disbursement of GSL funds, failure to return GSL checks to lenders, failure to notify students and lenders of GSL ineligibility, and disbursement of Pell Grant funds to ineligible students all violated ED regulations. (34 C.F.R. §§668.60, 668.61.) Accordingly, NTS has liability to ED for the Pell Grant funds received and GSL funds borrowed by students whose income information was required to be verified but was not. (34 C.F.R. §§668.60, 668.61, 690.79(a)(2).)

With regard to the school's failure to resolve conflicting information as part of the verification process, the general rule for the GSL program is that if the information on the application changes during the verification process, the school must recalculate the applicant's Expected Family Contribution (EFC) and, where appropriate, adjust the applicant's financial aid package. (34 C.F.R §668.59(c)(1)(I) & (ii).) For the Pell Grant program, the school must require the applicant to resubmit his SAR to the Secretary if the school either (I) recalculates the student's EFC and determines that the recalculated EFC changes the student's Pell Grant award, or (ii) does not recalculate the applicant's EFC (i.e., finds that the EFC does not change). (34 C.F.R. §668.59(a)(l)(I)&(ii).) But NTS, in several instances of inconsistencies between income and income tax paid versus information in the SARs disclosed by the verification process, simply failed to conduct any follow-up at all. (ED Ex. 1, Appx. C-1.) Eight such cases were found for award year '88-'89, and three more in the '89-'90 award year. In the face of such conflicting information, NTS was required to perform new needs analyses or obtained new SARs based on the corrected information obtained during the verification process. (34 C.F.R. §668.59.) The consequence of such failure is that the calculation of the amount of Pell Grant funds and GSL loan funds received by the students concerned was improper, unauthorized and it cannot be known whether any one of those students was legally entitled to any such funds, making NTS liable for all those funds. (34 C.F.R. §§668.53, 668.116(d), 668.609, 690.82.)

There were similar failures to verify the number of household members, the number enrolled in postsecondary educational institutions, and the dependency status of the students concerned. These items are important elements in calculating a student's EFC, and in turn, his level of entitlement to Title IV financial aid. These requirements and their impact in the calculations are set forth in relevant regulations 22/, with which the school is required to comply. There were two students in this category in award year '87-'88, two in award year '88-'89, and eleven students in award year '89-90. 23/

There were several instances of student files supplied to OSFA wherein the files did not contain sufficient information to determine whether or not verification was required. The files for four students in award year '88-'89 fell into this category, as did two students in award year '89-'90.24/

There were thirteen cases where NTS did not conduct required verifications involving obtaining signed statements listing the name and age of each household member and the relationship to the student-applicant (two in award year '87-'88 and eleven in award year '89-'90). 25/

For some students, NTS obtained the required verification form, but household size information on the form contradicted information given on the applicants' SAR (Two students in award year '88-'89, and two in award year '89-'90.) NTS failed to recalculate the EFCs of students whose SARS inaccurately reported household size and household college attendance. For failure to verify and failure to reconcile such conflicting information, NTS became liable for all the Pell Grant and student loan funds received by the students involved.

NTS also became liable for Pell Grant funds disbursed without valid SARS from students. (34 C.F.R. §690.61(a)(1).) Of the students selected for verification, nineteen received Pell Grants and did not submit valid, timely, signed SARS (or ESARs)26/. The school becomes liable to ED for such improper Pell payments and overpayments.27/

The specific amounts of improper Pell Grant disbursements, student names, award years, and pertinent ED Exhibits are summarized on pages 28-34 of the OSFA Brief (paras. 85-89), which summary is hereby incorporated by reference.

II. Finding Eleven

In order to admit students who did not have high school diplomas or "GEDs" (General Equivalency Diploma), NTS was required by regulations to determine that such students had the ability to benefit (ATB). (34 C.F.R. §§600.5, 600.11.) NTS was required to document the basis for its ATB determinations. (34 C.F.R. §600.5.) NTS purported to determine its students' ATB by administering an ATB Aptitude Test. Three students who did not graduate from high school or pass GED tests were allowed to attend NTS without taking ATB tests at the time of admission. They were not administered ATB tests until 1991 (if then), long after they enrolled. This does not satisfy the regulatory requirement that ATB tests be administered at the time of admission. (34 C.F.R. §600.11(a).) Accordingly, the Title IV assistance those students received was improperly disbursed to ineligible students and must be refunded to ED by NTS (totalling $4200 in Pell Grant funds and $7875 in GSL funds).28/ (See ED Exs. 1, Appx.I; ED Exs. 3 & 5.)

