

**ADMINISTRATIVE PROCEEDING
IN THE
UNITED STATES DEPARTMENT OF EDUCATION**

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OFFICE OF
HEARINGS AND APPEALS

**IN THE MATTER OF THE AUDIT APPEAL OF
COMMUNITY COLLEGE OF PHILADELPHIA**

BY PAUL S. CROSS, ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

On August 15, 1985, the Department of Education (ED) Office of Inspector General (OIG) issued audit report ACN: 03-30031. The audit report described the results of the OIG's audit of the Community College of Philadelphia's administration of the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965. The audit covered Title IV, HEA Programs between July 1, 1980 and June 30, 1983. This period includes award years 1980-81, 1981-82 and 1982-83.

In findings 1 and 2 of that report, the OIG found that the Community College of Philadelphia <CCP> had provided Title IV, HEA Program assistance to students who assertedly were not eligible for that assistance because they were enrolled in certain types of "remedial" programs or were not making good academic progress. Additional findings, 3, 4 and 5 of lesser monetary importance addressed other areas of CCP's administration of those programs.

On September 15, 1985, CCP responded to the ED Office of Student Financial Assistance (OSFA) with its comments on the findings and conclusions of the audit report. ED replied by letter to CCP's comments on March 28, 1988. OSFA wrote that additional information was needed to reduce CCP's liability for some of the findings but that finding number 1 would not be changed.

CCP responded to OSFA's March 28, 1988 letter in an August 16, 1988 letter. As a result of receiving CCP's August 16, 1988 letter, OSFA sent CCP a final audit determination dated September 30, 1988.

In the final audit determination, in resolution of finding 1 in the audit report, OSFA required CCP to repay ED \$1,455,682 on account of funds paid to students enrolled in the following programs: Level A and Level B of CCP's Project II remedial study program; and CCP's Project PI's remedial study program. In resolution of finding 2, OSFA required CCP to repay ED \$285,711 under the Pell Grant, Supplemental Educational Opportunity Grant, and College Work-

Study Programs. In addition, OSFA required CCP to repay \$1,200 to its National Direct Student Loan Fund, and required CCP to repay \$6,988 to appropriate lenders under the Guaranteed Student Loan (GSL) Program. These amounts were required to be repaid because they were paid to students who ED believed were not making satisfactory academic progress.

In resolution of finding 3, OSFA required CCP to repay ED 3,173 of Pell Grant Program funds that CCP paid to students who are said to have withdrawn from CCP before the first day of class for the term for which they were paid. In resolution of finding 4, OSFA required CCP to repay ED \$2,450 since CCP assertedly paid those funds to otherwise ineligible students. In resolution of finding 5, OSFA required CCP to repay ED \$8,415 in asserted improper administrative costs.

On November 16, 1988, CCP requested a review of the final audit determination under section 487(b) of the Higher Education Act of 1965 as amended (HEA), and the regulations published to implement that section, Subpart H of the Student Assistance General Provisions regulations, 34 CFR Part 668, Subpart H. Under those provisions, an institution may request the Secretary to review a final audit determination of its administration of the Title IV, HEA Programs.

Initially this matter was assigned to Administrative Law Judge Walter Alprin. He no longer is available to decide this matter, and, as a result, the proceeding is reassigned to me for decision. Judge Alprin did establish an evidentiary and briefing schedule under written procedures and the case is ready for decision.

It may be noted that an oral evidentiary hearing is not permitted under pertinent DE regulations, although oral argument confined to the written record is allowed. I assume that if both ED and the educational institution agreed, oral hearing would be allowed. However, no one seeks an oral hearing and I find no need for oral argument.

Title IV, HEA Programs.

The Title IV, HEA Programs involved in this review are the Pell Grant, Supplemental Educational Opportunity Grant (SEOG), College Work-Study (CWS), National Direct Student Loan (NDSL), and Guaranteed Student Loan (GSL) Programs.

General requirements.

Under each program during the audit period a student had to attend an institution of higher education in order to receive any Title IV, HEA Program assistance. 20 U.S.C. 1091(a)(1) (1983). To qualify as an institution of higher education, CCP, as a public community college, had to provide a program of postsecondary education in the State of Pennsylvania. 20 U.S.C. 1141(a)(2) (1983). CCP also had to provide a postsecondary educational program of not less than two years which was acceptable for full credit towards a bachelors degree, or a one year program of training to prepare students for gainful employment in a recognized occupation. 20 U.S.C. 1141(a) (3) and 1141(a) (1983). Further, CCP had to admit as regular students only persons who earned a high school diploma, the equivalent of that diploma, a GED, or persons who had the ability to benefit from education or training it offered. 20 U.S.C. 1141(a) (1) (1983).

To receive Title IV, HEA Program assistance during the audit period, a student also had to be maintaining satisfactory academic progress in the course of study the student was pursuing in accordance with the standards and practices of the institution at which the student was in attendance. 20 U.S.C. 1091(a) (3) (1983). ED also published regulations for the Pell Grant, SEOG, CWS, NDSL and GSL Programs implementing these provisions.

Description of the Pell Grant Program.

