

IN THE MATTER OF SINCLAIR COMMUNITY COLLEGE,
Respondent.
Docket No. 89-21-S
Student Financial Assistance Proceeding

DECISION

Appearances: Michael B. Goldstein, Esq., Leslie H. Wiesenfelder, Esq., and Blain B. Butner, Esq., for the Respondent, Sinclair Community College.

Stephen M. Kraut, Esq., Office of the General Counsel, U.S. Department of Education, for the Office of Student Financial Assistance.

Before: Judge John F. Cook

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I. PROCEDURAL BACKGROUND.

A final audit review determination was issued by the Chief of the Audit Review Branch of the Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (ED) to Sinclair Community College (Sinclair) on March 22, 1989. The determination identified total repayment claims of \$523,892 allegedly due to Sinclair's improper award of Title IV funds during the 1983-84 and 1984-85 award years. Sinclair's alleged liability under Title IV of the Higher Education Act of 1965(HEA), as amended, arises from its use of funds in three areas involving: alleged failure to apply the satisfactory progress policy in effect during that time; the enrollment of students in allegedly ineligible programs; and the alleged improper award of excessive room and board allowances.

The final audit determination set forth the following specific claims. First, it claimed Sinclair improperly disbursed Title IV funds of \$497,721 to students who were not making satisfactory progress. Next, it concluded that 51 students who received Title IV funds were not enrolled in an eligible program and Sinclair should repay \$24,561 for the alleged improperly awarded funds. Finally, Sinclair was charged with using an inappropriate room and board allowance involving 7 students and the sum of \$1,610 was disallowed.

This action was proposed following an initial review in January 1985 by the OSFA Program Review Office which advised Sinclair of certain deficiencies and a subsequent audit review in 1987 by the Regional Inspector General for Audit (IG) of the U.S. Department of Education. The IG final audit report was then issued in September 1988. On November 21, 1988, Sinclair filed a response to the IG audit report disputing the adverse findings. Earlier, in April 1988, Sinclair had submitted lengthy comments to the IG's draft audit report and directed those to Robert Seabrooks, the Regional IG. Both the Draft and Final Audit Reports had rejected Sinclair's contention that its Probation and Dismissal Policy qualified as an acceptable satisfactory progress policy upon the alleged ground that it did not contain a maximum time frame as required by Departmental regulation.

The IG review concluded that, had Sinclair monitored academic progress and processed appeals of adverse satisfactory progress determinations in a timely way, Sinclair could otherwise have withheld some awards or counseled students before awarding additional Title IV funds. The Chief of the Audit Review Branch considered other unforeseen events, like the flooding of Sinclair's campus, which had delayed Sinclair from implementing a computer system to monitor satisfactory academic progress. However, such events were deemed to be insufficient reasons to relieve Sinclair from its liability for the disallowed funds.

Accordingly, OSFA sought to recover the full amount of funds totalling \$523,892 for the three types of violations.

In response to the final audit determination, Sinclair filed its Request for Review and forwarded certain documents and materials to OSFA identified as its Exhibits 1-18. Sinclair disputed all liability OSFA alleged with the exception of \$34,095 in student loan awards which it was unable to support by adequate documentation. In conjunction with its Request for Review, Sinclair filed three motions. Those motions included a Motion for Prehearing Conference, a Motion for Access to Records, and a Motion for an Evidentiary Hearing.

The proceeding was initially assigned to Administrative Law Judge Walter Alprin who set a briefing schedule.

However, the proceeding was subsequently reassigned to the undersigned judge for further disposition. Sinclair filed its initial brief and attached its Exhibits 19-27 thereto. OSFA filed its initial brief with Exhibits G-1 through G-7. In its brief, OSFA challenged the admissibility in evidence of Sinclair's Exhibits 1-18 on the ground that Sinclair had failed to timely submit those exhibits with its brief as required under 34 C.F.R. § 668.116(e)(2). Thereafter Sinclair filed a Reply Brief and OSFA filed a Rebuttal Brief.

The parties, pursuant to an order of the judge, filed a Joint Memorandum regarding stipulations, and a Joint Statement of Issues of Fact and Law.

Thereafter the undersigned issued an Order as to Exhibits and Resumption of Procedural Schedule. [See footnote 1](#)¹ In the Order, the judge reviewed the background concerning the disputed receipt of Sinclair's Exhibits 1-18 and determined that those exhibits constitute evidence which is properly a part of the record for decision. The judge also found the disputed exhibits should be made part of the record for decision based on due process and equitable considerations.