III. Finding Fifteen

This FPRD Finding involves incorrect certification of SLS loans. In order to determine the maximum SLS loan amount for which an institution may certify a student, the school must apply the formula: Cost of Attendance (COA) less Other Financial Aid = Maximum SLS amount. (20 U.S.C. §1078 (1)(b)(3), see ED Ex. 104, at 11-28.) In subtracting "Other Financial Aid" from COA, schools such as NTS must subtract the net amount of any GSL loan, unless their COA figures do not include "loan origination fees." (See ED Ex. 103, Handbk., at 5-14.)

For six of the twenty student sample files initially reviewed by ED program reviewers, NTS failed to correctly certify the maximum SLS loan amounts. For three of those students, the miscalculation resulted in improper over-awards of SLS funds. 29/ NTS became liable to ED for a total of $3420 in SLS overpayments pursuant to the documentary support for Finding 15.

IV. Finding Sixteen

This FPRD Finding involves incorrect loan certification relating to improper estimated Costs of Attendance (COA). This concerned one particular student file (student #16) and NTS's March 3, 1989 certification of his application with an estimated COA of $6673 , later bumped up by NTS to $13,344, with no basis shown for the increase. 30/ NTS later made a small refund to Howard Savings Bank, representing part of the GSL loan to that student, resulting in a net over-award of $1229.99, for which NTS remains liable to the Department. An institution may not certify a student's loan application for an amount that exceeds the student's need. (34 C.F.R. §§682.603, 682.609.)

V. Finding Seventeen

This FPRD Finding involves missing Financial Aid Transcripts (FAT). Two students informed NTS that they had attended prior institutions, but neither student file contained the required FAT, nor any written certification that either student had not already received Title IV funds at the prior institutions. Nor was there any documentation that NTS made any effort to obtain transcripts or certification from those institutions that Title IV funds had not been disbursed to the two students. Regulations require institutions to contact prior institutions for such information, certifications and FATs before disbursing Title IV funds, and institutions may not release SLS, GSL or Pell Grant funds without such information and certifications. 31/ Requests for FATs must be made before Title IV funds are disbursed, and GSL and SLS proceeds must be returned to lenders if the required FATs are not received within 45 days of receipt of the loan proceeds. (34 C.F.R. §668.19(a).) NTS's belated effort to obtain the missing FATs (after the fact) does not constitute compliance. Accordingly, NTS released SLS and GSL proceeds and Pelt Grant funds to the two students (Brooks and Holland) in violation of the regulations, and created NTS liability to Ed for a total of $2100 in Pell Grant funds and $7450 in student loan funds under Finding 17. 32/

VI. Finding One

FPRD Finding 1 concerns NTS's "lack of administrative capability" as demonstrated by its consistent violations and evasions of regulatory requirements established for the proper administration of Title IV funds. It is based upon the evidence of a multitude of violations addressed in other findings (3, 4, 5, and 15, and further supported by 11, 16, and 17), and it also addresses NTS's refusal to supply ED with requested documentation sufficient to calculate the full magnitude of the violations and to accurately assess NTS's monetary liability to the Government and lending institutions, beyond the limited (but illuminating) samples OSFA's reviewers were allowed to examine.

In order to participate in any Title IV, HEA program, an institution must demonstrate that it can adhere to "standards of administrative capability." (34 C.F.R. §§668. 11, 668.14.) Additionally, such institutions must award, certify, document, and account for Title IV funds as required by the applicable statutes and regulations. 33/

Reviewing Finding 3, it is apparent that NTS not only failed to conduct required verification but systematically avoided, circumvented, or evaded it.

