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

In the Matter of
GULF COAST TRADES CENTER

Docket No. 89-16-S

Student Financial Assistance

DECISION AND ORDER

The Gulf Coast Trade Center (Center) of New Waverly, Texas initiated this case by requesting a hearing on the record to review the determination made by the Chief of the Audit Review Branch of the United States Department of Education (Education). The discussion below is divided into four parts. First, there is a discussion and ruling on various procedural aspects of the case as it pertains to the regulations promulgated by the agency. The second part is a review of the significant facts elicited from both the written record and the testimony taken at the hearing held in Houston, Texas on April 23, 24, and 25, 1990. The third portion of the case i5 a review of the applicable law pertaining to a school's eligibility to receive Title IV grants. Last, the significant facts and law are discussed in the concluding remarks and decision.

I.

SIGNIFICANT PROCEDURAL ASPECTS OF THE APPEAL

In order for the undersigned to consider the merits of this appeal, rulings on three issues must be resolved first: 1) the admissibility of additional evidence, 2) the acceptance of testimony from witnesses at a hearing, and 3) the appropriate site for holding a hearing.

From a procedural standpoint, this is an appeal from a Final Determination Letter issued April 28, 1989. The audit recovery conclusions are based upon the Center's loss of its eligibility to receive funds under Title IV of The Higher Education Act. The Office of the Inspector General (OIG) claims that it based its audit conclusion on a Texas Education Agency (TEA) statement that the Center was authorized to provide secondary education and not postsecondary education.

An appeal of the determination was filed by counsel for the school on June 15, 1989. Judge Walter J. Alprin, an Administrative Law Judge, was assigned to the case on July 6, 1989; he established a briefing schedule for the parties on July 16, 1989. Upon Judge Alprin's transfer to another agency, the case was reassigned to Judge Thomas Reilly on August 24, 1989. Upon Judge Reilly's retirement from government service, the case was reassigned to the undersigned, Judge Daniel R. Shell, on October 12, 1989.

Counsel for Education argues on page 14 of her October 18, 1989, brief that the Center is limited by 34 CFR 668.116(e) and (f). Therefore, counsel argues that the Center is not permitted to

submit additional evidence at a later hearing or to cross examine witnesses as the Center had earlier requested.

34 CFR 668.116(e) (1) states:

A party may submit as evidence to the administrative law judge only materials within one or more of the following categories: (i) ED audit reports and audit work papers for audits performed by the United States Education Department Office of Inspector General. (ii) Institutional audit work papers, records, and other materials, if the institution provide[s] 1/ those work papers, records, or materials to ED no later than the date by which it was required to file its request for review in accordance with 668.113. 2/ (iii) ED program review reports and work papers for program reviews. (iv) Institutional records and other materials provided to ED in response to a program review, if the records or material were provided to ED by the institution no later than the date by which it was required to file its request for review in accordance with 668.113. (v) Other ED records and materials if the records and materials were provided to the administrative law judge no later than 30 days after the institution's filing of its request for review.

Section 668.116(f) states:

The administrative law judge shall accept only evidence that is both admissible... timely...relevant and material....

Education argues:

1. The hearing on the record consists of the submission of briefs to the judge, unless an oral hearing is necessary. Counsel relies on 34 CFR 668.116(g) (1). 3/

2. The sole purpose of this proceeding is to review and determine the validity of the assessed audit liability. 4/

3. The Center may not raise the matter of the eligibility determination made by Education's Division of Eligibility and Certifications. 5/

Education counsel further argues in its brief of October 18, 1989, at page 19:

The audit appeal regulations specifically exclude any review of eligibility and certification issues except to the extent that those issues form the basis of the final audit determination.

On December 12, 1989, the undersigned found that the briefs and written record submitted demonstrate disputes of fact and law which cannot be resolved without holding a hearing for the purpose of taking additional evidence and permitting the cross examination of witnesses. A prehearing conference and hearing was ordered at that time.

On December 20, 1989, Education argued that the time period for submitting exhibits had expired. Counsel again argued that the regulations do not permit the presentation of witnesses. 6/

On January 4, 1990, after the denial of the motion limiting the exhibits and testimony of witnesses, Education filed exceptions to the rulings which granted an evidentiary hearing.

Education argued again to deny the introduction of exhibits after the filing of the appeal and not to permit witnesses at a hearing on the record. 7/

Counsel stated on page three of her January 4, 1990, exceptions:

Even were the taking of testimonial evidence authorized in audit appeal proceedings, the issues in dispute in this case involve the meaning of previously submitted exhibits and do not turn on the credibility of witnesses, and their resolution does not require the introduction of testimonial evidence.

Finally, Education argues that 34 CFR 668.116(h) states that any oral argument shall take place in the Washington, D. C. metropolitan area. Further, counsel states that the judge, general counsel, two potential Education witnesses, and a hearing room are located in the Washington, D. C. area. Therefore, the hearing must be held in Washington, D.C.

In summary, Education has repeatedly argued that the Center may only submit evidence at the time of the filing of its appeal, that it is limited in the type of evidence it may submit, that only an oral argument may be presented at a hearing, that any hearing held may only be one in which no witnesses or new evidence may be presented, and that the hearing must be held in Washington, D.C.

Education's assessment of the meaning of the statute establishing adjudicatory proceedings in Title IV disputes is not well founded for the following reasons.

A number of cases have examined the phrase "hearing on the record" and the function of an administrative law judge in an adjudicatory setting. Those types of determinations are directly related to the present inquiry.

"Hearing on the record" as is explained below means that the parties are entitled to the full benefit of confronting the opposition. They are entitled to present witnesses and to cross examine witnesses. In other words, the parties are entitled to benefit from the procedures of the Administrative Procedure Act, sections 554, 556, and 557.

In Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1072 (7th Cir. 1982), the court ruled:

The APA provides that the formal adjudicatory procedures described in 556 and 557 must be "followed in every case of adjudication required by statute to be determined on the record after the opportunity for an agency hearing..." 5 U.S.C.(a)(1976). The APA, as many courts have recognized, does not itself mandate that a trial type hearing be held where none is required under the administrative agency's own governing statute; the APA simply dictates the procedures to be followed when another statute provides for a hearing.

