IN THE MATTER OF DENVER PARALEGAL INSTITUTE,
Respondent.

Docket No. 92-86-SP, 92-87-SA
Student Financial Assistance Proceeding

DECISION

Appearances: William C. Clohan, Jr., Esq., of Clohan & Dean, Washington, D.C., and Thomas Hylden, Esq., of Baker & Hostetler, Washington, D.C., for the Respondent

Lawrence G. Brett, Esq., and Jennifer L. Woodward, Esq., of the Office of the General Counsel, United States Department of Education, for the Office of Student of Financial Assistance

Before: Judge Allan C. Lewis

This is a consolidated action initiated by the United States Department of Education (ED) to recover $256,251 from Denver Paralegal Institute (DPI) for the period January 1, 1987 through June 30, 1991. This action was proposed following an audit and program review which concluded that DPI certified ineligible and excess Stafford Loans and Supplemental Loans for Students. Based on the findings of fact and conclusions of law, infra, ED may recover $185,764.

I. FINDINGS OF FACT

The pertinent facts are set forth in the opinion. The detailed findings of fact are set forth in the Appendix A, infra. To the extent that proposed findings of fact or conclusions of law by a party have not been adopted in this decision, they are rejected as being inaccurate or unnecessary to the disposition of this case.

II. OPINION

A. Introduction

In 1979, Congress established the Guaranteed Student Loan Program to guarantee loans made by private institutions to individuals for postsecondary education. In general, the Guaranteed Student Loan and the Loan Insurance Supplemental Guaranty Agreement

programs provided loans not to exceed $2,500 for undergraduate students, including students attending proprietary schools, and loans not to exceed $5,000 for graduate students. 20 U.S.C. §§ 1075(a) and 1078-1(a) (1979).

Prior to 1986, undergraduate students, including students attending proprietary schools, were eligible for the identical yearly maximum amount of Federally guaranteed Stafford student loans regardless of their grade levels. 20 U.S.C. § 1075(a) (1985). In 1986, Congress recognized that the cost of education had dramatically increased in the preceding years while the maximum amount which a student may borrow had remained steadfast. H.R. Rep. No. 383, 99th Cong., 1st Sess. 36 (1986), reprinted in 1986 U.S.C.C.A.N. 2572, 2607. As a result, Congress modified the Guaranteed Stafford Loan Program which was formerly known as the Federal, State, and Private Program of Low-Interest Insured Loans to Students in Institutions of Higher Education. Congress increased the maximum yearly loan amount for undergraduate students and, for the first time, instituted a two tier system under which third year or more advanced undergraduate students were eligible for a yearly maximum loan amount which exceeded the amount available to first or second year students. 20 U.S.C.
§ 1075(a) (1986).

In the instant case, DPI is a proprietary institution which provided paralegal training to individuals during the period in issue from January 1, 1987 through June 30, 1991. The paralegal program was approximately one-half of an academic year. Unlike virtually all proprietary schools as well as colleges and universities, DPI's admission policy required substantially more than a high school diploma or its equivalence. For the majority of the period in issue, its minimum admission requirement was 36 semester or 54 quarter hours of college plus either a sponsorship letter from an employer or prospective employer or three years of experience in a law-related job.See footnote 1 1/ Fifteen percent of its students were admitted under this criteria. The remaining 85% of its students were admitted under its other criteria which required a baccalaureate degree.

As of January 1, 1991, DPI upgraded its minimum general academic standard and required its applicants to possess 48 semester hours or 72 quarter hours of college plus two years of experience in a law-related job. At the same time, however, it reduced its sponsorship admission standard by eliminating its minimum academic standard as long as an employer sponsored an applicant and indicated that the applicant would be employed in a paralegal capacity following the completion of his or her studies.

B. The Maximum Loan Amount Under The Stafford Program

The primary issue is whether DPI students were entitled to Stafford loans at the higher, second tier level which is available to third year or above undergraduate students. The controversy concerns the interpretation accorded 20 U.S.C. § 1075(a)(1)(A) (1987) which establishes the maximum loan limits under the two tier program for undergraduates.See footnote 2 2/ It provides, in pertinent part, regarding undergraduate students that--

(A) The total of [Stafford] loans made to a student in any academic year . . . may not exceed--
(i) $2,625, in the case of a student who has not successfully completed the first and second year of a program of undergraduate education;
(ii) $4,000, in the case of a student who has successfully completed such first and second year but who has not successfully completed the remainder of a program of undergraduate education . . . .

ED argues that the term "program" in subsection (A)(i) refers to the current program in which the student is enrolled. Inasmuch as DPI's program was only one-half of an academic year, ED urges that all of DPI's students were, therefore, only first year undergraduates entitled to the maximum loan amount permitted by the first tier.

In contrast, DPI urges that the phrase "who has not successfully completed the first and second year of a program of undergraduate education" in subsection (A)(i) refers to "any" program of undergraduate education. This would include the prior undergraduate programs attended by DPI's students at other institutions. When the prior undergraduate attendance by its students is considered, virtually all of DPI's students are eligible for the second tier maximum loan amount since they had completed their baccalaureate degrees.

As in any case of statutory construction, the "starting point must be the language employed by Congress." Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). If the language of the statute is clear and unambiguous, there is "no occasion for construction," Kenai Peninsula Borough v. Andrus, 436 F. Supp. 288, 291 (D. Alaska 1977) (citing Caminetti v. United States, 242 U.S. 470, 485 (1917)), aff'd sub nom. Kenai Peninsula Borough v. Alaska, 612 F.2d 1210 (9th Cir. 1980), aff'd sub nom. Watt v. Alaska, 451 U.S. 259 (1981) and "that is the end of the matter, for the court, as well as the agency, must give effect to the

unambiguously expressed intent of Congress." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (further citations omitted).

As noted previously, Congress established a two tier system for undergraduates. Under subsection (A)(i), the first tier loan amount is available to first and second year students. Under subsection (A)(ii), the second tier loan amount is available to a student who has successfully completed "such first and second year but who has not successfully completed the remainder of a program of undergraduate education." (emphasis added.) The term remainder, as defined by the **Oxford American Dictionary** 764 (1980), is "the quantity left after subtraction or division." Thus, the term remainder, as used in subsection (A)(ii), contemplates that the second tier amount is available in order to complete the balance of the program in which the student is enrolled. Hence, the statutory language clearly supports the general conclusion urged by ED that postsecondary education in any program may not be considered in determining the tier status of a DPI student.

This general conclusion is consistent with the Department's informal published position disclosed by three of its Dear Colleague Letters. As early as November 1986, the Assistant Secretary for Postsecondary Education issued a position letter to the postsecondary institutions which stated--

> The determination of whether or not a student has completed the first and second year of study must be made by the institution that certifies the GSL application and must be based on the grade-level classification of students in the program in which they are currently enrolled. For example, a student who is considered by the institution to be a freshman or sophomore in a program for which he or she is currently seeking a degree is eligible for a GSL of up to $2625

per academic year even if that student previously obtained an undergraduate degree in a different program. A student enrolled in a program that is normally completed in two academic years or less is not eligible for a GSL of more than $2625 per academic year regardless of the actual length of time it takes the student to complete the program.