With regard to Finding 4, documents provided by NTS to OSFA demonstrated that NTS provided late refunds in numerous instances and in some cases appeared not to have made the required refunds at all. NTS supplied no refund or a late refund in the cases of at least forty students, based upon just the limited evidence available to OSFA reviewers. In the Program Review Report, OSFA required NTS to review its records for the subject three award years to determine IF. refunds were due and paid for all students who withdrew or dropped. For all refunds paid, NTS was required to submit copies of all cancelled checks, as well as a LOTUS disk specifying for all students for whom refunds should have been made: (1) student's name, (2) Social Security number, (3) last date of attendance, (4) amount of refund due the lender, and (5) date the refund cleared the lending institution.

NTS admitted that it did not make all refunds within 30 days (as required), and that its system was not as "wisely put together" as it should have been. NTS said that it would supply the disk, but refused to supply copies of cancelled checks. NTS then supplied ED only a listing of a limited number of students for whom GSL refunds supposedly were made due to an asbestos-related delay in starting classes, but this listing did not purport to cover the required analysis of all refunds due students for the three award years. Additionally, NTS did not supply for the refund- category students (not even the asbestos-delay students) the requested last date of attendance, amount of refund due the lender, date the refund cleared the lender, and cancelled checks. NTS's refusal to supply the documentation requested by ED makes it impossible to determine if NTS complied with refund requirements for the subject award years, and, if not, the monetary extent of the failure.

With regard to Finding 5, the record clearly establishes inadequate accounting for Title IV funds. Institutions administering Title IV, HEA funds are held to the highest standards of care and diligence, by regulation, in administering programs and accounting for federal funds. (34 C.F.R. §§ 668.23, 668.82, 690.81.) An institution involved in such Title IV programs is required to establish and maintain on a current basis financial records that reflect all program transactions, and it must establish and maintain a general ledger, control accounts, and related subsidiary accounts that identify each program transaction separate from all other institutional activity. The institution is also required to account for receipt and expenditures of Pell Grant funds in accordance with generally accepted accounting principles. (34 C.F.R. §§ 668.14, 668.23, 690.81.) Yet, a comparison between NTS's Pell Grant accounting records and NTS's Pell Grant monthly checking account statements disclosed numerous unreconciled discrepancies, including $42,555 in checks written to NTS's operating account that were not recorded on the Pell Grant accounting records. Also, NTS's bank records showed NTS's Pell Grant checking account was debited bank service charges. Bank service charges are not permissible uses of federal Pell Grant funds; the institution must pay such charges out of its own funds. (34 C.F.R. §690.81(c).) Also, NTS did not reconcile its accounting records with financial aid award records to determine if students receiving Pell Grant funds were eligible for them. Because of these discrepancies, the Program Review required NTS to construct a complete accurate set of accounts for the Title IV funds received, including certain specified details in the reconstruction. That reconstruction was to be certified by a CPA as to accuracy and completeness, and was to accompany NTS's response to the Program Review. NTS refused to provide the required information or the record reconstruction, stating that "we have done our best" and "we do not have to arrange for any more expense in the hiring of an accountant...." This response established regulatory violations of the

records maintenance and records retention regulations, and violated regulations requiring the production of records to ED upon demand. 34/ This also violated NTS's Program Participation Agreement (PPA).

It is clear from the limited sample that the institution did not comply with federal requirements for accounting for Title IV, HEA funds, and precisely because of NTS's failure and refusal to maintain required records and provide an accounting of Title IV funds, it is now impossible to quantify how much of Title IV funds were properly and improperly disbursed and certified by NTS

With regard to Finding 15, concerning incorrect certification of SLS loans, the evidence indicates that a significant percentage of a small sample (20) 35/ of student files reviewed contained readily documentable errors in SLS certification. Despite being required to do so by ED, NTS refused to conduct a further file review to determine whether further SLS over-awards had been made, thus the exact magnitude of such over-awards is now indeterminable.

With regard to Findings 11, 16, and 17, a significant percentage of student files (of the 20 sampled) lacked documentation of ATB for students subject to ATB requirements, there was one case of an incorrect loan certification for cost of attendance in a GSL loan application, and there were multiple cases of missing Financial Aid Transcripts.