In support of the determination that the disputed exhibits should be part of the record for full consideration, the judge reviewed the following factors in overruling OSFA's objections to admitting that evidence. Since Sinclair's Exhibits 1-18, which were attached to the original Request for Review, have been incorporated by reference in its initial brief, they constitute evidence which is considered a part of the record upon which a decision will be based. OSFA and its representative have had complete knowledge of these exhibits since the outset of this case, have had an opportunity to respond to them, and have not shown any prejudice that OSFA would suffer if the documents are considered to be in evidence.

As stated in the Order, equitable and due process and other considerations have also been discussed, but only as additional matters since the primary reason for determining that these exhibits are evidence in the record is based upon a conclusion that they have been incorporated by reference in Sinclair's initial brief.

In addition to the ruling on the inclusion of Sinclair's Exhibits 1-18, the Order set forth a revised schedule for final briefs. However, after a telephone conference with counsel for the parties, a motion as to further proceedings was filed by Sinclair without opposition by OSFA. The undersigned then issued an Order as to Further Proceedings which stated, in part, as follows:

1. Sinclair Community College's pending motion for an evidentiary hearing is DENIED without prejudice to renewing such a motion at a later date.
2. The Administrative Law Judge will issue an initial decision on the basis of the documents and briefs already submitted by the parties, unless he determines that genuine issues of fact exist, in which event the Respondent may renew its motion for an evidentiary hearing and OSFA will be able to file its responses thereto.
3. The Administrative Law Judge will notify the parties if an oral argument is to be scheduled.

The Motion for Evidentiary Hearing, resolved as above, was the last of Sinclair's three outstanding motions. Sinclair's Motion for Prehearing Conference has been granted by means of the multiple telephone conferences which have taken place throughout this proceeding. Likewise, Sinclair's Motion for Access to Records was recognized as moot by the parties at a prehearing conference.

In consideration of the joint stipulations and the thorough briefing by both parties, there is no need to hold an oral argument. The undersigned judge is satisfied that the parties have fully briefed their positions and otherwise clarified all relevant issues. Consequently, no purpose would be served by soliciting a restatement of the parties positions through an oral argument. In view of the status of the record as a whole, it has been determined that a decision can now be issued.

Based upon the findings of fact and conclusions of law, *infra*, the final audit review determination is sustained in part and Sinclair is ordered to reimburse the Department of Education in the amount of \$35,705.00.

II. APPLICABLE LAW.

The applicable time period in this case, during which Sinclair's receipt of Title IV funds is questioned, involves the 1983-84 and 1984-85 award years. [See footnote 2](#)² The applicable law is discussed below:

A. The Pell and Campus-Based Programs Generally.

The Title IV, HEA Programs involved in this proceeding include the Pell Grant Program and Campus-Based Programs. The Pell Grant Program was authorized under Title IV, Part A, Subpart 1 of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. § 1070a. The Campus-Based Programs included the Supplemental Educational Opportunity Grant (SEOG), College Work Study (CWS), and Perkins Loan Programs, formerly the National Direct Student Loan Program. The relevant statutory provisions are found at 20 U.S.C. § 1070b et seq., 42 U.S.C. § 2751 et seq., and 20 U.S.C. § 1087aa et seq., respectively.

B. Statutory and Regulatory Provisions as to Measurement of Satisfactory Progress.

Under Section 487(b)(1)B of the HEA, as added by Section 451.(a) of the Education Amendments of 1980, Pub.L. 96-374, 94 Stat. 1451 [to be codified at 20 U.S.C. § 1094(c)(1)(B)], the Secretary is authorized to prescribe such regulations as may be necessary to provide, amongst other things, for the establishment of reasonable standards requiring an institution to demonstrate a capability to administer the Title IV, HEA Programs in order to participate in those programs. In order to demonstrate that capability, ED adopted regulations providing, amongst other things, for a satisfactory progress requirement.

We will analyze the satisfactory progress requirements from the standpoint of (1) the institutional responsibilities and (2) the student responsibilities.

1. Institutional requirements as to the measurement of satisfactory progress during the period in question, are set forth in 34 C.F.R. § 668.16(e).

A historical review of the evolution of the regulation is helpful.

45 C.F.R. § 168.16 (1979), an earlier version of 34 C.F.R. § 668.16(e), provided in relevant part:

The Commissioner considers an institution to have that capability [to adequately administer those programs} if it...

(e) Has established, and published..., 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;

This regulation was recodified without substantive change in 1980 as 34 C.F.R. § 668.16, when the Department of Education was formed, and, in relevant part, read as follows:

The Secretary considers an institution to have that capability if it...