Dear Colleague Letter (GEN-86-35) at 23 (Nov. 1986). See also Dear Colleague Letter (Gen-86-97) at 6 (Dec. 1986).

DPI argues, in effect, that a Dear Colleague Letter cannot serve as a basis for substantive rules upon which ED can rely. This view is consistent with Jackson v. Culinary Sch. of Wash., 788 F. Supp. 1233, 1262 (D.D.C. 1992) which held that a Department policy, not subject to the notice and comment procedures of the Administrative Procedure Act (APA), was not binding on third parties--

> [since] this policy has not yet been codified in law or regulation . . . [t]he case law in this Circuit clearly suggests that such a pronouncement, which has not been subjected to the notice and comment procedures required by the APA, 5 U.S.C. § 553, cannot be binding on third parties.

See also In re Baytown Technical Sch., Inc., Dkt. No. 91-40-SP, U.S. Dep't of Education (1991) at 26 (the Department's Dear Colleague Letters may be useful as a "backdrop of published policy statements . . . but these indicia of policy cannot stand alone as the basis for regulatory violation.")

As noted above, however, the foundation of this decision is based upon the statutory language, not the Dear Colleague Letter. Thus, DPI's argument misses the mark in this matter.

Next, DPI argues that its interpretation of the 1986 modifications to Section 1075(a)(1)(A) -- that a second tier status arises by virtue of accruing sufficient postsecondary education studies in any program -- is supported by the 1992 legislative history of the Higher Education Amendments of 1992 and the views of the Chairmen and ranking minority members of the House and the Senate Committees on Education.

The legislative history of the Higher Education Amendments of 1992 contains a floor colloquy regarding the 1986 statute in issue and the 1992 reauthorized version. The 1992 reauthorization legislation increased the maximum loan amount in both tiers and otherwise did not alter the language of the 1986 statute. Representative William D. Ford of Michigan, the Chairman of the Education and Labor Committee, and Representative Patricia Schroeder of Colorado engaged in the following
exchange--

> Mrs. Schroeder. Mr. Speaker . . . I would like to engage the gentleman from Michigan . . . in a brief colloquy regarding the issue of loan eligibility. I wanted to make sure that I am correct in stating that for purposes of determining a student's Stafford and SLS loan limits under both the current law and the conference report, students who are enrolled in a program for which 2 years

of postsecondary education are a prerequisite are considered to be third-year undergraduate students?

Mr. Ford of Michigan. Mr. Speaker, if the gentlewoman will yield, the gentlewoman from Colorado is correct.

Mrs. Schroeder. Mr. Speaker, I thank the gentleman for making that clarification, and I certainly hope the bureaucrats get the message on that clarification, because we have had a great problem with some excellent schools dealing with that, so I really thank the gentleman.

138 **Cong. Rec.** H6091, H6107 (daily ed. July 8, 1992).

Senators Pell and Kassebaum of the Subcommittee on Education, Arts and Humanities and Congressmen Ford and Goodling of the Committee on Education and Labor expressed a similar understanding of the legislation in letters sent to the Secretary of Education in late 1992 regarding this case. Thus, this post enactment legislative history rejects DPI's proposition that postsecondary education in any program is counted toward determining the appropriate tier classification of a student enrolled in a different program. The prior postsecondary education must be a prerequisite for the current program.

In determining the tier status of a student enrolled in a baccalaureate program, ED requires an institution to include any postsecondary education in a different program, whether it was received at this or any other school, so long as the institution accepts these courses as credits toward the student's current program. Thus, an individual enrolled in a baccalaureate program and possessing an associate degree from a two year school may be considered as a first tier student or a second tier student "complet[ing] the remainder of a program of undergraduate education" under Section 1075(a)(1)(A)(ii) depending upon the number of courses or credits in the former school which are recognized and accepted in the baccalaureate program.

In the above example, the school's acceptance of course work performed elsewhere is in sum and substance no different than DPI's entrance requirement which demands a specific minimum number of hours of postsecondary, college education in order to qualify for its program. In both cases, the postsecondary educational courses were completed at other institutions and, more importantly, are prerequisites to obtain the certificate or degree in the programs. Hence, it is appropriate to include the specific minimum number of hours of postsecondary, college education required by DPI in determining the tier status of a DPI student for purposes of the GSL programs.

In the present case, DPI had two academic criteria for admission into the program during the period in issue, one of which was altered toward the end of the audit period on January 1, 1991. The admission criteria, which remained constant during the audit period, was a four-year college degree. The other criteria reflected DPI's minimum academic standard and required during the period from January 1, 1987 to December 31, 1990, 36 semester or 54 quarter hours of college education plus either a sponsorship letter from an employer or three years of experience in a law-related job.

Although DPI acknowledges that approximately 15% of its students qualified for its program under the standard which did not require a college degree, it argues that a majority of its

students during the initial period had college degrees and, therefore, should be treated as fifth year students entitled to second tier loan status.

Where, as here, there are different admission requirements and these admission requirements do not affect the number of courses necessary to qualify for a certificate, the lowest academic standard must govern the amount of academic credit allowed to students for purposes of the GSL programs. Hence, the appropriate academic credit for all students for purposes of the GSL program is 36 semester or 54 quarter hours for the period January 1, 1987, through December 31, 1990. This amount of academic credit constitutes approximately 1½ years of college education. As such, DPI's students were only eligible for the first tier maximum loan amount under the Stafford program and do not qualify for the second tier maximum loan amount.

After January 1, 1991, DPI altered its minimum academic requirement. Without an employer sponsorship, the minimum academic admission requirement was upgraded to 48 semester hours or 72 quarter hours of college plus two years of experience in a law-related job. With an employer sponsorship, the minimum academic admission requirement was significantly downgraded and required no prior college credits. Under these circumstances, the minimum academic admission requirement of DPI was no prior college credits. Therefore, DPI students continued to be only eligible for the first tier maximum loan amount under the Stafford program after January 1, 1991.

Alternatively, DPI argues that its students were entitled to the maximum Stafford loan amounts established by the second tier on the theory that DPI processed its students as fifth year undergraduates in accordance with the guidance and instructions from its guaranty agency, the Colorado Student Loan Program (CSLP). DPI asserts that CSLP was the agent of ED and that CSLP had the real or apparent authority to provide guidance to DPI with regard to the Guaranteed Student Loan Programs. DPI contends that, in response to a letter by DPI to CSLP seeking approval of its grade-level designation and the second tier maximum Stafford Loan amount for its students, CSLP confirmed, in writing, that DPI's program was accurately classified as a fifth year undergraduate program and that its students qualified for the second or higher tier maximum loan limit of $4,000. Consequently, DPI argues that CSLP's confirmation, which was relied upon by DPI, estops ED from claiming that its program improperly classified students as fifth year undergraduates and from recovering any loans made in excess of $2,625, the maximum loan amount available under the first tier of the Stafford program.