The governing statute in student financial assistance cases clearly states that:

"The Secretary shall, arrange for a hearing on the record. 20 U.S.C. 1094 (b)(2). (emphasis added).

The Court held in Butz et al. v. Economou et al., 438 U.S. 478 (1978) that the administrative law judge serves in a quasi- judicial fashion. In Marathon Oil v. Environmental Protection Agency, 564 F.2d 1253, 1261 (9th Cir. 1977), the court held:

The "quasi-judicial" proceedings determine the specific rights of particular individuals or entities. And, like judicial proceedings, the ultimate decision often turns, in large part, on sharply disputed factual issues. As a result, cross examination of key witnesses are needed both for the protection of the affected parties and to help achieve reasoned decision making.

Later, the court stated at 1263-- Moreover, whether the formal adjudicatory hearing provisions of the APA apply to specific administrative processes does not rest on the presence or absence of the magic phrase "on the record." Absent congressional intent to the contrary, it rests on the substantive character of the proceeding involved. . . The APA defines "adjudication" broadly as an agency process leading to a final disposition "other than rulemaking." 5 U.S.C. 551(6),(7) (1970). 8/ 219

In United States v. Allegheny-Ludlum Steel, 406 U.S. 742 (1972) the Court states at page 757:

Sections 556 and 557 need be applied "only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be on the record."

In Seacoast Anti-Pollution League et al. v. Costle, 572 F. 2d 872 (1st Cir. 1978) the court said at 877:

We are willing to presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record. The legislative history of the APA and its treatment in court bear us out.

The court stated in Seacoast, id. at 876:

This is exactly the kind of quasi-judaical proceeding for which the adjudicatory procedures of the APA were intended.

These words from the Seacoast case seem most appropriate in the case-at-bar. This, too, is exactly the type of case contemplated by the Administrative Procedure Act. The agency statute clearly states that the hearings afforded in disputes of Student Assistance Programs shall be on the record. 20 U.S.C. 1094 (b)(2). (emphasis added).

Again from the Marathon case, supra, at 1264:

The focus of our inquiry should be the nature of the administrative determination before us.

As is stated in Marathon, my focus is on the nature of the determination. The nature of the proceeding is adjudicatory, not rule making. The proceeding is "quasi-judicial" in nature.

In student financial assistance cases, it was the intent of Congress to establish an adjudicatory process that is formal in nature to ensure that the full protection of Sections 554, 556 and 557 of the Administrative Procedure Act apply.

Counsel for Education argued in its January 4, 1990, exceptions discussed above that the further taking of evidence is not necessary and that the case does not turn on the credibility of witnesses. Counsel is mistaken. The discussion of the facts later illustrates the importance of judging the credibility of witnesses and the taking of additional evidence. Both of these points are vital aspects to the judicial fact finding and review.

Education's arguments that sections of 34 CFR 668.116, shown above, limit the evidence, set the place for hearing, and the type of hearing are mistaken. Counsel fails to recognize the adjudicatory nature of this proceeding and the fact that this case is essentially one of sharply disputed facts. Additionally, counsel fails to recognize the Administrative Law Judge's responsibility for the complete and impartial review of disputes, including plenary discretion over all procedural, factual, and decision making aspects of cases. Further, under 34 CFR 668.117(a):

The administrative law judge regulates the course of the proceedings and the conduct of the parties following a request for review and takes all steps necessary to conduct fair and impartial proceedings.

It is true, the regulations under Section 668.116(e),(g) and (h)make the following points:

1. What a party may submit in evidence;
2. What type of hearing an administrative law judge may schedule and;
3. Where the oral argument shall take place.

However, all of this regulatory verbiage contained in section 668.116 is designed to suggest a desired course of action for the administrative law judge to take. Any other interpretation would be contrary to the Congressional intent in establishing a process for a hearing on the record. Here, the statute governing hearings specifically directs that the hearing" be "on the record." Here, I find in order to render a fair and impartial decision that a hearing is necessary for the taking of additional evidence; that evidence from witnesses is required; that cross examination of witnesses from both Education and the Center is required; and that the appropriate site for the hearing is Houston, Texas. To hold the evidentiary hearing in any other location would cause a basic unfairness to the school. Key witnesses are from the Texas area and would not or could not attend a hearing in Washington, D.C. The language found in 34 CFR 668.117 is controlling as it is consistent with the intention of Congress in establishing an adjudicatory process for **hearings on the record.**

STATEMENT OF THE FACTS

The Center is located on United States forest land about fifty five miles north of Houston, Texas. The site had previously been used as a youth camp but it became vacant due to a lack of federal funds to continue that operation. Civic leaders from the Houston community met, discussed and decided on the future use of the site in 1971.

Ronald Rea. Secretary of the Board of Trustees for the Center, testified that the group decided to provide a residential training program for delinquent youth. The program was designed to try to re-motivate the youth to see the value of education, to remove them from their environment, and to generate interest in vocational careers in order to try to turn their lives around. 9/

He stated that the initial idea was to motivate the youth to get them back into school but that concept did not work. The Center then decided to only train "older kids . . . going to be entering the work force immediately upon leaving the Center." 10/ He stated that they changed the age limitations to at least 17 years of age. "We were putting a lot of kids in unions so they had to be sixteen to get into the apprenticeship programs." 11/ The concept of residential training services has not changed since January 1976. 12/

Mr. Oscar Gonzales, Admissions Director, who has worked for the Center since 1971, also stated that the Center changed its focus in 1975, from motivation back-to-school to one of placement in the trades. 13/

Mr. Thomas Buzbee has been the Director of the Center since January 1, 1976. He was employed prior to his directorship by the Center was an assistant. He testified that the 1974 decision to change the target age of the younger persons to seventeen was based upon the fact that a younger person would not be available for employment. 14/