(e) Establishes, publishes, 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;

As of July 1, 1983, the Department's regulations implementing this requirement were very broad, requiring only that an institution-

(e) Establishes, publishes, 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;

34 C.F.R. § 668.16(e) (1983).

In October 1983 the Department issued revised satisfactory progress regulations which set forth specific elements that an institution had to include in its satisfactory progress policy. The new regulations required that an institution-

(e) Establishes, publishes, and applies reasonable standards for measuring whether a student, who is otherwise eligible for aid under any title IV program, is maintaining satisfactory progress in his or her course of study. The Secretary considers an institution's standards to be reasonable if the standards-

(1) Conform with the standards of satisfactory progress of the nationally recognized accrediting agency that accredits the institution, if the institution is accredited by such an agency, and if the agency has such standards;

(2) For a student enrolled in an eligible program who is to receive assistance under a title IV program, are the same as or stricter than the institution's standards for a student enrolled in the same academic program who is not receiving assistance under a title IV program; and

(3) Include the following elements:

(i) Grades, work projects completed, or comparable factors which are measured against a norm;

(ii) A maximum time frame in which the student must complete his or her educational objective, degree, or certificate. The time frame shall be-

(A) Determined by the institution,

(B) Based on the student's enrollment status, and

(C) Divided into increments, not to exceed one academic year. At the end of each increment, the institution shall determine whether the student has successfully completed a minimum percentage of work toward his or her educational objective, degree, or certificate for all increments completed. The minimum percentage of work shall be the percentage represented by the number of increments completed by the student compared to the maximum time frame set by the institution;

(iii) Consistent application of standards to all students within categories of students, e.g., full-time, part-time, undergraduates, graduate students, and programs established by the institution;

(iv) Specific policies defining the effect of course incompletes, withdrawals, repetitions, and noncredit remedial courses on satisfactory progress; and

(v) Specific procedures for appeal of a determination that a student is not making satisfactory progress and for reinstatement of aid;

48 Fed. Reg. 45670 (1983) [codified at 34 C.F.R. § 668.16(e) (1984)].

The effective date of these new regulations was January 1, 1984, and the predecessor regulations remained in effect until that date. Thus, 34 C.F.R. § 668.16(e)(3)(i) and (ii) were specifically applicable to Sinclair for the entire 1984-85 academic year, and for half of the 1983-84 academic year, i.e. for all funds involving students after January 1, 1984. [See footnote 3](#)³ With the introduction of the grades and time frame measurement of § 668.16(e)(3)(i) and (ii) an institution's satisfactory progress policy had to include a measurement of grades or other qualitative measurement, as well as a maximum time frame in which a student must complete his or her degree. The maximum time frame was to be based upon the student's enrollment status, and further the institution was to divide the maximum time frame into increments of one academic year or less, and at the end of each increment determine whether the student has successfully completed a specified percentage of work toward the degree.

2. The responsibilities of students as to maintenance of satisfactory progress are set forth by statute as well as regulation.

During the audit period, the statutory requirement as to students stated as follows:

In order to receive any grant, loan, or work assistance under this subchapter and Part C of subchapter I of chapter 34 of Title 42, a student must-

....

(3) if the student is presently enrolled at an institution, be maintaining satisfactory progress in the course of study the student is pursuing according to the standards and practices of the institution at which the student is in attendance....20 U.S.C. § 1091(a)(3) (1983).

The predecessor of the 1983 version of Section 1091(a)(3) was enacted in 1976 by section 132 of the Education Amendments of 1976, Public Law 94-482, 90 Stat. 2150. This law was first implemented by ED in § 190.75(a)(2) of the Pell Grant Program regulations, 45 C.F.R. §190.75(a)(3) (1980).

The regulations embody responsibilities of the students as well as the institutions as to the disbursement of Title IV funds.

Pell Grant regulations in effect during the audit period are set forth in 34 C.F.R. § 690.75(a)(2), as follows:

- (a) An institution may pay a Pell Grant to a student only after it determines that the student-
- (2) Is maintaining satisfactory progress in his or her course of study;

Those regulations applicable to satisfactory progress standards under the National Direct Student Loan Program (NDSL), the College Work Study Loan Program (COOS) and the Supplemental Educational Opportunity Grant Program (SEOG) are similar to those applicable to Pell Grant recipients and, for the relevant audit period, are set forth below.

Student eligibility requirements for NDSL funds appear at 34 C.F.R. § 674.9(a)(5). They provide as follows:

(a) Eligibility. A student is eligible to receive an NDSL at an institution of higher education if the student-

(5) Is maintaining satisfactory progress in the course of study he or she is pursuing according to the standards and practices of that institution;

Student eligibility requirements for CWS funds appear at 34 C.F.R. § 675.9(a)(5). They provide as follows:

(a) Eligibility. A student at an institution of higher education is eligible for part-time employment under CWS if the student-

(5) Is maintaining satisfactory progress in the course of study he or she is pursuing according to the standards and practices of that institution;

Student eligibility requirements for SEOG funds appear at 34 C.F.R. § 676.9(a)(5). They provide as follows:

(a) Eligibility. A student is eligible to receive an [sic] SEOG at an institution of higher education if the student-

(5) Is maintaining satisfactory progress in the course of study he or she is pursuing according to standards and practices of that institution;

C. Eligibility requirements as a "regular student" in an "eligible program".

For a student to have been eligible to receive any Pell Grant or Campus-Based Program funds, the student had to have qualified as a "regular student," and to have been enrolled in an "eligible program." See 34 CFR §§ 674.9(a)(2), 675.9(a)(2), 676.9(a)(2), and 690.4(a)(3)(1984), for the Perkins Loan, COOS, SEOG, and Pell Grant Programs, respectively. For Pell Grant purposes an eligible student is defined at 34 C.F.R. § 690.4(a)(3) (1984), as follows:

(a) A student is eligible to receive a Pell Grant if the student--

(1) Is a regular student.

(2) Is enrolled as at least a half-time undergraduate student at an institution of higher education;

(3) Is enrolled in an eligible program as a regular student, as defined in § 690.3; and....

In general, the Title IV aid programs require, among other things, that a student be a "regular student" enrolled in an "eligible program" in order to receive Title IV aid. 34 C.F.R. §§ 674.9(a)(1)-(2) (NDSL); §§ 675.9(a)(1)-(2) (CWS); 676.9(a)(1)-(2) (SEOG); §§ 690.4(a)(1), (3) (Pell) (1983). A "regular student" is defined as a "person who is enrolled or accepted for enrollment, in an eligible program at an institution of higher education for the purpose of obtaining a degree or certificate." 34 C.F.R. § 674.2 (NDSL); § 675.2 (CWS); § 676.2 (SEOG); § 690.3 (Pell) (1983). An "eligible program" is a program that, among other things, leads to a degree, is at least a two-year program acceptable for full credit toward a bachelor's degree or is at least a one-year certificate program. During the 1983-84 and 1984-85 academic years a student had to satisfy the dual requirements here noted in order to be eligible to receive Pell Grant or Campus-Based funds.

D. Statute and Regulations as to Request for Review.

Sinclair's request for review of the Department's final determination was made under Section 487(b) of the HEA, 20 U.S.C. § 1094(b), and the regulations published to implement that section, Subpart H of the Student Assistance, General Provisions regulations, 34 C.F.R. Part 668, Subpart H.

III. ISSUES.

A. Satisfactory Progress.

1. What satisfactory progress policy embodied the standards and practices of Sinclair as to the requirement set forth in 34 C.F.R. § 668.16(e) for the academic years 1983-1984 and 1984-1985?
2. If the satisfactory progress policy was Sinclair's Probation and Dismissal Policy, did this comply with the requirements of 34 C.F.R. § 668.16(e) for the academic year 1983-1984?
3. If the satisfactory progress policy was Sinclair's Probation and Dismissal Policy, did this comply with the requirements of 34 C.F.R. § 668.16(e) for the academic year 1984-1985?
4. If Sinclair has failed in any respect to comply with the requirements of 34 C.F.R. § 668.16(e) or any other regulations relating to payments of Title IV funds to students not maintaining satisfactory progress during either of the academic years 1983-1984 or 1984-1985, what liability, if any, is owed to the Department of Education?

B. Eligible Program.

Were any Title IV, HEA Program Funds disbursed to Sinclair students who were ineligible to receive such funds on the basis that they were not regular students enrolled in a program eligible for such funding?

C. Burden of Proof.

1. Has OSFA, the proponent of the order in this case, presented a prima facie case to establish Sinclair's liability for the disallowed expenditures?
2. If OSFA did present a prima facie case establishing a Sinclair liability for disallowed expenditures did Sinclair bear the ultimate burden of persuasion to prove that the disallowed expenditures were otherwise proper?

IV. FINDINGS OF FACT.

A. Joint Stipulations of Fact.

The parties filed Joint Stipulations of Fact, numbering from 1-78. OSFA and Sinclair's Joint Stipulations are set forth as follows:

1. Sinclair is a public community college located in Dayton, Ohio.
2. For the 1983-84 and 1984-85 award years, three of Sinclair's nine-member Board of Trustees were selected by the Governor of the State of Ohio and six were selected by the Commissioners of Montgomery County.

3. For the 1983-84 and 1984-85 award years, Sinclair's revenues came from tax levies approved by the voters of Montgomery County, from funds appropriated by the State of Ohio, and from tuition paid by its students.

4. Sinclair is fully accredited by the North Central Association of Colleges and Schools.

5. With its programs approved by the Ohio Board of Regents, Sinclair is authorized to grant Associate Degrees in Arts, Science and Applied Science.