ED counters that the guaranty agency is not an agent of ED but proffers no legal or factual support for its view. ED's view,

however, is contrary to the well established relationship between ED and the State guaranty agencies. Guaranty agencies, like ED, have full access to the records of a school for inspection and to conduct a compliance review--

(e) Inspection requirements. Upon request, a school shall afford the Secretary, a guarantee agency, and any of their authorized representatives, access to its records in order to verify the accuracy of its reports or the school's compliance with the Act and applicable regulations.

34 C.F.R. § 682.610(e) (1987).

After a compliance review, a State guaranty agency issues a program review report on its findings. ED, in turn, then evaluates the school's response and issues a final program review determination letter. Basic Training Manual, Student Financial Aid Administration Title IV, HEA Programs, U.S. Department of Education (1989) at 14-3. A second aspect of a program review is to provide technical assistance for schools.See footnote 3 3/ Thus, guaranty agencies, like CSLP, function as agents of ED regarding the guaranteed student loan programs. Jackson v. Culinary Sch. of Wash., 811 F. Supp. 714, 719 (D.D.C. 1993) (an agent is one who is authorized by another principal to act on his behalf.) This conclusion does not, however, resolve the matter for the question remains as to the nature of the technical assistance provided by CSLP.

In order to understand the technical assistance provided by CSLP, a brief historical review is appropriate. In a 1983 program review, ED examined DPI's classification of "graduate" status for its students on their guaranteed student loan applications for 1981-82. Although the classification status had no effect on the maximum loan amount available to DPI's students at that time, ED maintained that the students classified as graduate students should be classified as undergraduate students--

the school does not meet the Section 682.200 definition of an "Institution of Higher Education." Therefore, all of its students, even those holding bachelor degrees, are properly classified as "undergraduate" for GSL purposes.

Thereafter, DPI changed the classification of its students. It designated all of its students, including those with a baccalaureate degree, as fifth year undergraduate students. For purposes of the guaranteed student loan program, this designation

had no effect because the permissible maximum amount of a loan was identical for graduates and undergraduates at all levels.

After the passage of the Higher Education Amendments of 1986, which modified the loan limits for undergraduate students depending on their academic grade levels, Ms. Sharon C. Nantell, the Director of DPI, sought assistance from CSLP regarding the classification of DPI students. She sought assistance from CSLP officials at a seminar offered by CSLP. Based on this discussion, Ms. Nantell subsequently wrote CSLP on November 14, 1986, as follows:

For purposes of the Guaranteed Student Loan Program, the Denver Paralegal Institute has been classified as a fifth year undergraduate program. As you are aware, the Institute offers a curriculum primarily directed toward the college graduate. Well over 90% of our students have already obtained their Bachelor's degree prior to admission to the program.

At the CSLP seminar held in Golden on November 3rd, Paul Tone informed me that, under the new Reauthorization Act, our students would qualify for the $4,000 maximum GSL loan limit. Mr. Tone also indicated that those students attending our program without a bachelor's degree would also qualify for the $4,000 loan limit due to the fact that our program has a fifth year undergraduate designation.

The purpose of this letter, therefore, is to confirm in writing that our students in a fifth year undergraduate program will qualify for the $4,000 maximum limit on Guaranteed Student Loans. In addition, I would like to confirm in writing that students in our program who have not completed their Bachelor's degree will also qualify for the $4,000 limit in light of the fact that they are attending a fifth year undergraduate program.

In the event the above statements are in fact true, please sign, date, and return this letter to me for our files. If your have any questions regarding this request, please feel free to contact me directly.

In response to the inquiry by Ms. Nantell, Mr. Paul Tone, who was the Deputy Director of CSLP and the same official with whom Ms. Nantell spoke at the seminar, replied by letter dated November 25, 1986 as follows:See footnote 4 4/

The 1986 Amendments to the Higher Education Act of 1965 changed annual and aggregate loan limits for students.

The Amendments provide that students who have not completed the first and second year of an undergraduate program may borrow up to $2,625. Students who have successfully completed the first and second year may borrow up to $4,000. Since Denver Paralegal Institute's program is defined as a fifth year undergraduate program, its students may borrow the higher $4,000 amount.

It is apparent that CSLP's conclusion -- that DPI students may borrow at the second tier level -- is based on the assumption that DPI's program was, in fact, a fifth year undergraduate program. It is equally apparent that neither CSLP nor ED made this determination or concurred in such a determination. DPI disclosed only that some of its students had not completed their bachelor's degree. This information is insufficient to conclude that DPI's minimum educational requirement for admission was at least 2 years of college which is a prerequisite for a second tier loan amount.

It is incumbent upon the party seeking technical advice to disclose fully and forthrightly all the facts. Where, as here, technical advice was given which was based on an assumption and that assumption is not true as a matter of fact, then this technical advice has no force and effect for purposes of an estoppel argument.See footnote 5 5/ Estate of Meres v. Commissioner, 98 T.C. 294, 316 (1992). See also Gerken v. Commissioner, 61 T.C.M (CCH) 1691 (1991); Yale Ave. Corp. v. Commissioner, 58 T.C. 1062, 1077 (1972). Accordingly, DPI's estoppel argument does not preclude the monetary recovery for loans made in excess of the maximum permissible loan amount under the Stafford program for the period

January 1, 1987 through June 30, 1991.See footnote 6 6/

C. SLS Maximum Loan Amount

The parties have a dispute similar to the Stafford Loan program regarding the maximum amount of a SLS loan available to a DPI student. Prior to 1990, the maximum amount of a SLS loan available to a student, whether attending a college or a proprietary school was $4,000 per academic year. 20 U.S.C. § 1078-1 (1987). Section 2003(b)(1) of the Student Loan Reconciliation Amendments of 1989, Pub. L. No. 101-239, 103 Stat. 2106, 2114, modified 20 U.S.C. § 1078-1(b)(1) and established, effective January 1, 1990, a tier system somewhat similar to the Stafford Loan program. 20 U.S.C. § 1078-1(b)(1) (1990) provides, in pertinent part, that--

the maximum amount a student may borrow in an academic year . . . is $4,000, except that in the case of a student who has not successfully completed the first year of a program of undergraduate education and who is not enrolled in a program that is at least one academic year in length, as determined in accordance with regulations prescribed by the Secretary, such maximum amount shall be --

. . . .

(B) $1,500 for a student who is determined, in accordance with such regulations, to be enrolled in a program whose length is less than 2/3, but at least 1/3, of a academic year. . .