Taken together, the evidence supporting Findings 11, 16, and 17, indicate that NTS routinely violated Title IV regulations. Such conduct make it clear that NTS not only lacked administrative capability, but showed a serious lack of any compliance effort on its part -- what other agencies in other circumstances would term a "lack of a compliance disposition." This organizational attitude and record would justify a demand for return of all 36/ Federal funds expended and disbursed by NTS over the three award years.

Broken down over the award years, Title IV funds expended in relation to NTS and its students were as follows: 37/

Award Year '87-'88: Pell Grant $ 52,300.
Stafford Loans 1,095,445.
SLS Loans 912,380.
2,060,125.-- subtotal

Award Year '88-'89: Pell Grant $ 134,275.
Stafford Loans 1,098,782.
SLS Loans 1,118,524.
2,351,581.-- subtotal

Award Year '89-'90: Pell Grant $ 373,670.
Stafford Loans 978,626.
SLS Loans 135,826.
1,488,122.-- subtotal

TOTAL: $5,899,828.

MEASURE OF LIABILITY

Counsel for the respondent has made one argument that has merit , although practical precise solutions are not so easy to fashion. That argument, included as well in NTS's requested findings of fact (NTS Brief, at 4, proposed Findings 13 & 17), points out that since the 1990 cohort default rate was 45.6%, one can logically conclude that 54.4% of the Stafford and SLS loans in question "are in repayment status and if NTS repaid these funds as well, the Department would receive a double payment" and that "if the Department received a return of those funds from NTS at the same time that the funds were being repaid by the students, the Department would receive a repayment in excess of the original loan."

To address that potential problem in a realistic and fair manner, ED suggests in its Reply Brief (at 53-55) that the 1990 cohort default rate of 45.6% should be applied as a conservative estimate in calculating the measure of assessed liability of NTS for the loans made during the three award years. (The 1988 cohort default rate was 6.9%, the rate for 1989 was 68.3%, and the rate for 1990 was 45.6%.)

As pointed out by ED, the ideal solution would be to require NTS to pay for the actual defaults to date, as well as all interest payments made by the Department, and to require NTS to purchase the remaining loans from the lenders, thus removing the loans from the federal insurance program. (Every loan certified by NTS in violation of Title IV regulations subjects the Department to the risk of having to pay reinsurance on the loan, a sum which includes principal plus accrued interest.) But the circumstances of the present case preclude the "ideal solution" from being practical or workable. We are faced here with a no longer functioning institution, bankrupt and no longer receiving or generating income.

Accordingly, we will adopt OSFA's suggested approach and assess NTS's liabilities by application of the FY 1990 cohort default rate (C DR) to the total of loans certified by the institution during award years 1987-88, 1988-89, and 1989-90. Adding the subject loans for those three periods, and applying the CDR of 45.6%, yields the following calculation:

'87-'88: Stafford $1,095,455
SLS 912,380
'88-'89: Stafford 1,098,782
SLS 1,118,524
'89-'90: Stafford 978,626
SLS 135.826
$5,339,593 :Loans Total
x 45.6% :CDR

$2,434,854.41 :Net of Loans

To the above loan liability net figure must be added the full amount of the Pell Grant funds for the three award years:

87-'88: Pell Grants $ 52,300
'88-'89: Pell Grants 134,275
'89-'90 Pell Grants 373.670
$ 560,245 :Total Pell
+2.434.854.41: Net of Loans

$2,995,099.41 :TOTAL N.T.S. ASSESSED LIABILITY

CONCLUSION

After due consideration of all the evidence of record and the briefs of the parties, I find and conclude that ED's OSFA has produced sufficient evidence to establish prima facie case that in the three award years covered by the FPRD the charged violations of Title IV did occur, that Respondent NTS did not comply with program or regulatory requirements, did not maintain accurate records or produce records upon request of ED as required by regulations, did not conduct required verifications, did not properly certify the eligibility of students applying for federal student loans and Pell Grants, and that NTS systematically ignored or evaded requirements for processing applications for such loans and grants, and in various ways failed to administer Title IV, HEA funds using the highest degree of care and diligence, the standard required by the regulations.