He explained that a combination of vocational courses were taught by the Center with remedial courses being done until recently by the Houston Independent School District. Now, the New Waverly Independent School District teaches the remedial classes. 15/ The trade related instruction was 715 hours of shop training and 200 hours of related academic instruction. The students were evaluated on an occupational competency system and each trade's evaluation is different. "The Center does not award a grade. . . it is based upon what is necessary for a student to hold a job." 16/ The school does not offer a remedial course such as reading. 17/ The Center's program is designed to prepare the student to take the GED and find employment related to the vocational courses that are conducted at the Center. 18/

The trade related instruction was added to the number of hours of Instruction but the trade related academics were not counted for Pell grants according to Thomas Buzbee. 19/ The students attending the Center are referred from county probation departments through the Texas Youth Commission according to the testimony of Gonza1es. 20/

The Center applied to the Texas Education Agency in 1972, for an exemption from licensure under the Texas Proprietary School Act. After they received an exemption from licensure, 21/ the Center never was required, nor did it obtain any other exemption. 22/ When the focus

changed, the Center changed the by- laws in order to charge a tuition. 23/ Even though a fee was charged to the Texas Youth Commission, no fee was charged directly to the student. The Center continued to operate with the 1972 exemption from the Texas Education Association until February 10, 1989, when the Center eventually obtained a license from the TEA. A discussion of the license application will follow.

The Center made application to the Southern Association of Colleges and Schools (SACS) for accreditation while at the SACS annual convention in New Orleans. 24/ According to the Center officials, the application was made for various reasons one of which was to apply to the federal government for Pell grant funds or Title IV funds. On December 12, 1984, they received their accreditation for five years. 25/ SACS reauthorized accreditation for an additional five years on December 1, 1989. 26/

In late 1987, Education's Dallas Office of the Inspector General (OIG) received an anonymous telephone call from a complainant allegedly working for the Center. Guillermo Zamudio, the audit supervisor of the Dallas OIG, testified that the caller stated that the students from the Houston Independent School District (HISD) were receiving money from the Pell grant funds. As a result of the caller's conversation, the OIG began an investigation of the Center in January, 1988. The auditor looked only at the issue of eligibility. Mr. Zamudio and Charles Thompson of the OIG spent three days at the Center looking at the books. 27/ The auditors later concluded after talking to officials at the TEA, SACS and the Texas Youth Commission that the Center students were entitled to a free public education. 28/ He further concluded that the level of education authorized by the State of Texas was at the secondary level. He stated the main factors to be considered were the level of program offered and the use of HISD teachers. He relied upon Exhibits P, Q, R, S, T, and U. 29/

Buzbee was aware of the complaint alleging that the Center was using Title I funds. However, he explained that the HISD teachers were paid from Chapter I funds and those funds came from the school district and not the Center. 30/ Buzbee also stated that Mr. Zamudio, the auditor, inspected by-laws but did not report the 1973 change in the by-laws that changed the focus of the Center. 31/

After the audit was completed by Zamudio, an exit interview was conducted on June 27, 1988, in Dallas, Texas. Present at the meeting was Cliff Bacon, representing the Eligibility Branch of the Division of Audit and Program Review for Education, Zamudio, the supervisory auditor, Charlie Johnson, from the audit team, and Kenneth Tarpey and Thomas Buzbee for the Center. 32/

Cliff Bacon testified that Buzbee asked for assurances at the exit interview that the funds not be cut off due to the question of eligibility. He said that Buzbee wanted to be provided an opportunity to adequately respond. Mr. Bacon attended the exit interview in Dallas at the request of Lois Moore from the Education Eligibility Branch. She was his supervisor at the time of the interview and the case was assigned to him for investigation. Bacon testified "'I said that the eligibility wouldn't take any action." 33/ Zamudio told the Center that an audit letter would follow thirty days after the exit interview. 34/ Zamudio testified that he made no recommendation to the Eligibility Branch to issue a revocation of eligibility. 35/

Lois Moore, Chief of the Eligibility Branch of the Division of Audit and Program Review for Education testified that her branch is responsible for the processing of applications from post secondary institutions seeking eligibility to participate in Title IV programs. 36/

To be eligible, Moore explained:

1. The school must be in existence for two years.\

2. The school must be accredited by an institution recognized by Education.

3. The school is authorized by the state in which they are physically located to provide education beyond secondary. 37/

4. The fiscal office of the school must be inspected and approved by the Certification Branch. 38/

Moore stated that all of these requirements were checked before awarding the Center's initial eligibility on March 14, 1984. 39/

The question of the Center's eligibility was first brought to the attention of Ms. Moore in May of 1988. She received information from Charles Johnson of the Dallas regional OIG. He related that the Center ""purportedly"" was no longer eligible under the State rules to operate with an exempt school. 40/ On cross examination, she claimed that she did not know that an audit was being done by the OIG when Charles Thompson called her. 41/ She stated that the information received in the case was a routine thing; and she would not inquire as to what generated Thompson's opinion. It was not until "June or July" of 1988, that she became aware of the audit procedure. 42/ Ms. Moore then in July of 1988, requested and received Exhibits P 43/, Q 44/, and R 45/. She testified that the exhibits state that the courses do not belong in a secondary education curriculum. She further stated that she talked to the TEA about the exemption that the Center had received. Based upon her verification and prior to the final audit report from Zamudio, she issued a letter to the Center revoking the Center's eligibility to receive the funds. 46/ Ms. Moore testified that as far as Eligibility was concerned she closed the case. 47/ The revocation letter was written on July 18, 1988, before the auditor's report was issued.