6. For the 1983-84 and 1984-85 award year, Sinclair awarded financial aid to its students including federal financial aid, such as Pell Grants, Supplemental Educational Opportunity Grants, College Work-Study, and National Direct Student Loans, as well as state, local and institutional grants and scholarships.

7. Sinclair's Probation and Dismissal (P&D) Policy provided a particular grade-point average (GPA) that Sinclair required each student to attain depending on the total number of credit hours the student had attempted as reflected in the following chart:

Credit Hours Attempted Cumulative GPA

Less than 12	No minimum
12 - 30	1.6 GPA
31 - 50	1.8 GPA
51 or more	2.0 GPA

8. GPA is the total number of quality points earned divided by the total number of credit hours attempted.

9. Under Sinclair's published P&D Policy, in order for Sinclair to determine a student's grade point average, it must know the courses in which the student enrolled, the number of credit hours in each of those courses, and the grade the student received in each of those courses.

10. Under Sinclair's published Probation and Dismissal Policy, when calculating a student's GPA, the Policy explicitly excluded as "credit hours attempted" the credit hours in a course in which a student registered if that student received a grade of "W" for "Withdrawal" for that course.

11. Under Sinclair's published P&D Policy, in order for Sinclair to determine the number of credit hours a student attempted, Sinclair must know, among other things, the number of courses for which the student received a grade of "W" for "withdrawal" and the number of credit hours in those courses.

12. Under Sinclair's published P&D Policy, in order for Sinclair to determine the number of credit hours a student attempted, Sinclair must subtract, among other things, the number of credit hours of the courses in which the student received a grade of "W" from the total number of credit hours of the courses in which the student was registered.

13. For all students, a student's GPA is computed after each quarter.
14. Under Sinclair's published P&D Policy regardless of his or her enrollment status, a student whose GPA fell below the levels specified in paragraph 7 above at the end of any term (or who was admitted as a transfer student on probation) was placed on academic probation.
15. Under the P&D Policy, if a full-time student on probation raised his or her cumulative GPA to the required level at the end of the next term, the student was returned to good standing; if a part-time student raised his or her cumulative GPA to the required level at the end of the next twelve credit hours, the student was returned to good standing.
16. Under the P&D Policy, if a full-time student on probation earned a GPA of at least 2.00 for the next term, but his or her cumulative GPA remained below the required level at the end of the term, the student would be continued on probation; if a part-time student on probation earned a GPA of 2.00 for the next twelve credit hours, but his or her cumulative GPA remained below the required level at that time, the student would be continued on probation.
17. Under the P&D Policy, if a full-time student on probation earned less than a 2.00 GPA for the next term and his cumulative GPA remained below the required level at the end of the term, the student would be dismissed; if a part-time student on probation earned less than a 2.00 GPA for the next twelve credit hours and his cumulative GPA remained below the required level at that time, the student would be dismissed.
18. Full-time enrollment is a minimum of 12 credit hours per quarter.
19. Under the P&D Policy, a student could be given a grade of "I" when he or she did not complete a course if the student's work was of a passing grade, but a specific course assignment was not completed.
20. When a student was given a grade of "I," he or she had to complete the course within 30 days after the beginning of the next term, at which time a final grade would then be awarded by the instructor.
21. If the course was not completed, the "I" grade automatically became a final grade of "F."
22. A student could repeat a course under the P&D policy.
23. When a student repeated a course one time, the grade made on the repeat effort replaced the first grade in the calculations made under the P&D Policy.
24. In such a case, the first grade was excluded from computation of the student's cumulative GPA, and the grade made on the repeat effort was the only grade shown on the student's record and was the grade included in the student's cumulative GPA.

25. If a student repeated a course more than once, the grade for the first repeat and all additional repeats of that course were included in the calculation of the student's cumulative GPA.

26. Under the P&D Policy, non-credit remedial courses were not included in any calculations.

27. For the 1983-84 and 1984-85 award years, the P&D Policy was applied uniformly to all students and not just those receiving Title IV federal student aid.

28. In August of 1982 Janice E. Bogan became Director of Financial Aid and Scholarships at Sinclair.

29. Ms. Bogan proposed the Standards of Satisfactory Progress (SSP) Policy which was to be implemented concurrently with and as an integral part of Sinclair's Student Information System (SIS) computer system, then under development.

30. In March of 1983 Sinclair's Board of Trustees accepted Ms. Bogan's proposal that Sinclair have a satisfactory academic progress policy specifically for Title IV students and adopted the SSP Policy to apply to students receiving Title IV financial aid.

31. Sinclair's published Standards of Satisfactory Progress Policy explicitly stated that "[s]tudents must successfully complete at least 50 percent of their registered hours each quarter for the first two quarters financial aid is received. Thereafter, students must successfully complete 75 percent of their registered hours each quarter." Sinclair's published Probation and Dismissal Policy did not explicitly include the language quoted.