I also find and conclude that the Respondent NATIONAL TRAINING SERVICE, INC., has failed to carry its burden of proving by credible evidence that the expenditures questioned and disallowed were properly made and complied with program and regulatory requirements, or that the charged violations of Title IV regulations did not occur, or that the assessed liabilities set forth in the subject FPRD for the three award years in issue were not established or were unjustified, and I find that the recovery of funds requested by the Department is fully justified by the overwhelming record of NTS violations of Title IV, HEA regulations.

In summary, the combined total assessed liabilities affirmed here amount to a grand total of $2,995,099.41.

ORDER

The Respondent, National Training Services, Inc., is hereby ordered to repay to the United States Department of Education the sum of $2,995 099,41.

Thomas W. Reilly
Administrative Law Judge

Issued: October 6, 1995.
Washington, D.C.

1/ ED had earlier issued another FPRD on January 14, 1992, based on the same audit, and that was also duly appealed by NTS. However, that first FPRD was rescinded by ED and replaced by the later and more detailed July 8, 1992, FPRD.

2/ ED's Philadelphia Regional Office (Region III) was notified by the Pennsylvania State Board of Education that NTS closed, effective September 1, 1990. Since then NTS has not submitted an audit to ED for the 1989-1990 and 1990-91 award years. Also, NTS has not complied with any of the closed school requirements in 34 C.F.R. §668.25. Further, an April 1, 1992 letter from the Vice President/Program Review of the Pennsylvania Higher Education Assistance Agency informed ED that they had not received a satisfactory response to their program review conducted in July 1990. That agency also informed ED that NTS "is under investigation and grand jury indictment." ED Ex.1, FPRD letter dated July 8, 1992, at 1.

3/ But OSFA asserts that there are six specific FPRD Findings in which specific sums of money are sought (Findings 1, 3, 11, 15, 16 & 17-- OSFA Reply Brief, at 64).

4/ SFAP's Brief Addressing NTS's Bankruptcy, filed February 16, 1995; NTS's Response To SFAP Brief Addressing NTS's Bankruptcy, filed March 22, 1995; SFAP's Reply Regarding NTS's Bankruptcy, filed March 31, 1995.

5/ In a Subpart H proceeding the respondent institution has the burden of proving, as applicable: (1) that expenditures questioned or disallowed were proper, (2) that the institution complied with program requirements. 34 C.F.R. § 668.1 16(d)(1994).

6/ A corporation is not entitled to discharge under Chapter 7 of the bankruptcy laws. See 11 U.S.C. § 727(a)(1), and cases: In Re Liberty Trust Co., 130 B.R. 467 (USDC, W.D. Texas, 1991); In Re Tri-R Builders. Inc., 86 B.R. 138 (Bankr. N.D.Ind. 1986); In Re Goodman, 81 B.R.

786 (Bankr. W.D.N.Y. 1988); In Re White Hat Feed, Inc. , 67 B.R. 851 (Bankr. D.Kan. 1986); In Re Springfield Constr. Co., 31 B.R. 395 (Bankr. S.D.Ohio 1983); Dept. Of Natural Resources v. 0-Tra Industries, Inc., 459 N.E.2d 564, 9 O.B.R. 472 (Ohio Supr.Ct.1984); Palmer v. First Nat. Bank of Kingman, 692 P.2d 386 (Kansas Supr.Ct.1984); NLRB v. Better Bldg. Supply Corp., 837 F.2d 377, 378 (9th Cir. 1988); In Re Bestway Products, 151 B.R. 530, 535-36 (Bankr. ED. Cal. 1993), affirmed 165 B.R. 339 (9th Cir. 1994); In Re Ocean Downs Racing Assn., 164 B.R. 245 (Bankr. D.Md. 1993); In Re James Downing. Inc., 74 B.R. 906, 910 (Bankr. N.D. I11. 1985).

7/ In the Matter of Bliss College, Dkt.No. 93-i 5-ST, U.S. Dept. Of Education (Decision of the Secretary, February 23, 1994).

8/ In the Matter of Pikeville Beauty College, Dkt.No. 94-36-ST, U.S. Dept. Of Education (ALJ Decision, April 19, 1994).