Upon receipt of the revocation letter, Buzbee contacted Zamudio, Moore and various congressional offices. Zamudio testified that Buzbee called him to advise him that the Center received a letter of revocation from Dr. Duval of the Eligibility Branch. 48/ He stated "that the funds were frozen. . . that he thought no action would be taken until we issued our draft report and our final report." 49/ Zamudio testified that he explained to Buzbee the letter was not issued at his direction; he had only heard of the letter but was unaware of its contents. 50/ He further stated to Buzbee that "Everything seemed, but not definitely, to indicate that the (sic) courses were the ones approved for Houston (ISD)..."' He explained that he talked to Joe Price at the TEA about the exemption; he reviewed the Center's records, interviewed the students and looked at the HISD records. 51/

The revocation letter dated July 18, 1988, was signed by Joan Duval, who was Chief of the Eligibility Branch at the time. The letter states:

The eligibility of the Gulf Coast Training Center, therefore, must be revoked as of March 14, 1984. This action is required because the school never satisfied the requirements for a postsecondary vocational institution contained in the Higher Education Act of 1965, as amended. 52/

The letter stated that all funds were frozen as a result of the eligibility revocation. Moore testified that soon after the Eligibility Branch issued the revocation letter she received a telephone call from Buzbee. He wanted an explanation and a meeting. 53/ Ms. Moore also testified that at the time of the revocation action she was not the Chief of the Branch but was a senior employee who had major input into the process. She stated on cross-examination that "it is safe to assume that all of the letters that Dr. Duval [signed] had been written by her [Moore]". 54/

While all of the above action was being taken by the Eligibility Branch, the Office of the Inspector General issued its draft audit report July 25, 1988. The report specifically states :

Because the scope of our audit was limited to determining whether the Center was eligible to participate in the SFA (Student Financial Assistance) programs and we performed no substantive tests of the actual administration of the program or the award and disbursement of funds, we cannot provide assurance that any unlisted items were in compliance with applicable laws and regulations.

The report recommends the cessation of the participation of Title IV SFA programs immediately and the return of $1,336,474 for funds drawn from December 31, 1984, through June 30, 1988. A final audit report was issued October 11, 1988, which stated the same conclusion as the draft audit report. 55/

The October, 1988, auditor's report states in the highlights of the audit results:

Regardless of the enrollment plans of the youths, the Center was not legally authorized to provide a postsecondary educational program. The educational program at the Center was operated by the Houston Independent School District with funds provided for the free public education for children, and the youths were counted for the purpose of receiving Chapter 1 neglected and delinquent funds awarded to elementary and secondary educational facilities. 56/

Ethelene Hughey, Chief of the Audit Review Branch of the Division of Audit and Program Review testified that a specialist in her office did preliminary work on the Center's audit but she issued the program determination letter. 57/ She stated, during an appeal of an audit review, a school is not required to pay the money back. 58/ Further, she testified the audit only addressed the issue of eligibility. She did not have the final audit when Eligibility cancelled the Center's eligibility. 59/ She later claimed that she talked to Eligibility regularly but was unsure if the revocation preceded the draft audit. 60/ She stated that the only reason for initiating the audit report was to collect the money due to Eligibility's action. "That is the way that was operated--it ran." 61/

As a result of revocation of eligibility, the Center made inquiries to the Eligibility Branch, the Audit Branch, and to certain members of Congress. Education agreed to hold a series of

meetings with the Center. The first meeting was held on August 25, 1988, to provide an explanation to the Center as to why the school was no longer eligible for funds.

At this meeting, there was a discussion about the audit and eligibility branches serving two separate functions. Even though the branches serve separate functions, they are both part of the same division. According to Moore, that is the reason why the Eligibility Branch could revoke eligibility while the audit process was still pending. Moore recalled in her testimony that Dr. Duval stated to the Center "that we would certainly be amenable and open to receiving any information from the institution...that would reverse the action... (of revocation)" 62/ Further, she said they were looking for "written indication from the State [of Texas]... that unequivocally verified that the institution and its programs were beyond the secondary level as well as the reversal of Exhibits P through R." 63/

On cross examination, Ms. Moore stated that the August 25, 1988, meeting focused on what the Center needed to do in order to reinstate the school's eligibility. 64/ She said "We advised that the problem was at the Texas agency." 65/ As a result of this meeting, the Center obtained a letter dated August 20, 1988, from The Southern Association of Colleges and Schools.

The letter states:

Nothing in our files indicate that your institution is anything other than a post secondary school. 66/

On September 8, 1988, the TEA sent a letter to Joan Duval, which states:

In 1973, the New Waverly campus of the Gulf Coast Trade Center was exempt from the Texas proprietary school act based on a finding that the school offered ". . . a course or courses of special study or instruction financed and/or subsidized by local, State or Federal funds or any person, firm or association or agency other than the student involved, on a contract basis and having a closed enrollment..." § 32.12(b), Texas Education Code (Vernons 1972). 67/

There was another meeting in October of 1988, in which Ms. Moore attended along with Dr. Kubiak, representatives from Congressman Jim Wright and Senator Lloyd Bentsen, Mr. Buzbee, Mr. Rea, Dr. Duval and Steve Kraut from Eduction's Office of General Counsel (OGC) . Owens testimony was that "Dr. Kubiak stated in the meeting, just tell us what you. want, and we will get it..." Mr. Kraut explained in detail that Education needed an unequivocal statement from the State of Texas as to the level of education being provided by the Center. 68/

Buzbee wrote on November 8, 1988, to the Assistant Secretary of Postsecondary Education complaining that the final audit ignored the Center's by-laws which state:

The purpose for which the Corporation is formed is educational, and vocational undertaking. 69/

Buzbee testified that he decided to obtain a proprietary license in order to hopefully revolve the eligibility issue informally. 70/ He applied to the Texas Education Agency and received a certificate of approval on February 10, 1989. After receiving the State's license, the Eligibility

Branch would not give the Center retroactive eligibility to include the period back to 1984. Exhibits 38 and 39 were submitted to Eligibility. 71/ Lois Moore on March 1, 1989, rejected Exhibits 38 and 39 as being conclusive because the language use was not clear in stating that the TEA approval of the Center was for postsecondary education. 72/ She also requested the Center to complete an application for Institutional Eligibility.