32. "Registered hours" were expressed as "credit hours attempted" in a table in Sinclair's published SSP Policy.

33. The published SSP Policy did not specifically exclude the number of credit hours attempted in a course in which a student received the grade of "W" for "withdrawal" when calculating whether the student completed the requisite percentage of credit hours attempted.

34. In Sinclair's published SSP Policy, "registered hours" or "credit hours attempted" included the credit hours in a course in which a student received the grade of "W" for "withdrawal" when calculating whether the student completed the requisite percentage of credit hours attempted.

35. The published SSP Policy counted the credit hours in a course in which a student received the grade of "W" for "withdrawal" as zero credit hours completed.

36. The SSP Policy was adopted with the intent of being implemented beginning with the Summer 1983 term.

37. Both the SSP Policy and the P&D Policy were published in Sinclair's 1983-84 Sinclair Community College Bulletin which came out in August 1983.

38. The manpower necessary for the College to recover from the floods that took place in January of 1983 drained critical personnel away from the implementation of the SIS computer system.

39. Despite the problem with the implementation of the SIS computer system, Sinclair continued to have its extant (albeit less sophisticated) capability to make the calculations necessary for determinations under its long-standing P&D Policy.

40. In determining whether students were making satisfactory progress for the 1983-84 award year and thus were eligible to receive Title IV, HEA Program funds, Sinclair at first attempted to use its published SSP Policy but due to problems associated with implementation of the new SIS computer system ultimately used its published P&D Policy for measuring satisfactory progress.

41. The determination of each student's satisfactory progress for the Fall 1983 Term was made prior to the beginning of the Fall 1983 Term which was prior to January 1, 1984.

42. Both the SSP Policy and the P&D Policy were republished in Sinclair's 1984-85 Sinclair Community College Bulletin which came out in August 1984.

43. Even as attempts at implementation of the SIS computer system continued, correcting the elements of the SIS necessary to the effective utilization of the SSP Policy had a lower priority than correcting problems with what Sinclair considered to be other, more necessary computer functions, such as registration, enrollment and billing.

44. Sinclair continued to have problems with the SIS computer system through the 1984-85 award year.

45. In determining whether students were making satisfactory progress for the 1984-85 award year and thus were eligible to receive Title IV, HEA Program funds, Sinclair at first attempted to use its published SSP Policy but due to problems associated with implementation of the new SIS computer system ultimately used its published P&D Policy for measuring satisfactory progress.

46. Sinclair never actually applied the SSP Policy to any of its students.

47. On January 21-24, 1985, the Chicago Regional Office of ED (the Regional Office) undertook a program review of Sinclair to determine its compliance with federal student aid requirements.

48. The program review was in response to Ms. Bogan's request for such a review that she had made to the Regional Office when she first became Director of Financial Aid and Scholarships at Sinclair.

49. At the end of that review, representatives of the Regional Office indicated by oral report to Sinclair that because the College had not implemented the SSP Policy, Sinclair could be at risk for awards to students not making satisfactory academic progress.

50. The Regional Office required that Sinclair retroactively apply the SSP Policy to its students enrolled during the 1983-84 and 1984-85 award years for purposes of quantifying noncompliance with the Department's satisfactory progress requirements.

51. Thus, in 1985, Sinclair reviewed the files of approximately 4,000 students who received Pell Grant and Campus-Based Program funds for the 1983-84 and 1984-85 award years to determine whether those students were making satisfactory progress under the published SSP Policy.

52. Following this retroactive review utilizing the SSP Policy and in consideration of other factors, Sinclair informed the Regional Office by letter dated September 6, 1985, that Sinclair believe that it had no financial liability at that time.

53. The Regional Office accepted this conclusion, subject to verification at a later date.

54. In January 1987 an ED auditor arrived at Sinclair to undertake a follow-up compliance review of the records prepared in connection with the retroactive analysis of Sinclair's compliance with the SSP Policy.

55. After auditing a sample of 1,002 students who had been awarded federal student financial aid funds, the auditor concluded that those students received \$497,721 of such funds for terms following the period at which they were determined not to be making satisfactory progress and orally advised Sinclair of this conclusion.

56. Sinclair's Director of Financial Aid and Scholarships, Janice E. Bogan, and its Director of Accounting Services, Michael W. Plourde, performed Sinclair's own analysis of the two award years in question based on the Probation and Dismissal Policy.

57. It was determined from a review of the financial aid master roster that 7,041 students were awarded financial aid from all sources, federal and non-federal, during the audit years.

58. The College took a 5% sample of students from that roster.

59. That sample was chosen as follows: (1) a portion of the sample, totalling 139 students, was randomly selected by pulling a block of cards directly from the keypunch cards used to produce the master roster; and (2) the remainder of the sample was arrived at by selecting every 30th name from the master roster.