ED argues that DPI students were not entitled to the $4,000 maximum loan amount since the DPI students satisfied both criteria under the exception to the general rule, namely DPI students were enrolled in a program whose length was less than one academic year and they had not completed the first year of a program of undergraduate education. Since DPI's day and evening programs were more than 1/3 of an academic year (300 clock hours) and less than 2/3 of an academic year (600 clock hours), its students were entitled, according to ED, to a maximum loan amount

of $1,500.

DPI asserts that its students fail one of the two criteria under the exception and, therefore, were entitled to the $4,000 maximum amount under the general rule. DPI focuses on the criterion that a student "has not successfully completed the first year of a program of undergraduate education." Since this language is identical to language employed under the Stafford statute, DPI advances the same legal theory advocated in the Stafford Loan issue namely, that the completion of "the first year of a program of undergraduate education" in the SLS statute means the completion of "any" program of undergraduate education regardless of any relationship to the program in which the student is presently enrolled. (emphasis added.)

"When Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts shall be interpreted the same way." Greenwood Trust Co. v. Massachusetts, 471 F.2d 818, 827 (1st Cir. 1992) (citing Morales v. Trans World Airline, 112 S. Ct. 2031, 2037 (1992); Ingersoll-Rand v. McClendon, 498 U.S. 133, 144-45 (1990); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)). Accordingly, the result under the Stafford issue is the same under the SLS program. Where the minimum admission criteria of the current undergraduate program requires more than a year of undergraduate education, these students

have successfully completed the first year of a program of undergraduate education for purposes of the SLS loan program and, therefore, are entitled to the maximum amount of a SLS loan permitted by the general rule.

As in the Stafford loan context, the result in this issue is consistent with the treatment afforded a student who transfers programs. His or her borrowing level will depend upon the number of credits in the prior program which are accepted in the current program. Thus, the results mandated by the Stafford and the SLS statutes are consistent and compatible with the rationale of the statutes.

For the period January 1, 1990 through December 31, 1990, DPI's minimum academic standard for admission was 36 semester or 54 quarter hours of college education which represents 1½ years of academic education. Accordingly, the SLS loans authorized by DPI during this period were properly certified and the recovery sought by ED is denied. For the period January 1, 1991 through June 12, 1991, DPI's minimum academic standard was a high school diploma and, therefore, its admission standard does not qualify its students for the maximum loan amount available under the general rule.

DPI argues, however, with respect to its day program students, that they were also entitled to the $4,000 maximum loan amount available under the general rule during the period January 1,

1990 through June 12, 1991, on the theory that its day program failed the second criteria under the exception, namely that its program was not less than one academic year due to a conversion of the program to credit hours from clock hours in October 1989.
ED does not dispute that the conversion resulted in a program whose length was more than one academic year. ED disputes, however, the date of the conversion.

In October 1989, the State Board of the Colorado Community College & Occupational Education Agency authorized a conversion of DPI's program from clock hours to quarter credit hours. Such a conversion would create a day program of 37 quarter credit hours which was slightly in excess of the requisite minimum of 36 quarter credit hours needed to qualify as one academic year. Some 17 months after the state's authorization, on March 22, 1991, DPI submitted a request to its accrediting agency, the National Association of Trade and Technical Schools, to convert to quarter credit hours. Its accrediting agency approved the conversion on April 3, 1991. Thereafter, DPI submitted an application for institutional eligibility and certification to ED on April 9, 1991. This application sought approval to convert to quarter credit hours. On June 18, 1991, ED approved the conversion and made it effective June 12, 1991.

ED asserts that conversion occurred as of June 12, 1991, because its approval was necessary as the overseer of the Federal Title IV student financial assistance programs. DPI maintains that the conversion occurred in October 1989 because, as of this date, it was legally required to offer its program in quarter credit hours and there is no requirement that ED must approve a conversion.

In order to participate in a Title IV program, ED must determine whether the school is an eligible institution under 20 U.S.C. §§ 1091 and 1094 and that it has complied with 34 C.F.R. Part 668.

In addition, the school and ED must execute a program participation agreement with respect to the programs.

In order to determine a school's eligibility and to certify the school's compliance with 34 C.F.R. Part 668, ED requires the school to complete and file an application. This application for eligibility and certification requires the school to disclose, inter alia, its method of measurement, i.e. clock or credit hours, and the applicable academic calendar for credit hour institutions, e.g. semester, quarter. With respect to each program, the school indicates the length of the program and the number of clock hours per week or its credits per the appropriate academic calendar. The subsequent designation as an eligible institution by ED will extend only to the educational programs determined by ED to satisfy the applicable requirements of Subpart A of 34 C.F.R. Part 600. 34 C.F.R. § 600.10(b).

In the instant case, DPI received a favorable determination

regarding eligibility in the early 1980's and, again, in 1989. The eligibility was granted, in part, on the basis of a clock hour method of program measurement for its two programs. As a result of this determination and the execution of a program participation agreement, DPI was permitted to participate in the Federal guaranteed student loan programs. A conversion to a different method of program measurement represents a material change in one of the bases underlying the existing eligibility determination. This eligibility determination may only be altered or modified by the Department. Thus, DPI's conversion by the State of Colorado does not automatically alter DPI's existing eligibility determination for the Federal guaranteed student loan programs.See footnote 7 7/ Hence, it is necessary for DPI to apply for, and receive, a new eligibility determination by the Department in order to continue to participate in the Federal guaranteed student loan programs under a different method of program measurement.

Lastly, the effective date of conversion is not the date arbitrarily dictated by ED in its letter notifying DPI of ED's approval of the conversion. Under 34 C.F.R. § 600.10(a), the general rule is that ED considers an institution as an eligible institution "as of the date the Secretary receives all the information necessary to make that eligibility determination." In this instance, the appropriate date is April 11, 1991, the approximate date on which ED received DPI's application for institutional eligibility and certification that sought ED's approval of the conversion. Accordingly, under this argument, ED may recover SLS loan amounts made in excess of $1,500 for SLS loans authorized prior to April 11, 1991, and may not recover any amounts attributable to loans authorized thereafter.

In summary, ED may not recover on any SLS loans certified between January 1, 1990 and December 31, 1990; it may recover for SLS loans certified between January 1, 1991 and April 10, 1991; and it may not recover for any SLS loans certified on or after April 11, 1991.

D. Half-time Student Status

The last dispute between the parties is whether the period of classroom attendance by DPI's nine month, night-time students was sufficient to qualify these students as half-time students under 34

C.F.R. § 682.201(a)(1), a prerequisite in order to participate in the Stafford and SLS loan programs.

A half-time student "carr[ies] an academic workload that amounts to at least one-half of the workload of a full-time student." 34 C.F.R. § 682.200(b). For vocational schools, a full-time student carries a workload of not less than 24 clock hours per week or 12 quarter hours of instruction. 34 C.F.R. § 682.200(b). Therefore, a half-time student is one who carries a workload not less than 12 clock hours per week or 6 quarter hours of instruction.