Buzbee then obtained a March 6, 1989, letter from Joe Price of the Texas Education Agency which stated that the February 10, 1989, certificate was issued for postsecondary courses of instruction. 73/ Later, Buzbee responded to Moore's request for a new application for eligibility by stating that such an application was already on file. 74/ He stated in a letter to Moore that essentially only minor changes in the courses and hours of study had changed. This had been the case ever since the school received its initial exemption under the Texas Proprietary School Act. 75/ Buzbee testified that Education appeared to be foot dragging at this point. 76/

On March 17, 1989, Joe Price of the TEA sent another letter to Education. The letter stated:

Because of the thoroughness of the accreditation approval process by Southern Association of Colleges and School (SACS), Texas Education Association concurs with their conclusion that Gulf Coast Trade Center was in compliance with criteria for postsecondary institutions from the date that accreditation was granted by Southern Association of colleges and Schools on December 12, 1984 through the date of reaffirmation scheduled for July, 1989. 77/

On March 20, 1989, Joan Duval, Director of Eligibility and Certification, responded to the Price letter mentioned above. She requested another letter to clarify his March 17, 1989, letter. She acknowledged in her letter that Education and the Center were holding meetings in which the issue of reinstatement of eligibility retroactive to 1984 was the major topic of discussion. She stated that Price's letter, in her opinion, was not a clear reversal or change in the TEA's recognition of Gulf Coast. She provides specific instructions:

In order that we may provide Gulf Coast every opportunity to regain its eligibility retroactive to 1984, we must receive from TEA an unequivocal statement as to whether TEA authorized Gulf Coast to offer post secondary education from March, 1984 to July, 1988. If not, an unequivocal statement that TEA did not authorize Gulf Coast to offer Education beyond the secondary level is needed. 78/

Lois Moore testified that the Exhibit 44 letter was to convey "my intention to carry out whatever the Department, be it the Division Director, the Assistant Secretary, the Inspector General, or the General Counsel instructed us to do." 79/

Moore's office issued an eligibility notice on March 28, 1989, with an effective date of March 14, 1989. It had no provision for retroactivity. 80/ However, Moore admitted that there was no problem as to future eligibility. 81/

Ethelene Hughey issued an undated final determination letter that was received May 2, 1989, by the Center. The Audit Determination found the Center not eligible for Title IV funds due to its ineligibility to provide education beyond the secondary level. 82/ The letter demanded the return

of all funds provided from December 31, 1984 to June 19, 1988 as the sum of $1,336,474. Ms. Hughey testified that her office did not consider any evidence that was submitted by the Center. 83/

At approximately the same time that Ms. Hughey issued her final determination letter, the Education Certification Branch issued a letter to the Center which required them to provide a financial statement as of May 1, 1989. The letter instructed the school to include the amount requested by the Audit Review Branch, letter of April 28, 1989. 84/

On May 29, 1989, the TEA mailed a letter to Dr. Joan Duval in response to the instructions from Education concerning unequivocal statements as to the Gulf Coast Trade Center authority to provide postsecondary education and its ability to provide such education during the period of December 31, 1984 through June 19, 1988. The letter was signed by W. N. Kirby, Commissioner of Education for the State of Texas. In the letter, the Commission states that the Education Office of Inspector General for Audit is in error in finding that the Center is authorized by the Texas Education Association to offer secondary vocational education programs only.

The third paragraph of the Commissioner's letter states:

During the years in question, the Center was found to be exempt from regulation under the Texas Proprietary School Act. Holding exempt status, the Center was legally authorized to offer and conduct postsecondary vocational course in the State of Texas. 85/

Later, in the letter, Kirby states that funds were approved by TEA for the HISD for some secondary vocational programs. However, it goes on to say that the Center is a district and separate educational institution with a separate governing board, separately owned or leased facilities and distinct funding sources. The Center, according to the Commissioner, is not a part or campus of the Houston Independent School District. He further stated:

"In Texas schools, a student is enabled by law and administrative rule to attend a secondary school and postsecondary school at the same time if there is no scheduling conflict."

The Commissioner ended the letter by stating:

All of these students are at risk of becoming coming societal drop outs and never gaining meaningful citizenship. These particular students are being helped by this program and it seems a shame to adversely affect the students because a precise definition of "post-secondary"" is the subject of an imprecise disagreement.

Ethelene Hughey, Chief of audit testified that the Kirby letter would only be significant to the Eligibility Branch and not to the Audit Branch. 86/ Hughey admitted in her testimony that she had seen the letter but took no action on it. 87/ During cross examination, she was asked to read the letter which she did. She then said "it would say that they are eligible." 88/

Hughey gave testimony that the eligibility issue must be resolved by the Eligibility Branch and any monetary reimbursement is done by her branch. 89/ She further stated that after eligibility is revoked it is for her branch to collect the amount due. 90/

Moore testified that Steve Kraut of the Office of General Counsel advised her:

That the audit process takes precedent over the eligibility process. . .

She claims to have received her legal advice in December 1988 or January, 1989. She sought the legal advice because "My reason for inquiry. . . was for some information that should be done in response... because the issue was no longer in my branch."

Mr Kraut advised that the only response that we could possibly provide to any inquiry is that the audit process is ongoing and that the documentation provided by the person writing the letter had been referred over to the audit review office. 91/

Ms. Moore testified that at all times she was following her legal advisor's direction. 92/ She stated "The consideration of the reinstatement of the eligibility retroactively was the issue in the audit." 93/

Moore further testified that the audit findings are considered allegations so that the institution has an opportunity to respond. She said:

If I am made aware of information under the auspices of an audit that directly impacts upon the status of eligibility, I do not take action, because at that point they are allegations. 94/

Moore stated that she did not intend to take any action until after the audit process. 95/ She, however, worked for Joan Duval at the period in question and admitted that all of the letters from Dr. Duval had been written by her. 96/

In response to questions after cross examination, Moore admitted that the Commissioner Kirby letter was supportive of what the Center was trying to represent. She said "If it [the letter from Kirby] came in early without all the confusion, it would have worked. It is unfortunate that the letter was not available earlier." 97/

She further stated that determinations or decisions by her Branch--

"Were collectively made between eligibility. . . certification, the audit and program review office. . . the Office of General Counsel internally, and the inspector."