During the audit period, the Pell Grant Program was authorized under Title IV-A-1 of the HEA, 20 U.S.C. 1070a (1983). The Pell Grant Program regulations were codified in 34 CFR Part 690 (1983). Under the Pell Grant Program, the Secretary of Education provided grants to financially needy undergraduate students. Good scholarship is not an initial requirement, although, as noted above, the student must maintain satisfactory academic progress. The Secretary entered into agreements with institutions under which the institutions agreed to calculate and disburse Pell Grant awards to their students in accordance with the rules and regulations established by the Secretary, and the Secretary agreed to provide funds periodically to the institutions to pay those awards. 20 U.S.C. 1094(a), and 34 CFR Part 690, Subpart G.

With regard to remedial programs, section 411(a) (3) of the HEA as to Pell Grants provided that:

The period during which a student may receive . . . Pell grants shall be the period required for the completion of the first baccalaureate course of study being pursued by that student at the institution at which the student is in attendance. Nothing in this section shall exclude from eligibility courses of study that are noncredit or remedial in nature which are determined by the institution as necessary to help the student be prepared for the pursuit of a first undergraduate baccalaureate degree.

20 U.S.C. 1070a(a)(3)(1983). See also 34 C.F.R. 690.9(a) of the Pell Grant Program regulations.

[1](#)

FACTS

Remedial Programs.

During the audit period of July 1, 1980 through June 30, 1983, CCP, which had so-called "open" enrollment, carried out as pertinent, two remedial programs. One was called "Project II" and the other was called "Project PLUS." In this respect, CCP is a leader in the area of gearing remedial programs to the needs of its postsecondary students. The refinements of CCP apparently were copied by other open enrollment institutions.

The Project II remedial program consisted of three components, Level A, Level B, and Level C. Each Level was geared to students at different levels of educational achievement, and each Level consisted of four, three "credit" courses. Each Level could be completed by a full-time student in one semester, but a full-time student could take two semesters to complete that Level. Only a few of the students allowed in the program were not high school graduates or holders of an equivalent GED degree. Ninety-eight percent held such degrees.

The successful completion of the 12 credit program in Level A did not lead to enrollment in CCP's regular postsecondary graduate programs but instead led to enrollment in the 12 credit program of Level B. The successful completion of the 12 credit program in Level B also did not lead to enrollment in CCP's regular postsecondary graduate programs but instead led to enrollment in the 12 credit program of Level C. Only the successful completion of Level C allowed the students to enroll in CCP's actual non-remedial postsecondary graduate programs. However, students at any level could and did enroll in college level subjects not dependent upon the phased remedial courses.

A full-time student potentially could take six semesters, three academic years, before the student could start in certain college courses essentially Math and English. In contrast, a non-remedial student potentially could complete CCP's certificate program in one academic year of full-time study, and could complete CCP's most advanced degree, the Associate Degree, in two academic years of full-time study. Moreover, the successful completion of Level A meant that a full-time student potentially had from one to two additional academic years of remedial study before entering all of CCP's required postsecondary courses. Also, the successful completion of Level B meant that the student potentially had from one-half to one additional academic year of remedial study before entering all of CCP's required postsecondary courses.

Level A was geared toward a student whose verbal or math proficiency was tested to be that of a student who completed the third or fourth grade in an elementary school. The educational level of verbal and math instruction provided in Level A was equivalent to that provided in the fourth and fifth grades of an elementary school.

Level A consisted of basic courses in English and Mathematics and three hours of required tutoring in CCP's Learning Lab. Although Level A consisted of four, three "credit" courses, these courses are more accurately described as four, "non-credit" courses. [2](#) If and when a student successfully completed Level A, he or she had a reading and writing proficiency equivalent to that of a student who had completed the fifth grade in an elementary school.

Level B also consisted of four, three "credit" courses, and was aimed at a student who had a reading and writing proficiency equivalent to that of a student who completed the fifth or sixth grade. The educational level of instruction provided in Level B was equivalent to that provided in the sixth and seventh grades of an elementary school.

The purpose of Level B was to raise the reading, writing and mathematics skills of students from a fifth grade level to a seventh grade level. Level B also allowed students to acquire some of the background information necessary for college level content courses. In Level B, students were still required to participate in two to three hours of tutoring in the Learning Lab. If and when a student successfully completed Level B, he or she had a reading and writing level equivalent to that of a student who had completed the seventh grade.

Level C consisted of four, three credit courses. In Level C, it even was possible that three or four remedial courses would be credited toward a student's associate degree. Also, as in the case of Levels A and B, other regular college courses were taken by the remedial students, which also would be credited toward a degree.

Project PLUS was comparable to Project II. While Project II was provided to students whose primary language was English, Project PLUS provided a remedial program in languages other than English for students whose academic skills were deficient in their native languages. CCP provided Title IV, HEA Program funds to students enrolled in Level A and Level B of Project II and Project PLUS.

Satisfactory Academic Progress.

During the audit period, CCP's standards of satisfactory academic progress were set forth in a June 8, 1979 memorandum from the Office of the President of CCP to "General Faculty, - Student Government and Vanguard."