Under DPI's nine month program, each student took two courses per week and attended four evening classes per week.See footnote 8 8/ Each evening session consisted of 2½ hours of instruction. Therefore, each student received 10 actual hours of instruction per week.

ED asserts that the nine month night-time students were not half- time students during the period from January 1, 1987 through April 15, 1991. ED's position is based upon two factors. First, it maintains, factually, that DPI was a clock hour school during this period. Second, it asserts that, as a matter of law, the number of clock hours of instruction received by the student cannot exceed the actual number of hours of instruction. Therefore, the 10 actual hours of instruction represents 10 clock hours of instruction and the DPI students do not qualify as half- time students.

As of April 15, 1991, DPI extended its evening session from 2½ to 3 hours of instruction. Thus, each student received 12 actual hours of instruction each week. Under ED's interpretation of clock hour, the evening students were now attending 12 clock hours of instruction per week and, accordingly, ED concedes that the evening students are half-time students thereafter.

DPI counters that a clock hour may be only 50 minutes in duration. Thus, 10 actual hours of weekly instruction reflects 12 clock hours of instruction i.e. 600 actual minutes of weekly instruction divided by 50 minutes per clock hour equals 12 clock hours. Therefore, according to DPI, its students qualify as half-time students.

Initially, a clock hour is defined by 34 C.F.R. § 668.2 (1989) as "[t]he equivalent of [a] 50 to 60 minute class, lecture, or recitation." Thus, 50 minutes of instruction is sufficient to constitute one clock hour. Hence, the regulation is clear that clock hour measurement does not correspond precisely with the actual amount of time of instruction. Clock hour measurement will always be the same or more than the actual instruction time. Hence, ED's the premise underlying its litigating position -- that clock hour measurement reflects actual time -- is inconsistent with the Department's regulation.

To reach its premise, ED argues, in effect, that a period for a break must also be included as part of a clock hour of instruction. Under ED's view, the sum of the break period and the instruction period must equal an actual hour of time in order to constitute a clock hour. Therefore, it asserts that DPI's 150 minutes of evening instruction is less than three clock hours because DPI's evening session failed to include three 10 minute breaks.

ED's position is based on the 1992-93 Student Financial Aid Handbook which contains a provision not included in earlier editions--

It is not allowable to count more than one clock hour per 60-minute period; in other words, a school cannot schedule several hours of instruction without breaks, and then count clock hours in 50-minute increments. The result would be that seven hours of consecutive instruction would count as 8.4 clock hours (420 minutes/50 minutes=8.4 hours). This is not allowable; seven real-time attendance hours cannot count for more than seven clock hours.

In this case, the nine month evening program consisted of four lectures each week. Each lecture was held from 6:00 pm to 8:30 p.m. and provided 150 minutes of instruction. This approach provided the same quantity of education as would have been provided by three separate, 50 minute classes with three 10- minute breaks.

The clock hour regulation focuses solely upon the period of instruction. Break periods are not relevant under the regulation. Thus, the determining factor is the quantity of education provided, not whether there is or is not a break provided before or after the period of instruction. In this case, the minimum quantity of education provided at DPI satisfies the quantity required by ED's regulations governing half-time status and, therefore, the students in the nine month evening program may be considered as half-time students during the period in which the course measurement was in clock hours.

ED's student financial aid handbook for fiscal 1993 does not

affect this issue in any event. First, it was published and made effective for periods after the period in issue in this case. Under Bennett v. New Jersey, 470 U.S. 632 (1985) and In re Temple University, Dkt. No. 89-26-S, U.S. Dep't of Education (1990), regulations promulgated subsequent to the year of the program may not govern the program in a prior year. Such a proscription is equally applicable to a modification in the Student Financial Aid Handbook which came after the period in issue. Second, the position advocated in the handbook conflicts with the rationale of the definition of clock hour in 34 C.F.R. § 668.2, as noted above, and, therefore, the handbook may be disregarded.See footnote 9 9/

Lastly, DPI argues that its evening students qualified as half- time students well before the additional two hours of instruction added as of April 15, 1991. DPI asserts that its evening students became half-time students as of October 1989 when its method of program measurement was changed from clock hours to credit hours by Colorado Community College & Occupational Education Agency. This is the state agency which regulates vocational schools.

As resolved earlier in the opinion, DPI's conversion from clock hours to quarter credit hours was not effective for purposes of the Federal student financial aid assistance programs until April 11, 1991. Thereafter, its nine month evening students are considered at least half-time students due to the 37 quarter credit hour rating assigned by NATTS to the program. Thus, without considering the effect of the clock hour measurement issue, April 11, 1991 is the earliest date that the evening students may be considered half-time students and eligible to participate in the Stafford and SLS programs.See footnote 10 10/

E. Calculation of Recovery

There is no dispute between the parties regarding the formula to determine DPI's liability for loans in excess of the maximum amount permitted under the Stafford and SLS programs. The basic formula to determine the estimated actual loss is--

$ of excess loans X DPI's cohort rate = amt. of recovery

The parties agree that DPI's weighted average cohort rate is 3.5% during the period in issue.

With respect to DPI's day students, ED may recover the excess over $2,625 for Stafford loans during the period from January 1, 1987 through June 30, 1991. There were 597 students who received a total of $782,990 of excess loans.See footnote 11 11/ Therefore, ED's recovery is $27,405, computed as follows:

$782,990 X 3.5% = $ 27,405

With respect to DPI's day students, ED may recover the excess

over $1,500 for SLS loans during the period from January 1, 1991 through April 10, 1991, the day preceding DPI's conversion to the quarter credit hour method of program measurement. There were 16 students who received a total of $8,000 in excess SLS loans. Therefore, ED's recovery is $280, computed as follows:

$8,000 X 3.5% = $280

With respect to DPI's night students in the nine month program, ED may recover the excess over $2,625 for Stafford loans during the period from January 1, 1987 through June 30, 1991. There were 112 students who received a total of $137,091 in excess Stafford loans. Therefore, ED's recovery is $4,798, computed as follows:

$137,091 X 3.5% = $4,798

With respect to DPI's night students in the nine month program, ED may recover the excess over $1,500 for SLS loans during the period from January 1, 1991 through April 10, 1991. There were 5 students who received a total of $2,500 in excess SLS loans. Therefore, ED's recovery is $88, computed as follows:

$2,500 X 3.5% = $88

The record does not reflect any dispute regarding students who attended the 18 month night program.

In summary, the total recovery by ED reflecting the estimated actual loss attributable to the excess Stafford loans received by DPI students is $32,203. The total recovery by ED reflecting the estimated actual loss attributable to the excess SLS loans received by DPI students is $368.