9/ In Re Fischer Technical Institute and consolidated cases, Dkt. Nos. 92-141-ST, et al, U.S. Dept. Of Education (Secretary's Order of Remand, January 27, 1995). \

10/ Fischer, supra, at 2.

11/ See also In Re Art of Beauty College, Dkt.No. 94-151-ST, U.S. Dept. Of Education (ALJ Decision, March 28, 1995; final decis. of Secretary, August 25, 1995), wherein, inter alia, a terminated and bankrupt school was nevertheless held liable for imposition of monetary fines for violations of program requirements under Title IV of the Higher Education Act of 1965, 20 U.S.C. ? 1001 et seq., although that was a Subpart G proceeding wherein the Department had the burden of persuasion [34 CFR § 668.88(c)(2)].

12/ In Re Computer Processing Institute, Dkt.No. 92-20-SP (ALJ decision, April 28, 1994).

13/ Supra, at note 5.

14/ Supra, at note 7.

15/ Not counting the three bankruptcy briefs already referred to (supra, note 2), the parties' briefs on the merits of the FPRD and the demand for return of ED funds consist of the following: (1) NTS's Application For Review (21 pages), dated August 20, 1992; (2) OSFA's "Brief, Supporting Evidence, and Proposed Findings" (60 pages), dated November 24, 1992; (3) NTS's Brief (58 pages), dated January 4, 1993, together with approximately 100 pages of attached exhibits; (4) OSFA's Reply Brief (79 pages), dated January 22, 1993.

16/ OSFA's exhibits are numbered 1 through 114 (with Ex. 1 being the subject July 8, 1992 FPRD letter), see OSFA exhibit list received November 24, 1992. Respondent NTS's exhibits (two volumes), appended to its August 10, 1992, Application for Review, are numbered 1 to 24, with multiple lettered appendices and attachments. Respondent's additional exhibits attached to its January 4, 1993, brief, are numbered I and 2, with Ex. I being an affidavit of Michael F. Bell, Sr., president of NTS, and Ex.2 being an ED letter regarding the appeal process for SLS default

rate determinations, coupled with approximately 100 pages of computer-run sheets ("tape dump" reports, loan record details).

17/ There are ten appendices to the July 8, 1992, FPRD letter, consisting of over 130 pages

18/ Respondent does not complain that the initial issuance of the FPRD was untimely. In fact, NTS itself took well over a year to respond to the Program Review Report (PRR), and then only a token "initial response." At that time, NTS refused to provide much of the additional documentation requested by OSFA. Respondent's only apparent claim of "delay" would be for the period between the letter rescinding the first FPRD (March 20, 1992) and the second FPRD (July 8, 1992), less than four months. This is hardly a "substantial" delay, much less a "prejudicial" or "inexcusable" one. NTS asserts that it was caught unprepared by the second FPRD, and that it had destroyed and misfiled records and lost track of potential witnesses during that short period. This is not credible. Beyond this, both FPRD's contained exactly the same 19 findings, the only difference being that the latter had extensive further explanatory detail supporting the findings. How this could "prejudice" respondent is unclear. Likewise, NTS's claim that it had "discarded or filed away without organization" records that needed to prove their Title IV compliance in the face of the earlier FPRD's 19 findings does not seem logical and, in fact, would be self-defeating. Schools are required to maintain records of Title IV compliance for five years after the award year to which they relate. 34 C.F.R. §690.81, 690.82, 682.610. (This requirement is not dependent on the school still being open.) See also State of South Carolina v. U.S. Department of Labor, 795 F.2d 375, 378 (4th Cir. 1986), wherein the State, a CETA grant recipient, asserted that the Secretary's delay in issuing a final audit determination has caused undue prejudice. The court pointed out that "the grant recipient has the burden to preserve and maintain adequate records in order to aid the federal government in administering the CETA program" and therefore the State could not "claim that the Secretary was somehow at fault for the State's improper storage of records."

19/ Three points to be noted about the Freedom of Information allegation: (1) OSFA has already produced a large amount of records (even though discovery is not applicable to these Subpart H proceedings, 34 C.F.R. § 668.117), (2) the Secretary has already made a final decision disposing independently of respondent's FOIA request in this matter, and (3) the only documents not released were subject to privilege.