As part of its standards of satisfactory academic progress, CCP established a sliding scale minimum grade point average, based on a 0.00 to 4.00 scale where 0.00 was given for an "F" 4.0 was given for an "A". The scale was as follows:

Number of semester hours attempted	Minimum grade point average
12	1.6
24	1.8
36	1.9
48	2.0
Graduation	2.0

A student who failed to meet the relevant minimum grade point average was placed on academic probation in the next semester in which he registered. The student would be removed from academic probation if he raised his grade point average to at least the required minimum cumulative average at the end of that semester. If he did not reach the required minimum cumulative average but earned at least 6 credits with at least a C average, the student was continued on academic probation. If the student did neither of the above, he was dropped for poor scholarship. While on academic probation, CCP considered the student to be making satisfactory academic progress and eligible to receive Title IV, HEA Program funds.

Students who were dropped for poor scholarship were not permitted to enroll in CCP for one semester. After a semester absence, they were permitted to re-enroll, but were limited to a maximum of seven credits. Upon re-enrollment, CCP considered those students eligible to receive Title IV, HEA Program funds.

Notwithstanding the above, students who were dropped for poor scholarship were allowed to enroll in a summer session without sitting out a semester. Moreover, during that summer semester, CCP considered those students eligible to receive Title IV, HEA Program funds.

When determining whether a student's grade point average qualified under its standard, CCP did not include as semester hours attempted nor did it count the grades from remedial courses. It also did not include all the semester hours for a course a student attempted if the student had to repeat

that course. For an example, if a student took a three-credit course three times, CCP did not consider that the student attempted 9 semester hours, CCP considered that the student attempted only three semester hours.

Further, if a student had to repeat a course because of poor grades, only the last grade received for that course would count in computing the student's cumulative grade point average. In addition, students who changed curriculum were allowed to omit failing grades of D and F in their cumulative grade point averages if those grades were received for courses in their old curriculum and those courses were not required in their new curriculum.

DISCUSSION AND CONCLUSIONS

OSFA found that CCP improperly disbursed \$1,455,682 of Title IV, HEA Program funds to students enrolled in programs that provided up to four years of elementary education equivalent to that provided in the fourth, fifth, sixth, and seventh grades of an elementary school. CCP contended that those programs were eligible to receive Title IV, HEA Programs funds.

OSFA also found that CCP improperly disbursed or caused to be disbursed \$293,898.60 of Title IV, HEA Program funds to students whose grade point averages were below the minimum grade point average required by CCP to be making satisfactory academic progress. CCP contended that those students were making satisfactory academic progress. (Incidentally, OSFA initially claimed a finding 2 amount of \$285,711.)

OSFA additionally found that CCP had improperly disbursed Title IV HEA Program funds to students who for various other reasons were said to be ineligible to receive those funds. CCP initially contended that the students were eligible, but except for minor corrections appears to concede the OSFA findings 3, 4 and 5.

I

The basic purpose of the student financial assistance programs authorized by the Higher Education Act is to provide financial aid to high school graduates or the equivalent thereof so that they can obtain postsecondary degrees or certificates offered by a college. It is not the purpose of the Title IV, HEA Programs to deny financial aid to impoverished students who have obtained a high school degree; even though testing shows them to be below a fifth grade education, a sixth grade education or a seventh grade education in Math and English. Simply because the students were uneducated does not mean that the high school graduate or other students enrolled in Level A and Level B of Project II and Project PLUS were ineligible. These students had very poor reading, math and writing proficiency levels, but there were high school graduates and were entitled to participate in Federal student aid programs.

The purpose of the Title IV, HEA Programs is to provide financial aid to students undergoing postsecondary education. Further, Congress has recognized that it may be necessary for some students to obtain remedial instruction in order to successfully complete their postsecondary program. The City of Philadelphia has refined the process. Thus, the HEA as interpreted by the

city permits students to receive Title IV, HEA Program aid while receiving intense remedial instruction.

Properly, even though during the audit period the only statutory mention of remedial programs was contained in the Pell Grant Program statute, ED in the exercise of discretion extended the Pell Grant statutory policy to all Title IV, HEA Programs.

Section 411(a) (3) of the HEA provided that:

The period during which a student may receive . . . Pell grants shall be the period required for the completion of the first baccalaureate course of study being pursued by that student at the institution at which the student is in attendance. Nothing in this section shall exclude from eligibility courses of study that are noncredit or remedial in nature which are determined by the institution as necessary to help the student be prepared for the pursuit of a first undergraduate baccalaureate degree. 20 U.S.C.1070(a)(3) (1983)

Further, Section 690.9(a) (2) of the Pell Grant Program regulations, 34 C.F.R. 690.9(a)(2) (1983) provided that

. . . in determining a student's enrollment status, the institution and the Secretary will include any non-credit remedial course in which the student is enrolled.... A non-credit remedial course is a course for which no credit is given toward a certificate or degree and which is designed to increase the ability of the student to pursue an undergraduate course of study leading to that certificate or degree.

In a Strictly legal sense, every remedial course or program offered by a college, no matter how basic, how elementary, or how far removed from the educational level of its postsecondary education program of study qualifies as a remedial course or program which is "determined as necessary to help ... [a] student be prepared for the pursuit of a first undergraduate baccalaureate degree." Thus, if a college operated an elementary school and high school and had a combined elementary, secondary, and postsecondary program, a student enrolled in the first grade of that combined program could be considered to be in a remedial program which is "determined as necessary to help . . . [a] student be prepared for the pursuit of a first undergraduate baccalaureate degrees, under DE regulations extent during the audit period." As a result, the student in the first grade could be considered eligible to receive a Pell Grant or other Title IV, HEA Program assistance. Under DE regulations existent during the relevant period such a student would be eligible to receive a Pell Grant or any other Title IV, HEA Program assistance. Of course, no one espouses Pell Grant awards to first grade students in this proceeding.