There remains for determination the amount of interest and special allowances incurred by ED with respect to the excess amount of Stafford loans awarded to DPI students. Once again, there is no dispute between the parties regarding the method to calculate these figures. Each of the calculations below utilizes a figure which reflects an average period of time between the two events. These average periods are determined based upon information from proprietary schools which complied by the guaranty agencies on an annual basis.

Interest and special allowance subsidies were incurred by ED between the disbursement of the loan and the beginning of the repayment period. The formula to ascertain the amount of the subsidies incurred is as follows:

excess Stafford loans X daily ISA factor X average days from disbursement to repayment = ISA subsidy

The daily allowance factor is .000247 and, for proprietary schools, the average days from disbursement to repayment is 584 days.

With respect to the Stafford loans for day and night students, the total amount of excess Stafford loans is $920,081. Accordingly, ED may recover $132,720 in interest and special allowance subsidies attributable to the Stafford loans, computed as follows:

$920,081 X .000247 X 584 days = $132,720

ED incurs special allowances with respect to Stafford loans during the period from repayment to default or from repayment to payment in full. For defaults, the formula is--

estimated Staff. actual loss X daily special allowance factor X average days from repayment to default = special allowance

For payments in full, the formula is--

½ (excess Staff. loans - est. Staff. actual loss) X daily special allowance factor X ave. days from repayment to pm't in full = special allowance

The daily special allowance factor is .0000273. For proprietary schools, the average days from repayment to default is 418 and from repayment to payment in full is 1,659.

With respect to the Stafford loans for day and night students, the estimated actual loss is $32,203. Accordingly, ED may recover special allowances in the amount of $367 for loans in default and $20,106 for loans paid in full. The computations are as follows:

$32,203 X .0000273 X 418 days = $367 for defaulted loans

½ ($920,081 - 32,203) X .0000273 X 1,659 days = $20,106 for loans paid in full

In summary, DPI is liable for a total amount of $153,193 in interest and special allowances incurred by ED.

III. ORDER

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is hereby--

ORDERED, that Denver Paralegal Academy immediately and in the manner provided by law pay the United States Department of Education a sum of $185,764.

.....
Allan C. Lewis
Administrative Law Judge

Issued: March 14, 1994
Washington, D.C.

APPENDIX A

1. DPI was founded in 1977, was accredited by the National Association of Trade and Technical Schools (NATTS) in 1979, and was approved by the American Bar Association in 1979. It began its participation in the Federal student financial assistance programs in 1981 and is classified as a vocational school. The program participation agreement governing DPI's current participation in the Title IV programs was executed by DPI and ED on April 13, 1987.

2. Approximately 85% of DPI students have baccalaureate degrees prior to entering DPI and 8% have at least 48 semester hours of college. The remaining 7% have obtained at least a high school diploma or its equivalent and may have college credits not in excess of 48 semester hours. DPI has a 90%+ completion rate and, upon completion of its program, its students are employed at a rate exceeding 99%.

3. In 1981, DPI forwarded draft procedures for processing Guaranteed Student Loan applications to the Colorado Student Loan Program (CSLP), its guaranty agency, for comment. The draft procedures included a classification of students as either undergraduates or graduates and professional students. On October 7, 1981, CSLP returned the proposed procedures to DPI for its consideration with modifications necessary to comply, in its view, with Federal law. The suggested modifications did not include altering the classification of students as either undergraduates or graduates and professional students.

4. Thereafter, CSLP approved Guaranteed Student Loans for DPI students classified as graduate students. For example, student C.B. was classified at the academic grade level of a first year graduate student for her loan in January 1982.

5. In 1983, ED conducted a program review and reviewed the status of students classified as having "graduate" status on the Guaranteed Student Loan applications for 1981-82. ED maintained in its program review determination of July 25, 1983, that students classified as graduate students should be classified as undergraduate students--

the school does not meet the Section 682.200 definition of an "Institution of Higher Education." Therefore, all of its students, even those holding bachelor degrees, are properly classified as "undergraduate" for GSL purposes.

6. Thereafter, DPI changed the classification of its graduate students. It adopted a classification for all its students, including those with baccalaureate degrees, as fifth year undergraduate students. For example, student C.K. was classified at the academic grade level of a fifth year undergraduate for her

loan in September 1983. CSLP processed guarantees for loans to DPI students in which the students were designated as fifth year undergraduates. At this time, a classification as an undergraduate at any level did not affect the permissible maximum amount of an available loan which was $2,500.

7. After the passage of the Higher Education Amendments of 1986 which established different loan limits for undergraduate students depending upon their academic grade levels, Ms. Sharon C. Nantell, the Director of DPI, sought assistance from CSLP at a CSLP seminar regarding the maximum loan limits for DPI students. Thereafter, on November 14, 1986, Ms. Nantell, wrote CSLP as follows:

For purposes of the Guaranteed Student Loan Program, the Denver Paralegal Institute has been classified as a fifth year undergraduate program. As you are aware, the Institute offers a curriculum primarily directed toward the college graduate. Well over 90% of our students have already obtained their Bachelor's degree prior to admission to the program.

At the CSLP seminar held in Golden on November 3rd, Paul Tone informed me that, under the new Reauthorization Act, our students would qualify for the $4,000 maximum GSL loan limit. Mr. Tone also indicated that those students attending our program without a bachelor's degree would also qualify for the $4,000 loan limit due to the fact that our program has a fifth year undergraduate designation.

The purpose of this letter, therefore, is to confirm in writing that our students in a fifth year undergraduate program will qualify for the $4,000 maximum limit on Guaranteed Student Loans. In addition, I would like to confirm in writing that students in our program who have not completed their Bachelor's degree will also qualify for the $4,000 limit in light of the fact that they are attending a fifth year undergraduate program.

In the event the above statements are in fact true, please sign, date, and return this letter to me for our files. If you have any questions regarding this request, please feel free to contact me directly.

Thank you very much for your prompt attention and assistance in this matter.

8. In response to the inquiry by Ms. Nantell, Paul Tone, the Deputy Director of CSLP and the same official with whom Ms. Nantell spoke at the CSLP seminar, replied on November 25, 1986, as follows:

The 1986 Amendments to the Higher Education Act of 1965 changed annual and aggregate loan limits for students.

The Amendments provide that students who have not completed the first and second year of an undergraduate program may borrow up to $2,625. Students who have successfully completed the first and second year may borrow up to $4,000. Since Denver Paralegal Institute's program is defined as a fifth year undergraduate program, its students may borrow the higher $4,000 amount.

This letter was copied to Harry Shriver, Regional Director, Office of Student Financial Assistance, United States Department of Education. ED did not respond.

9. CSLP continued to approve loans for DPI students which were designated by DPI as fifth year undergraduate students. For example, student S.B. was classified at the academic grade level of a fifth year undergraduate and received a $4,000 loan. The amount of the loan is consistent with Stafford Loans made available to students who have completed the second year of postsecondary education. The amount of the loan is also consistent with SLS loans made to students who have completed the first year of a program of undergraduate education. In the case of S.B., the record is unclear regarding the date of the loan and the type of loan received by student. The loan approval form reflects a GSL balance of $0 and a PLUS/SLS/ALAS balance of $4,000. Thus, it appears that this was a SLS loan.