60. This resulted in a sample size of 368 students, slightly more than 5% of the total financial aid population.

61. Once the sample population was isolated, Ms. Bogan personally reviewed each of the transcripts for those students to determine whether all the elements of the P&D Policy had been properly applied.

62. Ms. Bogan identified a total of 14 students out of the sample who were dismissed for failure to comply with the P&D Policy but who enrolled for a subsequent quarter and also received Title IV financial aid.

63. Sinclair determined that its maximum liability for payments made to students not making satisfactory academic progress under its P&D Policy during the two years in question was \$34,095.

64. On January 21, 1988, and September 15, 1988, ED issued a Draft Audit Report and a Final Audit Report, respectively, concerning its "Review of Selected Student Financial Aid Administrative and Financial Issues at Sinclair Community College, Dayton, Ohio for Awards Covering the Period July 1, 1983, through June 30, 1985."

65. The Draft and Final Audit reports rejected Sinclair's contention that its P&D Policy qualified as an acceptable satisfactory progress policy for federal student financial assistance purposes on the ground that it did not contain a maximum time frame element as required by the Department's satisfactory progress regulation.

66. The effective date of 34 C.F.R. § 668.16(e) (3) (i) & (ii) (1984), which was published at 48 Fed. Reg. 45670 (Oct. 6, 1983), was January 1, 1984.

67. The Draft and Final Audit reports concluded that the policy to apply to determine Sinclair's liability for awards to students not maintaining satisfactory progress during the audit period was the SSP Policy.

68. The Final Audit Report concluded that \$497,721 in financial aid was paid to students not maintaining satisfactory academic progress.

69. This \$497,721 included \$264,936 from the 1983-84 award year and \$232,785 from the 1984-85 award year.

70. The Draft and Final Audit reports also concluded that Sinclair awarded aid to 51 students "whose records did not indicate enrollment in a program of study eligible for SFA funding" and, therefore, that \$24,561 in Title IV funds were wrongfully disbursed and should be refunded to ED.

71. With the exception of certain programs that, due to their short length, were "ineligible programs," every other program offered by Sinclair qualified as an "eligible program" under the federal regulations.

72. During the 1983-84 academic year, Sinclair offered only five "ineligible programs": Dietetic Assisting Certificate (18 credit hours); Gerontology Certificate (10 credit

hours); Human Services Certificate (33 credit hours); Infant/Toddler Care Certificate (28 credit hours); and Urban Administration Certificate (31 credit hours).

73. During the 1984-85 academic year, Sinclair offered just three "ineligible programs": Dietetic Assisting Certificate (18 credit hours); Gerontology Certificate (10 credit hours); and Infant/Toddler Care Certificate (30 credit hours).

74. Sinclair undertook a review of the transcripts of each of the 51 students referred to in paragraph 70 and Sinclair determined that each student was enrolled in an eligible program at the time he or she received financial aid and that in none of the 51 cases cited by ED was the student taking a course sequence applicable to any of the ineligible programs.

75. Sinclair filed extensive responses to both the Draft and Final Audit reports on April 18, 1988, and November 21, 1988, respectively.

76. Sinclair also provided additional information, at ED's request, by letter dated February 17, 1989.

77. On March 22, 1989, ED issued its final Program Determination Letter demanding reimbursement of the \$497,721 attributable to the "Satisfactory Academic Progress" issue, and \$24,561 attributable to the "Eligible Program Enrollment" issue.

78. On May 15, 1989, Sinclair timely filed its Request for Review of the Program Determination Letter in accordance with 20 U.S.C. § 1094(b) and 34 C.F.R. § 668.111, et seq., and requested a hearing on the record before an Administrative Law Judge.

B. Continuation of Findings of Fact.

1. General.

Sinclair offers one-year certificates, two-year associate degrees and university parallel programs transferable to all area universities. Sinclair is divided into six academic divisions: Allied Health, Business Technologies, Engineering and Industrial Technologies, Extended Learning and Human Services, Fine and Performing Arts, and Liberal Arts and Sciences.

In 1989 the enrollment was approximately 23,000 students, served by a staff of nearly 1200, which included 275 full-time faculty, 600 part-time faculty and 270 full-time staff members. Sin. Ex. 23, at 11.

Sinclair has been the recent recipient of several program excellence awards by the State of Ohio. It has received more awards than any other two-year or four-year institution in Ohio. Sinclair is involved in several economic development projects with local businesses which form partnerships between it and the community.

Sinclair has a consistently high employment placement record for its graduates. The overall employment placement rate for 1987 Sinclair graduates was 96.2%. The corresponding figure for 1988 graduates was 95.8%.