Remedial programs are an essential aspect for institutions of higher education offering regular postsecondary education programs. Few colleges and universities are immune to the requirement of remedial education However, in determining the meaning to be accorded section 411(a)(3) of the HEA, and the scope and nature of remedial programs that qualify for Title IV, HEA Program funds, it is necessary to examine how the remedial course of study described in that statutory provision fits within the statutory scheme of the Title IV, HEA Programs.

The Title IV, HEA Programs were designed to provide financial assistance to students pursuing postsecondary education at an eligible institution of higher education. One of the criteria defining such an institution is the type of instruction it must provide. The remedial program cannot be an end to itself. It cannot be "freestanding." It must be combined with postsecondary education.

An institution of higher education must provide postsecondary education leading to a postsecondary degree or certificate. 20 U.S.C. 1141(a)(2) and (3). The students it admits as regular students must be high school graduates, GED recipients, or recipients of similar degrees, or must be above the age of compulsory school attendance with the ability to benefit from the education or training offered by the institution. Such were the students admitted by CCP in 98 percent of the instances.

Nonetheless, the remedial course of study or program that is eligible for Title IV, HEA Programs funds under section 411(a) (3) of the HEA and 34 CFR 690.9(a)(2) must be connected to the institution's postsecondary program and the student being remediated. The connection must extend both to the content of instruction provided in the remedial program, and the length of the remedial program. Clearly, the remedial program cannot be of such scope that it overwhelms the postsecondary educational effort.

Since a regular student in an eligible institution such as CCP is a person with a high school diploma or its recognized equivalent, or is a person with the ability to benefit from the training offered by the institution in which he enrolls, the scope of an eligible remedial program must be on a level appropriate to a high school graduate who is deficient in one or more particular areas of study such as Math and English. Thus, the remedial course should not be the dominant aspect of the education effort, at least by the huge margin here present. Levels A and B of Project II were long term and accounted for at least two-thirds of a full-time (18 hours) students class time.

Postsecondary education occurred but it was minor compared to the huge investment of times and money in the remedial courses. Thus, remedial A and B levels, while not totally freestanding were virtually so. The students enrolled were not engaged primarily in postsecondary education but instead were involved in completing elementary school.

As described, Project PLUS was equivalent to Project II except it was geared for students whose primary language was other than English and whose academic skills were deficient in their native languages. Therefore, Project PLUS was similar to Levels A and B of Project II.

In sum, CCP permitted students undergoing remedial elementary instruction to receive Title IV, HEA Program assistance. In my opinion, CCP should not have given financial aid to students in a "remedial program" where the basic objective is long-term pre-secondary education. In this regard DE would apply a test, that is, whether the remedial program had a reasonable relationship to the postsecondary curriculum offered by CCP. The latter, however, asserts that any remedial program qualifies provided it is not an independent free-standing plan of education. In my view, under any test, Levels A and B of Project II and Project PLUS are not eligible for Federal funding.

It is too simplistic to conclude that because the CCP remedial program had some relationship to postsecondary education, or because it was not totally free-standing, students in the program therefore were eligible for Federal funds. The fact that CCP used the same instructors for both programs (remedial and postsecondary) and the further fact that CCP enabled students to take postsecondary courses while being remediated, help the position of CCP. Also helping somewhat the position of CCP is a letter, attached as Appendix A, dated August 24, 1983, wherein DE Assistant Regional Administrator Williar applies an either/or test ("part of the total educational program" versus "a curricular entity" or "a remedial segment of these [postsecondary] programs rather than an end in itself." Mr. Williar concluded that students enrolled in Project II were eligible for Federal funds, even while concluding that Project II was not itself an eligible program.

The Williar letter was written after the end of the involved audit period and was not relied on by CCP as pertinent to the audit. Also, as indicated above, the Williar conclusion is simplistic and does not reflect an analysis of Project II. To reject consideration of the optimal duration of the remedial program two to three years and the scope of it (two-thirds or more of students' class time) was unreasonable. Further, to reject consideration of the level of the remediation (elementary school) was unreasonable.

In the case of any Federal law, an effort should be made to attach a reasonable intent on the part of Congress. It passes belief that Congress even intended that Pell Grant funds be used for prolonged and predominately elementary school education.

Accordingly, I would uphold ED in respect of finding I in the audit report. In this regard, there can be no disagreement with the determination of CCP that Level A and B Project II and Project PLUS remedial courses were necessary to help the students preparation for a postsecondary degree. The determination of CCP certainly is correct and is fully accepted. However, the need for remediation is only one aspect of the correctness of CCP action. There also is an issue whether there was a connection between the remedial program and postsecondary education.