10. On December 11, 1991, Robert Former, Director of CSLP, wrote DPI as follows:

Pursuant to U.S. Department of Education (ED) regulations, the Colorado Student Loan Program (CSLP) considers determination of grade level to be the responsibility of the school, as are determinations of eligible programs, eligible students, and so forth. Of course, CSLP does become involved in grade-level issues as part of its role in approving student loans for guarantee.

As you are aware, when the Higher Education Act was amended in 1986 to permit larger loan amounts for higher grade levels, management staff at Denver Paralegal Institute (DPI) contacted CSLP about determination of grade level under the new law. CSLP relied on the school's characterization of its programs in interpreting grade level to determine eligible loan amounts for students at DPI. We certainly do not feel we were misled by DPI in the regard.

Communication about this matter was by conversation only, except for frequent contact by means of Dialcom (an electronic mail system) between CSLP's deputy director at

that time, and ED staff in Washington, D.C. Unfortunately, written records of these communications no longer exist. Based in the deputy director's recollections, however, we are

confident that nothing in his communication with ED on this subject gave us any reason to believe that DPI's interpretations of grade level were incorrect, or that the school could not certify fifth-year undergraduate loans. And, as you note in your response to the present IG audit, CSLP's letter to DPI of November 25, 1986 was copied at that time to Harry Shriver of ED Region VIII. If ED had any misgivings about the eligibility of DPI's students for upper-level undergraduate loan limits, that would have been the time to raise them.

CSLP understands, and has always concurred with, the ED position that a student entering a program requiring a high school diploma (or demonstration of ability to benefit) is eligible only for a freshman level loan amount, without regard to any other degree or certificate the student may happen to possess. I think you will agree, however, that this circumstance does not apply to the case at hand. We were satisfied then, and we are satisfied now, that the nature of DPI's curriculum, and its admission requirement of any undergraduate degree makes it the functional equivalent of a fifth-year undergraduate program.

Recent conversations with ED about the grade-level question at DPI suggest they are distinguishing DPI's programs from others with the same entrance requirements on the basis of DPI's status as a "vocational" school rather than an institution of higher education. In 1986, at the time we were seeking guidance from ED on this matter, that distinction was not identified to us as a determining factor in establishing grade-level guidelines. CSLP regrets that ED appears so definitive on this matter now, with regard to enforcement, when it was less than explicit at the time operational interpretations were being sought in 1986.

We thoroughly understand and support ED's interest in monitoring program compliance and assuring that schools are providing high quality education and training. For our part, CSLP determines priority for school audits according to certain performance criteria (high loan volume, a cohort default rate exceeding 20%, complaints by students about a school). Since DPI did not meet any of these criteria, CSLP has not conducted an on-site review of DPI since 1985.

We feel, in fact, that the Department's own annual default rate calculations for DPI (3.3%, 3.1%, and 4.2% respectively for 1987-89) are powerful evidence of DPI's integrity in administering the loan program and in educating its students. And while this evidence may not alter ED's

present interpretation of the law, it does strongly suggest the inequity of penalizing an excellent school for a presumed misinterpretation of that law without having provided prior clarification or correction.

11. DPI wrote ED on July 25, 1991, as follows:

> I'm writing in response to your question regarding whether we had written confirmation defining our program as 5th year undergraduate. We have no specific correspondence verifying that definition. However, it is our understanding that to provide such confirmation is not standard procedure for the United States Department of Education or the Colorado Student Loan Program.

12. The description of DPI's program as a fifth year undergraduate program was a characterization fashioned and used by DPI.

13. The State of Colorado licenses private occupational schools as well as their programs and courses. While not expressed in the state governing statute, the Colorado State Board for Community Colleges and Occupational Education required, as of August 1989, these schools to operate their programs under a credit hour format. On August 3, 1989, the Board informed DPI that it was required to change its format from clock hours to credit hours. The format was changed and, thereafter, on October 18, 1989, the Board informed DPI that it had approved the following programs for sale to the public--

Programs From Clock Hours To Credit Hours
General Practice Program for
Legal Assistants (evening) . . 360 29.675
General Practice Program for
Legal Assistants (day) 500 37.05

14. On April 1, 1991, DPI informed ED of its intention to have its status as a clock hour institution converted to a credit hour institution and that it had applied to its accrediting agency for that purpose--

[b]ased on a "Dear Colleague" letter dated September 1990 (GEN-90-33), we have applied to NATTS to become a credit hour program and not a clock hour program. Pursuant to NATTS formula, our day program will be 43 quarter hours and our evening program will be 37 quarter hours. It is our understanding that, if this change is approved by NATTS, our students will be eligible for a $4,000 SLS loan. . . .

15. On March 22, 1991, DPI submitted a request to NATTS to approve a change in its program measurement from clock hours to quarter credit hours. On April 3, 1991, NATTS approved the

conversion and the day General Practice Program was classified as 43 quarter credit hours and the evening General Practice Program was classified as 37 quarter credit hours.

16. On April 9, 1991, DPI mailed its Application for Institutional Eligibility and Certification to ED. In this application, it sought approval to convert its program from clock hours to credit hours and indicated that its accrediting agency had approved the conversion.

17. On June 18, 1991, ED approved DPI's conversion from clock hours to credit hours through the issuance of an institutional eligibility notice. This notice provided that the Secretary determined that DPI satisfied the definition of an eligible proprietary institution of higher education (Section 481(b), HEA) and vocational school (Section 435(c), HEA) with respect to its day and evening general practice programs.

18. A program review of DPI was conducted by ED on January 14-16, 1991 for the 1989-90 and 1990-91 award years.

19. On April 1, 1991, and in response to a finding in the program reviews, DPI informed ED, in writing, that--

[e]ffective April 15, 1991, our evening program will require students to attend class 12 hours per week and not 10 hours per week. It is our understanding that this change meets the requirements for our students to be eligible for loans and eliminates one problem.

(emphasis in original).

This remedial action was taken by DPI to mitigate potential liability.

20. The final program review report was issued on March 22, 1991. After DPI responded to the findings contained therein, ED informed DPI that all findings contained in the program review report had been satisfactorily resolved with the exception of Findings 1 and 2. On November 13, 1991, ED sought additional information from DPI to quantify DPI's liability to ED. On December 20 1991, DPI requested an extension of 180 days to supply the information required.

21. On February 13, 1992, ED informed DPI that it was considering an alternative procedure for affixing liability and did not require DPI to determine the current status of the Guaranteed Student Loans.