Moore further admitted that the Kirby letter was the first letter to which her Branch did not respond. She said she directed the Kirby letter to audit. She claims she had no opportunity tot make a conclusion or render a decision. 98/

Patrick Whelan, an employee of the Texas Education Association since 1968, was called as a witness by the Center. He appeared at the hearing as the official representative of the TEA. He

had been instructed by the Deputy Commissioner of the TEA to review all records related to the Center. 99/ He reviewed all records and information on the Center. He concluded that the Center's students are in a program designed for them to take a GED and find employment related to the vocational courses conducted at the Center. 100/ He stated that the certificate issued February 10, 1989, was the Center's continuing authority to offer postsecondary education. His opinion is based upon site surveys, continued approval and meeting the plan in its application. He further stated that it is the official position of the Texas Education Agency that:

They were legally authorized to offer a program of postsecondary education in the State of Texas. Our position is that at all times they have been providing a postsecondary program of education. 101/

Mr. Whelan stated that he was charged with the responsibility of reviewing applications for exemptions under Section 3212(b) of the Texas Proprietary School Act in 1972. It was 1972 when the Center received its exemption from TEA. He said the exemption remains in effect until it is revoked. 102/ He explained that section 3212(b) of the Texas Proprietary School Act exempts certain courses at a school but --

TEA policy has consistently been... that if a school offers only courses that are exempt under § 3212(b) the Agency's policy in implementing a consumer protection statute... has been to exempt the entire school and not the course. 103/

If, however, the school changed its policy and charged the student a tuition, it would lose its exemption. 104/

He further said:

A deviation in course will not destroy the exemption as long as they maintain the fact. . . that the student is not responsible for his or her tuition. 105/

Furthermore, Whelan rendered the opinion that it was his opinion that if the Center wanted to remain exempt they could still do that instead of obtaining a license as they had done. He said the act of obtaining a license did not change anything. 106/

Whelan, on cross examination, admitted that he wrote the letter that was signed by Commissioner Kirby and identified as Exhibit 49. "The Commissioner reviewed what I wrote and then he signed it." 107/ With reference to the intent of the Kirby letter, he said:

What the TEA is saying in this letter is that they [the Center] have continuously been legally authorized to offer a post secondary program in Texas. . . . The writer intended this letter to try to satisfy the Department [of Education] once and for all that the Center was legally authorized to offer a postsecondary education program in Texas. 108/

III.

DISCUSSION OF THE LAW

Did the Gulf Coast Trade Center have the authority to provide a program of instruction beyond secondary education? Was the Center authorized to provide postsecondary education? Was the Center authorized to receive Title IV funds from the United States Department of Education? What elements are required by Education before the Center is considered eligible to receive Title IV funds? Opposing counsel raised these questions in their opening statements.

In order for the Center to be considered an eligible institution, the school must be qualified as eligible under the Higher Education Act of 1965, as amended, Pub. L. 96-374.

Higher Education is defined as including a proprietary institution of higher learning and a postsecondary vocational institution § 20 U.S.C.A. 1088 (a)(l)(A),(B).

A proprietary institution of higher education is defined as one that includes a proprietary educational institution in any State which, in lieu of admitting as a regular student having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, 109/ admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located and who have the ability to benefit from the training offered by the institution. 110/

The institution must be a public or other non-profit institution. Here, the Center is considered a private non- profit corporation that provides adjudicated youth, 16 to 18 years of age, with a social experience to help the student become an occupational success, to attain self sufficiency, and to avoid subsequent delinquent behavior. 111/ There is no issue raised as to the institution's status in this regard.

The Higher Education Act also requires that the school be accredited by a nationally recognized accrediting agency. Here, the Center is accredited by the Southern Association of Colleges and School (SACS). 112/ Education has not challenged the Center's assertion that SACS is on the Secretary (of Education's) published list of nationally recognized accredit one agencies as required by 20 U.S.C.A. 1088(b). The Secretary may not establish standards for determining ability to benefit or establish restrictive standards for accrediting bodies. 113/

Additionally, the definition of higher education includes postsecondary vocational education. However, there is no definition in the Statutes or regulations which specifically define postsecondary vocational education. 114/

The statute does state that the "'institutions of higher education . . . require the institution to be legally the authorized in State where it is located to provide a program of education beyond secondary education." 20 U.S.C.A.1141(a).

Here, the Texas Education Agency is the agency from the State of Texas authorized to consider compliance with the Texas Proprietary School Act. It is the agency that in 1972 considered the Center's exemption from the Act and later considered the issuance of license (2-10-89) to the Center.

The 1972 exemption, which the Center received and is shown in exhibit 4, recites section 2.12 (b) of the Proprietary School Act. The Act states:

Schools offering a course or courses of special study or instruction financed and/or subsidized by local, State or Federal funds or any person, firm, association, or agency other than the student involved, on a contract basis and having a closed enrollment may apply to the Administrator for exemption of such course or courses [as) may be declared exempt by the Administrator. Where be (he/she) 115/ finds the course or courses to be outside the preview of this Chapter. 116/

IV.

CONCLUSION

I find that the Center, during the entire audit review period, was providing a level of instruction which was designed for regular students beyond the age of compulsory school attendance. Compulsory school attendance in the State of Texas is age sixteen. There is substantial evidence that during the period of the audit review the students attending the Center were beyond the compulsory age of school attendance.

The youth were adjudicated delinquent. In lieu of incarceration in a penal institution, the students were placed in the Center. The Texas Youth Commission in conjunction with contracts from various Texas county Probation Departments authorized the placements. The Center attempted to rehabilitate the youngsters and to provide occupational training. As a result of the students being adjudicated delinquent and institutionalized, Chapter 1 education funds could be used to provide a free public education. 117/

Here, the students attend a non-profit proprietary education institution. A proprietary institution, as defined above, includes an institution that admits, as regular students, those who are beyond the age of compulsory attendance in the state in which the institution is located provided the students have shown the ability to benefit from the training offered by the institution. Additionally, the Center is a postsecondary vocational educational institution because the courses are designed to prepare students for gainful employment in a recognized occupation. The Center is accredited by the Southern Association of Colleges and Schools as required by the Higher Education Act.