Pell Grants and other Federal postsecondary funds never were intended for prolonged elementary school education. Further, even though CCP has great discretion to determine the need for remediation, CCP has no greater discretion than DE in determining whether an educational program of a remedial student is truly postsecondary and whether a student actually is enrolled in a postsecondary program. Here, the question is not one of second guessing CCP. Instead, the question is one of basic statutory authority to award Federal funds. This issue, therefore, differs materially from audit report finding 2, next discussed, which does turn upon CCP discretionary findings. Accordingly, I conclude that CCP paid \$1,455,682 of Title IV, HEA Programs funds to students enrolled in non-postsecondary remedial programs. Accordingly, CCP must repay that amount to ED.

II

During the audit period, a student was eligible to receive Title IV, HEA Program funds if that student was making "satisfactory progress in the course of study the student was pursuing in accordance with the standards and practices of the Institution at which the student was in

attendance." Section 484(a)(3) of the HEA; 20 U.S.C. 1091(a)(3) (1983). While an institution thus was granted discretion in establishing standards to measure satisfactory academic progress, the Secretary still had authority with regard to administering this statutory provision to prevent a clear abuse of discretion. Therefore, the preamble to Pell Grant Program regulations that were published in the Federal Register in January 1979 provided as follows:

. . . Satisfactory progress is an evaluation of a student's efforts to achieve an educational goal within a given period of time. Accordingly, in formulating its standards, the institution should take into consideration the normal time frame for completing a course of study and must have some means, such as grades or work projects completed, which can be measured against a norm.

Under CCP's standards of satisfactory academic progress in effect for the audit period, students who failed to meet the relevant minimum grade point average were placed on academic probation for the next semester in which they registered. The students would be removed from academic probation if they raised their grade point averages to at least the required minimum cumulative average at the end of that semester. If they did not reach the required minimum cumulative average but earned at least 6 credits with at least a C average, the students were continued on academic probation. If the students did neither of the above, they were dropped for poor scholarship because their cumulative grade point averages were below the minimum required by CCP.

Students dropped for poor scholarship were not permitted to enroll in CCP for one semester. After a semester's absence, they were permitted to re-enroll but were limited to a maximum of seven credits. In addition, students dropped for poor scholarship were nevertheless allowed to enroll in courses during a summer session without sitting out a semester.

CCP paid \$128,394.40 to students who were dropped by CCP for poor scholarship because their cumulative grade point average was below the minimum average required by CCP to be considered making satisfactory academic progress. Therefore, ED contends that by disbursing these funds, CCP paid Title IV, HEA Program funds to students who were not making satisfactory academic progress under CCP's own standards.

CCP additionally paid \$165,504.20 to students who were not making satisfactory academic progress because CCP failed to include all the courses in which students enrolled when calculating those students' grade point average. If those courses were included, those students would have been dropped for poor scholarship under CCP's own standards much earlier. Therefore, by postponing the semester in which the students should have been dropped for poor scholarship, CCP enabled those students to be considered making satisfactory academic progress. ED thus asserts that CCP enabled the students to improperly receive \$165,504.20 Title IV, HEA Program funds.

Even though students were dropped for poor scholarship because their grade point averages were below the minimum required by CCP to be considered to be making satisfactory academic progress, [3](#) CCP provided these same students with \$128,394.40 of Title IV, HEA Program funds during summer sessions and upon re-enrollment after sitting out a semester. However, if the students were dropped for poor scholarship because their grade point averages after a period of

probation were below that needed by CCP to be considered to be making satisfactory academic progress, their grade point averages were the same subminimal averages when they enrolled in summer sessions or re-enrolled in CCP after sitting out a semester.

Thus, according to DE their averages were still too low for them to be considered to be making satisfactory academic progress. Accordingly, DE believes these students were ineligible to receive Title IV, HEA Program funds because they were not making satisfactory academic progress under DE's interpretation of CCP's grade point average standard. DE asserts that CCP must repay ED the \$128,394.40 of Title IV, HEA Program funds funds it disbursed to these summer school or re-enrolled students. [4](#)

CCP failed to include all the semester hours students had taken in calculating remedial students' grade point average. If those semester hours were included, many of those students would have been dropped for poor scholarship because their grade point averages would have been below the minimum required under CCP's grade point average standard. Therefore CCP postponed the semester in which the students should have been placed on probation and ultimately dropped for poor scholarship. By postponing the semester in which the students should have been dropped for poor scholarship, DE asserts that CCP enabled those students to make satisfactory academic progress, and that the postponement enabled CCP to improperly provide them with \$165,504.20 of Title IV, HEA Program funds.

In determining a student's grade point average under CCP's standard to ascertain whether the student was making satisfactory academic progress, CCP first had to determine the number of semester hours the student attempted. It then needed to calculate the student's grade point average, and finally, it had to compare that average against its sliding scale. However, CCP did not include the total number of semester hours a student attempted in making the above determinations.

When determining the total number of semester hours attempted, CCP did not include any semester hours in remedial courses taken by a student. In addition, if a student repeated a course, CCP included the semester hours in that course only once in its calculations. Therefore, for example, if a student repeated a three semester hour course four times, which actually happened on occasion, CCP would consider that the student attempted only three semester hours rather than 12 semester hours.