22. On May 22, 1992, ED issued its final program review determination letter in which ED assessed liability against DPI in the amount of $256,251. In this letter, ED informed DPI that

it utilized the procedure for affixing liability referred to as "The Estimated Actual Loss Calculation for Ineligible Stafford and SLS Loans." This formula included the use of actual default rates of DPI for the period in issue. The default rate calculations for DPI were 3.3%, 3.1%, and 4.2% for 1987-89, respectively.

On June 23, 1992, ED issued a second final program review determination based upon the earlier audit which asserted a demand for payment of $256,251 regarding ineligible or excessive GSL loans.

23. On July 10, 1992, DPI, through counsel, appealed both the final program review determination and the final audit determination.

24. The November 1986 Dear Colleague letter (Gen-86-35) states as follows:

The Higher Education Amendments of 1986 (P.L. 99-498) . . . make major changes in all the student aid programs authorized under the Higher Education Act of 1965.

. . . .

The purpose of this letter is to provide you with initial information on the major program changes mandated by the new Act. . . . .

In an effort to provide assistance to constituents, many organizations have distributed information concerning the provisions of the new law. Unfortunately, we have received copies of publications that contain inaccurate and misleading information. Institutions are reminded that

the definitive interpretations are provided by the Department of Education, and are therefore cautioned against relying solely upon interpretations received from others.

. . . .

Increased Annual and Aggregate Loan Limits for GSL

A student who is enrolled on at least a half-time basis at a participating school is eligible for the following GSL loan amounts:

1. A student who the school determines has not successfully completed the first or second year of an undergraduate program may borrow up to $2625 per academic year.

2. A student who the school determines has successfully completed the first and second year of an undergraduate program, but who has not successfully completed the undergraduate program, may borrow up to $4000 per academic year.

. . . .

The limit of $2625 per academic year applies to any student who the school determines has not successfully completed the first and second year of a program of undergraduate education, including transfer students and students who may have completed previous programs of study at other institutions. The determination of whether or not a student has completed the first and second year of study must be made by the institution that certifies the GSL application and must be based on the grade-level classification of students in the program in which they are currently enrolled. For example, a student who is considered by the institution to be a freshman or sophomore in a program for which he or she is currently seeking a degree is eligible for a GSL of up to $2625 per academic year even if that student previously obtained an undergraduate degree in a different program. Students enrolled in programs which are normally completed in two academic years or less are not eligible for a GSL of more than $2625 per academic year regardless of the actual length of time it takes them to complete the program.

Footnote: 1 *1/ The sponsorship letter must indicate that the individual was guaranteed paralegal employment upon the successful completion of the program.*

Footnote: 2 *2/ Graduate or professional students were eligible for a loan in the maximum amount of $7,500 as provided in 20 U.S.C. § 1075(a)(1)(A)(iii).*

Footnote: 3 *3/ In addition to program reviews, guaranty agencies may also terminate, limit, or suspend institutions which participate in the guaranteed student loan programs. 20 U.S.C. § 1078(b)(1)(T) (1989). See also 20 U.S.C. § 1082(h)(3) (1989).*

Footnote: 4 *4/ This letter was copied to Harry Shriver, Regional Director, Office of Student Financial Assistance, United States Department of Education.*

Footnote: 5 *5/ ED also argues that CSLP's technical advice should be disregarded due to ED's November 1986 Dear Colleague Letter, GEN- 86-35. This letter indicated that many organizations had distributed information concerning the Higher Education Amendments of 1986 which contained inaccurate and misleading information. It noted that the definitive interpretations are provided by the Department of Education, and, therefore, cautioned institutions against relying solely upon interpretations provided by others. It is apparent, due to the special relationship between ED and the guaranty agencies, that this warning pertained to the advice proffered by third parties and was not intended to effect the technical advice provided by guaranty agencies.*

Footnote: 6 *6/ Based upon a general affirmation by DPI's president, DPI also argues that ED is aware of other paralegal programs at non- profit institutions of higher education which are comparable in length and content to DPI's and in which students are designated as third-year undergraduates or higher for purposes of the Federal guaranteed student loan programs. As such, DPI urges that it should receive similar treatment. Other than this broad generalization, the record contains insufficient evidence regarding specific programs at specific non-profit institutions which establishes DPI's assertion. Hence, there is no factual foundation for DPI's argument and, accordingly, it warrants no further discussion.*

Footnote: 7 *7/ There is no evidence in the record which suggests that DPI altered, in fact, the measurement of its programs during the majority of the period in issue. The student catalog utilizes clock hours, not credit hours, in describing the programs. Moreover, DPI did not apply to its accrediting agency for approval to convert to credit hours until March 22, 1991, some 17 months after the State's authorization.*

Footnote: 8 *8/ DPI also offered a 18 month night-time program in which the students attend two evening sessions per week. These students are not in issue.*

Footnote: 9 *9/ As of April 15, 1991, DPI increased the length of its class period for its evening students from 2½ to 3 hours. ED argues that this action supports its view. The school's action is a typical response by an institution which seeks to avoid any costly controversy in its business. This issue is substantive in nature and, as such, any subsequent modification by the school regarding the length of its classes is simply not relevant in resolving this matter.*

Footnote: 10 *10/ In its reply brief, ED raised two procedural matters. It urged that DPI's appeal be dismissed because DPI's main brief was unsigned, none of the facts advanced in the brief were attested to by DPI, and many of its requested findings of fact were not supported by citations to specific documents in the record as required by the Order Re Further Proceedings. Subsequently, DPI filed a "substituted brief" which corrected these deficiencies. While the resolution process is significantly hampered by an institution's failure to comply with the briefing guidelines, DPI did correct its deficiencies and, accordingly, it is inappropriate to impose the harsh sanction sought by ED.*

The second matter concerns the admissibility of DPI's exhibits 2, 4, 6, and 7 which accompanied DPI's brief. ED argues that these exhibits were not submitted to ED at the time DPI filed its request for review as required by 34 C.F.R. § 668.116(e)(1)(iv) (1992) and, therefore, they are inadmissible. For purposes of an appeal of a program review or audit determination, evidence is admitted under 34 C.F.R. § 668.116 to establish the facts in the matter. Exhibits 4, 6, and 7 are letters sent from Members of Congress to the Secretary in the latter part of 1992 which expressed their views regarding the interpretation to be accorded 20 U.S.C. § 1075(a)(1)(A). As such, 34 C.F.R. § 668.116 is simply not applicable in this instance.

Exhibit 2 is a letter dated March 31, 1992, by David Longanecker, Executive Director of CLSP. It was not submitted in a timely fashion as required by 34 C.F.R. § 668.116(e)(1)(iv) and is, therefore, inadmissible. Its exclusion, however, does not affect the resolution of any factual dispute between the parties.

Footnote: 11 *11/ This total excess exceeds the figure of $ 750,447 utilized by ED in its calculation. Both figures were derived from the 17 pages of loan information supplied by DPI. The record does not contain sufficient information to ascertain the basis for ED's initial error.*