The hearing focused upon the Center's exemption from the license procedure of the Texas Proprietary School Act as determined by the Texas Education Agency. Education argued that the school's level of instruction was only at the secondary level. They based their arguments upon an investigation done by OIG auditors and upon a summary inquiry done by the Eligibility Branch.

Guillermo Zamudio, the audit supervisor for OIG, indicated that he looked at the records of the Center, the students and the Houston Independent School District. I found Mr. Zamudio's investigation incomplete and confusing. His testimony was not credible and at times rambling and confused. He summarized his confused testimony at page 834-835 of the transcript.

The SFA (Student Financial Assistance) . . . focused towards what they considered post-secondary education.... We thought it was fairly simple, and now trying to explain it, I can see that maybe we were not very realistic. It was a little more complicated... when we talked to the Texas Youth Commissioner They agreed that the students are entitled to a free public education, but they don't know about the student financial assistance programs . . . .

The Chief of the Eligibility Branch, who initiated the revocation of the Center's eligibility without giving the school an opportunity to respond, claims she based the decision of the eligibility branch primarily upon the auditor's report, a review of the conversations with TEA and Exhibits P through R. She relied upon the legal opinion of the Office of General Counsel and provided no appeal opportunity of the eligibility issue at the time of the summary revocation. Ms. Moore indicated that her office closed the case on the issue of eligibility; however, she did participate in a series of meetings that were colored with the appearance of assisting the school in reinstating its eligibility. In fact, the eligibility branch always considered the case closed and did not consider any new evidence from the Center after the revocation of the school's eligibility.

Moore repeatedly testified that the eligibility issue was in the audit branch for review, yet Audit Branch Chief Hughey testified that the entire audit was designed to collect the money based upon eligibility revocation. Hughey admitted that her branch never considered any of the exhibits that the Center obtained after the summary revocation by the eligibility branch.

It is also interesting to note in Moore's testimony that her branch would not have revoked eligibility had the Audit Branch taken steps to revoke the Center's eligibility prior to Eligibility summary revocation. Moore further comments that if audit would have taken steps to revoke then her office would have treated the reports as allegations which had to be proven by Education. Additionally, the Center could have submitted evidence and information to refute the allegation. I find that it makes no sense to make such a distinction.

I find that the portions of the testimony of both Moore and Hughey difficult to believe. Moore claims that she was unaware of the actions being taken by Hughey and Hughey testified that she was unaware of the revocation action being taken by Moore. Yet they both worked in the same Division as senior members in responsible positions.

After a series of meetings and attempts by the Center to comply with Education's demands or directions, the Eligibility Branch received a letter from the Texas Education Agency Commissioner detailing their position. The letter recognized the Center's ability to provide postsecondary vocational education. The eligibility branch nevertheless took no action to reverse its position on the eligibility issue.

Ms. Moore, in her testimony, made it quite clear that had the Center presented the Commission's letter earlier it would have provided the necessary information to support of the Center's position. In other words, according to Moore's own testimony the Center was retroactively eligible to December 1984.

The most credible evidence of the Center's authorization to provide postsecondary vocational education or education beyond the secondary level came from F. Patrick Whelan. He testified as

the official spokesman for TEA. He unequivocally stated that the school is legally authorized to offer a program of postsecondary education in the state of Texas. Whelan stated that the TEA policy was to exempt schools that offered courses which were exempt.

The final analysis in this case rests upon Education's central argument that the Center is not authorized to provide educational programs beyond the secondary level. Here, the Texas Education Agency is the State body that authorizes a program of education beyond the secondary level. The official representative of that agency clearly states that the Center was authorized to provide a postsecondary vocational education program during the entire period in question.

I conclude that the school was, in fact, authorized to provide postsecondary vocational education programs during the audit years in question. As such, the Center was authorized, during the audit period through the date of the hearing, to conduct a program of postsecondary education. Accordingly, I find that the Center was eligible to participate in the United States Department of Education Title IV programs. It is, therefore, ORDERED that Gulf Coast Trade Center be retroactively reinstated as an institution eligible for Title IV programs. 118/

Daniel R. Shell
Administrative Law Judge

DATED: July 11, 1990
Washington, D. C.

1/ The word as stated in the text of the regulation is "provide."

2/ Section 668.113 requires filing of evidence within 45 days from the date of receipt of the final audit determination letter.

3/ Vol I, pg. 15.

4/ Volume I, pg. 18.

5/ Vol I, pg. 18.

6/ Counsel for Education relied on 34 CFR 668.116(c), (e)(1) (ii) , (iv), (v) , and (e) (2) , as well as 34 CFR 668.11(b) and (g).

7/ Counsel relied upon 34 CFR 668.116(c), (e)(l)(ii), (iv) , (v) and (e) (2).

8/ This case involves a statute that specifically includes a reference to a "**hearing on the record.**" The magic words "on the record" are included in the statute. Some of the case discussion here turns on the legislative intent in those cases where the statute fails to include the words "on the record". The rationale of this case comments on both the specific language of the

statute which uses "**hearing on the record**" and the legislative intent in the creation of administrative law judges in the Department of Education.

9/ Tr. pg. 50.

10/ Tr. Pg. 58.

11/ Tr. Pg. 60.

12/ Tr. Pg. 58.

13/ Tr. Pg. 138-139.

14/ Tr. Pg. 165 in 1973. The Center's by-laws were changed to reflect the changed emphasis. Tr. Pg. 83.

15/ Tr. Pg. 167.

16/ Tr. Pg. 112. Also see Ronald Rea testimony at Tr. Pg. 64 to include the award of GED Certificates.

17/ Tr. Pg. 116.

18/ Tr. Pg. 430.

19/ Tr. Pg. 169, 171.

20/ Tr. Pg. 139.