The OIG auditors surveyed students who had been dropped for poor scholarship by CCP. In analyzing those students' records, the OIG found that these students should have been dropped for poor scholarship under ED imposed standards much earlier than they were actually dropped because CCP did not include all the semester hours they attempted when comparing their grade point averages with CCP's sliding scale standard. The OIG factored in those attempted semester hours, determined the semester that those students should have been dropped for poor scholarship under CCP's grade point average sliding scale, and computed the amount of Title IV, HEA Program funds those students received in those intervening semesters. This amount totaled \$165,504.20, and would be repaid under the standards espoused by ED.

CCP argues that ED had no authority to determine whether CCP's standards of satisfactory progress were unreasonable, and, alternatively, that its policy was reasonable. Of course, no one (CCP included) has unfettered discretion to utilize Federal funds. With regard to CCP's first contention, ED has authority to determine whether an institution's standards are ultra vires in order that section 484(a)(3) of the HEA not be rendered meaningless. However, prior to 1984, there were no specific guidelines regarding satisfactory progress, even though ED did define the statutory parameters of satisfactory progress in January 1979 in connection with the publication of Pell Grant Program regulations. See the preamble of those regulations quoted, supra.

With regard to its second contention, CCP argues that its policy of allowing individual students who were dropped for poor scholarship, to be considered to be making satisfactory progress upon re-enrollment or during a summer session was within its discretion. I agree, and conclude that ED shows no abuse of discretion by CCP. The policy of CCP not to include as semester hours attempted, semester hours attempted in remedial programs was within the sound discretion of CCP. The school does not give letter grades in those courses. Of course, Ed argues that since those semester hours were counted under 34 CFR 690.9(a) and 20 U.S.C. 1091(a) (2) (1983) for the purpose of determining whether a student was eligible for Title IV, HEA Program funds under one eligibility criterion, it is unreasonable not to have counted them for the purpose of determining whether the student is eligible for such funds under another eligibility criterion.

In this regard, the Higher Education Act, 20 U.S.C. § 1091(a) (3) (1981) required that a student must be maintaining "satisfactory progress" in the course of study according to the standards and practices of the institution at which the student is in attendance. The regulations in effect during the audit period required the institution to establish "reasonable" standards for measuring satisfactory progress, but according to the standards and practices of the institution as determined by the school, 34 C.F.R. § 675.9(a)(5), § 674.9(a)(5). 34 C.F.R. § 682.201(a) (i) (1980). For example, 34 C.F.R. § 682.201 says:

(a) A student is eligible to receive a GSLP loan if the student (1) (i) if currently enrolled, the student must be in good standing and maintaining satisfactory progress as determined by the school.

As a matter of fact, regulations adopted just prior to the audit period stated the same thing. The requirement that institutions develop and apply standards for determining satisfactory progress by students "was first codified in § 168.16 of the student assistance general provisions regulations published in the Federal Register on September 28, 1979." (44 Fed. Reg. 56278). Those new regulations, codified at 45 C.F.R. § 168.16, read in relevant part as follows:

§ 168.16 Standard of administrative capability .

To participate in a title IV student financial aid program, an otherwise eligible institution must be able to adequately administer those programs. The Commissioner considers an institution to have that capability if it establishes and maintains required student and financial records and if it . . .

(e) Has established and published (as required by 45 CFR 178.4(b)(2)), and applies, reasonable standards for measuring whether a student receiving aid under any title IV program is maintaining satisfactory progress in his or her course of study; . . .

The new regulations did not contain any minimum guidelines regarding "satisfactory progress" and, in fact, the Commissioner of Education specifically declined to provide guidelines. He explained that decision in responding to a comment as follows:

"The recommendation that the Commissioner set forth minimum guidelines for satisfactory progress has not been adopted. The Commissioner does not believe that a delineation of specific criteria for a definition of satisfactory progress is warranted at this time. Each institution should establish a definition of satisfactory progress that reflects its immediate and unique characteristics and concerns. The Commissioner will not make any reference to qualitative or quantitative aspects of a satisfactory progress definition.

44 Fed. Reg. 56294 (Sept. 28, 1979) (commentary accompanying final regulations). These new regulations took effect November 3, 1979, and they were not revised prior to the instant audit period .

Legislative history of the Act confirms that Congress intended to defer to the school to adopt its own academic progress standards absent federal interference: "there is no intention to impose a federal standard to measure satisfactory academic progress, and the bill provides that this determination is to be left solely in the province of the educational institution which the student is attending." House Report No. 94-1086 (1976) Nothing in any later legislative history indicates that this view changed. This represented Congressional intent during the audit period.

The Department cannot impose its own de nova definition of "reasonable" and thus, ignore that provision of the statute which leaves to the institution the freedom to establish its own reasonable standards and practices.

Certainly, the institution must have acted reasonably. As noted, CCP did not have unfettered discretion. Indeed, by regulation, CCP was required to establish reasonable standards measuring satisfactory progress. Nonetheless, ED officials determined long ago that CCP was acting within a zone of reasonableness. See appendices B and C hereto. It simply is impossible to conclude that CCP acted in an unreasonable manner, beyond its discretion. In this regard, DE may be free to impose new regulations for measuring satisfactory progress in the future, as it has. However, DE cannot call CCP's past conduct an abuse of discretion in circumstances where the school acted within an allowed zone of reasonableness.