20/ Seven students for award year '88-'89 and forty students for award year '89-'90 purportedly signed "odd job" Filing Status Verification Forms with similar round income figures, most typically "$4000", for their 1988 income, representing that they did not and would not be filing income tax returns for that year. (ED Ex. I, Appx.C-1, C-2; OSFA Reply Brief, at 14-15, and exhibits cited therein.) Two other students allegedly signed "Verification Forms" supplied by NTS, but reported their "odd job" income for the wrong year. (CF., 34 C.F.R. § 668.57(a)(4): "...income earned from each source.")

21/ ED Exs. 13, 14,25,26,28,30, 32, 33, 39, 41, 44, 53, 57, 67, 73, 74, 92; EDEx.1, Appx. C-1, OSFA Brief, at 10-11.)

22/ 34 C.F.R. §§ 668.56, 668.57, 668.59.

23/ OSFA Brief, at 21-23; ED Exs. 11, 12, 25, 31, 44, 50, 53, 65, 67, 68, '83, '89, 91, 94, & 98.

24/ See requirements set forth in 34 C.F.R. §§668.23(f)(1)(vii), 690.82,668.116(d); and ED Exs. 26,33,39,41,51 & 60.

25/ ED Exs. 11, 12, 50, 51, 53, 60, 65, 67, '83, '89, 91, 94, 98.

26/ ED Exs. 15, 20, 21, 22. 27,33, 36, 47, 92, 95, 17, 18, 13, 52, 56, 57, 61, 70, 98; OSFA Brief, at 27-28.

27/ 34 C.F.R. §§ 690.61, 690.79(a)(2), 680.'82(b)(2), 668.61.

28/ 34 C.F.R. §§ 668.7(b), 682.609, 690.79(a)(2).

29/ ED Ex.2, at 18-19; ED Ex.1, at 5; ED Ex. 5 (the Artis, Randall & Morgan files).

30/ ED Ex.5, Daye file, PLUS/SLS application/note; ED Ex.5, Daye file, NJ HEAF applic.; ED Ex.1, at 19; ED Ex.104, at 11-27, ED Ex.3, para. 36; NTS Ex. 1D, at 10; NTS Ex.16; NTS Ex. l, at 19.

31/ 34 C.F.R. §§ 668. 19(a), 668. 19(a)(3)(ii), (a)((3)(v), & (a)(5). Pell Grant funds may be disbursed for one payment period only, prior to receipt of FAT or certifications

32/ 34 C.F.R. §§ 668. 19, 682.609, 690.79(a)(2). For breakdown of

funds between the two student files and between types of loans/grants, see OSFA Brief, at 42-43, ED Ex.5, Brooks and Holland files.

33/ 34 C.F.R. §§682.607, 668.23, 668.82, 690.81, and 668, Subpart E; NTS Ex. 24.

34/ 34 C.F.R. §§ 668. 14, 668.23, 690.81, 690.82. See also NTS Ex.24 (PPA).

35/ The twenty files examined by ED's program reviewers apparently were just the tip of a large iceberg of violations. Those twenty, plus a large amount of other evidence, make clear that NTS's standard practice was noncompliance. Since NTS has refused to provide further accounting or further records (which could theoretically absolve NTS of the impression of large-scale violations), it is reasonable to infer that what already had been reviewed was truly indicative of NTS's records as a whole. However, the evidence is clearly not limited to just twenty files. The reviewers, upon determining that the twenty indicated serious compliance deficiencies, broadened their investigation by examining other NTS records. (ED Exs. 1 & Appx.; ED Ex.3, paras. 5, 20, 23, 25, 26, 27, 32, 33; and ED Exs. 11 thru 100.) Those records establish that the violations documented in the initial twenty files were indicative of. NTS's method of doing business with federal money.

36/ NTS's argument that it should only be assessed liability for "overawards" is almost ludicrous in the face of its refusal to produce further required records and additional accounting that could

permit a true fix on the magnitude of actual liabilities and an accurate measurement of all the violations NTS committed.

37/ See ED Ex.1, at 21; ED Ex.114; OSFA Brief, at 54.