21/ See Exhibit 4 for the Center's exemption.

22/ Tr. Pg. 82 and 353.

23/ Tr. Pg. 83.

24/ See Exhibit 7 for the initial application.

25/ Exhibit 16, 17 and 18.

26/ See Exhibit 54.

27/ Tr. Pg. 793.

28/ Tr. Pg. 798.

29/ Tr. Pg. 805.

30/ Tr. Pg. 194.

31/ Tr. Pg. 207.

32/ Tr. Pg. 842.

33/ Tr. Pg. 845.

34/ Tr. Pg. 821.

35/ Tr. Pg. 820.

36/ Tr. Pg. 658.

37/ Tr. Pg. 660.

38/ Tr. Pg. 663.

39/ See Ex. 10.

40/ Tr. Pg. 668.

41/ Tr. Pg. 711.

42/ Tr. Pg. 713.

43/ Exhibit P is a letter from Janice Leroy, the Regional Inspector General for Audit dated June 3, 1988. The letter sets forth speculation on the part of her office that the Center may not be permitted to provide education beyond the secondary level. The letter was directed to the TEA requesting clarification on the issue.

44/ Exhibit Q is a letter dated June 8, 1988, from Janice Leroy of the TEA requesting clarification again. A note affixed to the letter with a signature purporting to be that of the addressee state that he cannot verify the information.

45/ Exhibit R is a letter from the TEA to the OIG which states that the courses offered by the Houston Independent School District at the Gulf Coast Training Center campus are secondary vocational courses. The letter is dated May 24, 1988.

46/ Tr. Pg. 672 and Ex. 28.

47/ Tr. Pg. 675.

48/ Ex. 28.

49/ Tr. Pg. 822.

50/ Tr. Pg. 823.

51/ Tr. Pg. 828-830.

52/ Ex. 28.

53/ Tr. Pg. 676.

54/ Tr. Tr. Pg. 705.

55/ Ex. 36.

56/ Ex. 36.

57/ Exhibit 46.

58/ Tr. Pg. 539.

59/ Tr. Pg. 542.

60/ Tr. Pg. 547.

61/ Tr. Pg. 556.

62/ Tr. Pg. 682.

63/ Tr. Pg. 683.

64/ Tr. Pg. 729.

65/ Tr. Pg. 730.

66/ Ex. 23.

67/ Ex. 34.

68/ Tr. Pg. 692.

69/ Ex. 37.

70/ Tr. Pg. 213.

71/ Exhibit 38 is a letter from Buzbee to Clifford Bacon of the Eligibility Branch. Buzbee included a letter from Joe Price of the TEA which said he believed that the Administrator of the Texas Proprietary School Act would sign a certificate of approval. Exhibit 39 is a letter form

Buzbee to Bacon dated February 16, 1989, which included a certificate of approval to operate under the Texas Proprietary School Act.

72/ See Exhibit 40.

73/ Exhibit 41.

74/ See Exhibit 26 as a cover letter with the Center's previously filed United States Department of Education form 1059, Application for Eligibility.

75/ Exhibit 42.

76/ Tr. Pg. 221.

77/ Exhibit 43.

78/ Exhibit 44.

79/ Tr. Pg. 758.

80/ Exhibit 45.

81/ Tr. Pg. 699.

82/ See Exhibit 46.

83/ Tr. Pg. 567.

84/ Exhibit 46 is undated but is a demand letter for $1,336,474.

85/ Exhibit 49.

86/ Tr. Pg. 567-568.

87/ Tr. Pg. 572.

88/ Tr. Pg. 570.

89/ Tr. Pg. 545.

90/ Tr. Pg. 549.

91/ Tr. Pg. 701.

92/ Tr. Pg. 703.

93/ Tr. Pg. 702.

94/ Tr. Pg. 714-715.

95/ Tr. Pg. 753.

96/ Tr. Pg. 706.

97/ Tr. Pg. 780-781.

98/ Tr. Pg. 780-781.

99/ Tr. Pg. 419.

100/ Tr. Pg. 430.

101/ Tr. Pg. 435-436.

102/ Tr. Pg. 448.

103/ Tr. Pg. 451.

104/ Here, the charge is to the Texas Youth Commission and not to the individual student. Tr. Pg. 458.

105/ Tr. Pg. 454.

106/ Tr. Pg. 466.

107/ Tr. Pg. 481.

108/ Tr. Pg. 498.

109/ 20 U.S.C.A. 1141(a).

110/ The issue of ability to benefit is not an issue and will not be discussed further.

111/ See Exhibit 1, Pg. 2; Exhibit 6 - non profit income tax exemption

112/ See Exhibit 13 dated 12-14-84.

113/ 20 U.S.C.A. 1088(b)

114/ See the testimony of Patrick Whelan at Tr. Pg. 437, where be states there is no definition of postsecondary schools; also see testimony of Lois Moore at Pg. 764, where she states there is no

statutory or regulatory language that can be relied upon in making the determination as to whether or not an institution provides postsecondary education.

115/ The exemption form which is exhibit 4 uses the word "be."

116/ Exhibit 4.

117/ Funds are proportionally distributed to states for use in the local school districts. Here, the fact that the students were receiving benefits from their entitlement to a free public education does not negate the fact that the students may also be eligible for other federal funds through Title IV. Here, the services of the Houston Independent School District and later the New Waverly Independent school District were contracted by the Center to provide a free public education. Thomas Fagan, Special Assistant to the Director of Compensator Education for the U.S. Department of Education, admitted that it is the state's responsibility to determine whether or not a child is entitled to benefit from Chapter 1 services. Tr. Pg. 524 - 529.

118/ The Secretarial delegation of authority to hear the revocation issue was made to the undersigned by a document in Volume III of the records of the proceeding. It should be noted that the delegation was not received until after the case was heard. The undersigned finds that it is necessary to address the issue of Education's failure to provide the Center with a due process review of Eligibility Branch of Education's summary revocation of the Center's eligibility in light of the decision favorable to the appeal of the Center.