As mentioned in connection with appendices B and C, the issue of satisfactory progress standards was a subject of discussion within DE in 1983 and 1984. After the audit period, Mitchell J. Laine, Assistant Inspector General for Audit, felt that CCP's practice was unreasonable. Mr. Stephen Kraut disagreed in a legal opinion to Mr. Laine dated February 16, 1984 (See Appendix B):

it is not unreasonable for institutions to exclude grades received in non-credit remedial courses in determining a student's GPA for the purpose of determining whether a student is maintaining satisfactory progress. Thus, we believe, your position is not legally supportable. As noted above, the legal authority for the Secretary to impose standards of satisfactory progress is extremely limited.

The Director of the Division of Policy and Program Development, Stephen J. Blair, in a letter dated November 16, 1983 to Mr. Kraut, found that CCP's policy of extending probation periods and not terminating Title IV aid during that time was reasonable. (See Appendix C), at paragraph 1) Mr. Blair also found CCP's policy reasonable for excluding non-credit courses from courses attempted in calculating GPA: "[W]e would consider fit unreasonable to require a school to include any grade received in a noncredit remedial course in its GPA calculations for determining satisfactory progress." *Id.*, at paragraph 3. If these two officials believe this policy was reasonable, then reasonable men can differ on this question. If reasonable men within the Department can differ, then the Department must be bound, as per the statute, to the institution's own standard.

HEA, during the audit period, provided that a student must be maintaining satisfactory progress according to the standards and practices of the institution. 20 U.S.C. § 1091(a) (3) (1981). The regulations reinforced this deference to the institution. See 34 C.F.R. § 675.9(a)(5), § 674.9(a)(5), § 682.201(a)(1)(i). The Commissioner of Education himself just prior to the audit period refused to set minimum guidelines for satisfactory progress saying, "[e]ach institution should establish a definition of satisfactory progress that reflects its immediate and unique characteristics and concerns." 44 Fed. Reg. 56294 (September 28, 1979). The Congress prior to the audit period stated that under HEA, "there is no intention to impose a federal standard to measured satisfactory academic progress, and the bill provides that this determination is to be left solely in the province of the institution . . ." House Report No. 94-1086 (1976). See CCP's first brief at p. 42. If reasonable men can differ as to the reasonableness of CCP's policy, then that policy does not fall without the zone of reasonableness as DE claims.

The Department also finds unreasonable CCP's practice of allowing students dropped for poor scholarship (DPS) to enroll in a summer course with Title IV aid and allowing these students to re-enroll after a semester's absence with Title IV aid. The Department contends these students must first raise their G.P.A. to an acceptable level without Title IV aid in order to then be eligible for that aid. The Department cannot cite any support for this view in the law or regulations then existing.

CCP, on the other hand, replies that the regulations applicable to the audit period contained no minimum standards for defining satisfactory progress. As stated earlier, the Commissioner, in commentary on the final regulations, stated that criteria defining satisfactory programs were not warranted, that "[e]ach institution should establish a definition of satisfactory progress that reflects its immediate and unique characteristics and concerns." 44 Fed. Reg. 56294 (September 28, 1979).

Educators can argue whether academic progress standards are "reasonable." This argument is one of educational philosophy, not law. CCP contends its standards were reasonable, given the barriers faced by a student population from disadvantaged, poverty backgrounds.

For example, CCP provided a summer session with Title IV aid to students who were dropped for poor scholarship. That session represented one last chance for the student to demonstrate improvement before being suspended. The summer represented a bridge between Spring and Fall semesters, a transition period in which a student could focus on his academic problems in a less formal environment. This difficult-to-educate group needed this transition period in order to have a chance of succeeding in the overall program.

Of course, OSFA asserts that the letters attached as appendices B and C are not admissible as evidence because under its rules rebuttal evidence is prohibited. However, the letters in question are official records of DE. One was sent by the instant counsel for DE and the other sent to him. DE and the administrative law judge can take official notice of official correspondence of the DE official who represents OSFA in this proceeding. There can be no prejudice to DE because it had an opportunity to reply concerning the letters and indeed did so. Clearly, failure to consider the letters would amount to a denial of due process. The letters long have been in the possession of DE, even during the time of the audit. The letters, therefore, are not late submitted, at least insofar as DE is concerned. It is my view that under 34 CFR 668.116(e) (i) (ii) the letters were "provided: to ED (ED itself generated the letters) prior to the CCP request for review of the subject audit. Further, the letters even though not submitted with the initial brief of CCP are not in violation of 34 CFR 668 (e) (2) because the doctrine of official notice, involving official records of DE is invoked by the administrative law judge in the interest of fairness. If DE should rule otherwise, I suggest that exclusion of highly relevant rebuttal evidence may expose a serious flaw in DE rules.

OSFA also asserts that the letters in appendices B and C are excusatory for only a minor portion (less than \$20,000) of the \$293,898 presently said by OSFA to be due from CCP on account of final audit determination 2.

I do not perceive the factual points raised by OSFA in this regard. The appendices (B and C) cover and absolve all of the topics which account for the amount stated in finding 2, except that possibly in the case of students dropped by CCP because of poor grades it may be that such students could not obtain Federal funds for summer school or for another semester, after sitting out a semester, in a blanket manner. Instead, CCP was charged with applying a policy of making individual judgements on student progress. As a result "no liabilities have been assessed to [CCP for individually] awarding title IV aid to such students." (Appendix C, page 2, paragraph 2.)

CCP's policy comported with the regulatory environment applicable during the audit period and, at the same time, it reflected the unique characteristics and concerns of CCP. For these reasons, finding 2 of the audit must be set aside.

III

During the audit period, § 690.78(c) of the Pell Grant Program regulations, 34 CFR 690.78(c) provided that:

The institution must return to the Pell Grant account any funds paid to a student, who before the first day of classes--

(1) officially or unofficially withdraws, or

(2) Is expelled.

In addition, § 668.21(c)(4) of the Student Assistance General Provisions regulations, 34 CFR 668.21(c)(4), provided that:

If a student drops out, the institution shall use the last recorded day of class attendance by the student as the end of the student's enrollment. However, if it is unable to document the student's last day of attendance, any cash it disbursed to the student for that payment period is an overpayment.

The August 15, 1985 audit report indicated that 19 students who received Pell Grants for a semester never attended class during that semester. The final audit determination required CCP to return the \$3,173 it paid to those 19 students.

In the material it submitted, CCP has provided evidence that four of the 19 listed students attended at least one day of class during the semester in which they received a Pell Grant. OSFA accepts the documentation submitted by CCP for these students.

The Pell Grant amounts questioned for the four students total \$1,431. Therefore the reduced amount owed by CCP under finding number 3 is 1,742, $\$3,173 - \$1,431 = 1,742$. [5](#)

In finding number 4, OSFA required CCP to repay ED \$2,450 since CCP paid those funds to three ineligible students. One student received \$602.50 of Title IV, HEA Program funds in the Fall 1981 semester because, during that semester he was enrolled in the Center for Adult Learning. Another student received \$56.50 of Title IV, HEA Program funds in the Spring 1982 semester because, during that semester, [student name] was enrolled in the Center for Adult Learning.

The Center for Adult Learning was operated by CCP under funds received from ED under the Adult Education Act, 20 U.S.C. 1201 et seq. CCP does not contest that students enrolled in the Center were ineligible to receive Title IV, HEA Programs funds.

CCP submitted documents attempting to show that these two students were enrolled in CCP for the semesters in question and, thus, were eligible to receive that aid. However, CCP's records indicate that the two students were enrolled in the Center when they received the Title IV, HEA funds.

With regard to a third student, OSFA concedes that \$1,791 of Pell Grant Program funds were properly received. The reduced amount CCP owes under this finding is \$659.

CCP owes ED the modified sums determined under findings 1, 3 and 4 in the final audit determination. Therefore, CCP also must repay \$8,415 in administrative cost allowances, under finding number 5, except that there might be some reduction as a result of the invalidity of OSFA finding 2.

FINDINGS AND ORDER

For the reasons previously stated, I find that the September 30, 1988 final audit determination ordering CCP to repay \$1,455,682 for finding number 1, and all or most of \$8,415 for finding number 5 should be affirmed. I further find that the final audit determination findings 3 and 4 should be modified CCP should repay \$1,742 for modified finding number 3, and \$659 for modified finding number 4. Finding number 2 of the final audit determination is set aside.

This decision and order will become effective as the order of the Department of Education unless set aside or modified upon timely appeal by the parties.

By Paul S. Cross, Administrative Law Judge, on the 8th day of November, 1989.

1 During the audit period the SEOG, CWS, NDSL and GSL programs were conducted under concepts similar to Pell Grants, even though there was no specific statutory or regulatory provision in any of these four programs dealing with remedial education.

Under the SEOG Program, an institution of higher education awarded grants to its eligible, financially needy undergraduate students, while under the CWS Program the institution provided financial assistance through compensation for part-time employment. Federal CWS funds made up eighty percent of the compensation for that employment.

Under the NDSL Program, a participating institution established a revolving NDSL Program Loan Fund and made loans from the revolving Fund to its eligible, financially needy students. Ninety percent of the Fund consisted of Federal funds.

Under the GSL Program, a student applied to a private lender for a loan. As part of the application process, the institution the student was attending had to certify, inter alia, that the student was making satisfactory academic progress.

If the lender decided to make a loan, a guarantee agency guaranteed the lender against default on the part of the borrower. If the guarantee agency satisfied certain Federal requirements, the guarantee agency was reimbursed by ED for all or part of the default claims it paid.

2 In Levels A and B, all of the courses required were non-credit with the exceptions of Math 1165 and 117, which could not be taken concurrently. Students in Levels A and B were

permitted to enroll in CCP's introductory mathematics courses, even though they were extremely deficient in their reading and writing skills.

3 CCP would not have dropped these students for poor scholarship if, while on probation, these students earned at least a C average for at least six credits.

4 This practice is said by DE to be identical to the practice of Bowling Green Junior College which was held to be invalid in the fine and termination proceeding of that institution. No details of this action are given, however.

5 An institution acts importantly as a trustee and administrator when it receives Title IV, HEA Program funds from ED. 34 CFR 668.22 (1983). In these capacities the institution has a major responsibility for accounting for all the Title IV, HEA Program funds it receives. As a responsible administrator, the institution may be required to repay all funds for which it cannot account. 34 CFR 668.13 (1983).