2. Sinclair's Financial Aid Office.

Sinclair's Office of Financial Aid and Scholarships (OFAS) uses strict quality control measures to ensure adherence to federal student aid requirements and the management of financial aid funds. Sinclair has for many years conducted annual audits of its Title IV programs instead of meeting only the biennial requirement. For the two most recent audits that have been reviewed and closed by the Department of Education, the Department has closed its reviews imposing no repayment liability on the School. Sinclair has undertaken several initiatives to decrease its student loan default rate, including improved due diligence practices, more efficient management of its billing agency, and increased assignment of loans. Sinclair has instituted improved procedures with its increased use of computer services in OSFA operations. As of March 31, 1989, the cumulative default rate at Sinclair for Perkins Loans (formerly NDSL) was less than 3.5%, and the cumulative default rate for Stafford Guaranteed Student Loans was 4.73%.

3. Sinclair Officers and Employees.

David H. Ponitz is the President of Sinclair and has held that position since 1975. In addition to a B.A. degree he has an M.A. degree from the University of Michigan with a major in School Administration and Business Administration, and an Ed.D. degree from Harvard University. Dr. Ponitz coordinated top personnel duties in the aftermath of two floods which struck Sinclair in January 1983.

On January 9, 1983, the Sinclair campus was devastated by the flooding caused by the rupture of a city water main, which dumped over 8,000,000 gallons of water into Sinclair's campus. The deluge so severely damaged campus facilities that it was necessary to postpone the start of the 1983-84 Winter term, which had been scheduled to begin the next day, January 10, 1983.

On January 14, 1983, the effects of the January 9, 1983, water main break became more severe when a second city water main rupture poured an additional 1,000,000 gallons of water onto the Sinclair campus, causing an additional postponement of the start of the Winter term until January 17. These two water main breaks resulted in the flooding of 9 of Sinclair's 11 campus buildings and damage to all 11 buildings. Twenty percent of the total space of the College was under water, including the entire Library, which is located two stories below ground. While Sinclair did manage to continue to operate, it did so only on an emergency basis, with each crisis being dealt with as it arose.

Dr. Ponitz made critical decisions and diverted top personnel from regular duties to deal with the flood consequences. Under Dr. Ponitz's direction, Sinclair returned to normal operations over a 7-month period. However Dr. Ponitz identified setbacks with the new computer system and the implementation of the SSP policy which prevented the start of the policy as intended. Hence, the SSP policy could not be put into effect for the 1983-84 and 1984-85 academic years as intended. Sin. Ex.1, Ponitz Affidavit.

Barry R. Blacklidge was the Vice President for Business Operations from 1975 until his retirement in June 1988. Mr. Blacklidge had responsibility for all of Sinclair's financial operations, including accounting, budget, business services, construction, plant operations and maintenance, payroll and auxiliary services. Mr. Blackridge was also the vice president responsible for computer operations during the development and early stages of the Student Information System (SIS) computer project which was to be used in processing the data to make calculations of students' satisfactory academic progress.

Mr. Blacklidge confirmed Sinclair's inability to implement the SSP Policy because of problems with implementation of the SIS computer system. He describes OSFA's view of the SSP Policy as Sinclair's official policy since it was published in Sinclair's College Bulletin. He notes Sinclair officials' strong objections to that view, and to any requirement by ED's Regional Office to retroactively apply the SSP Policy to determine whether students were in compliance since the policy had never been implemented. He stated that since they were presented "with the possible cut off of our federal funds if we did not comply, we reluctantly returned to the College to conduct this review." Sin. Ex. 2, Blacklidge Affidavit.

Janice E. Bogan has been the Director of Financial Aid and Scholarships since 1982. Her responsibilities include making sure the guidelines for awarding and disbursing student financial aid funds are met and interpreting and implementing policies and procedures in a consistent manner with determinations made by Sinclair and with federal, state and local requirements. Ms. Bogan was the drafter of the SSP Policy and stated it was to be implemented in conjunction with the new computerized student data system known as SIS. Ms. Bogan states that the SSP Policy was predicated on the proper operation of the SIS system and never predicated upon implementation on a manual basis. Ms. Bogan reiterated the same problem described by Mr. Blacklidge as to the requirement in March of 1985 by ED's Regional Office that Sinclair retroactively apply the SSP Policy to students enrolled during the subject years. She stated, "We were concerned that if we did not perform this review, we could be subject to severe penalties, such as cutting off all of our Title IV funds." Sin. Ex. 3, Bogan Affidavit, para. 15. She and her staff devoted the next six months to manually reviewing thousands of student records, causing quite a disruption from normal performance of duties.

Ms. Bogan conducted a review of Sinclair's compliance with its P&D Policy for 1983-84 and 1984-85 with Sinclair's Director of Accounting Services (Mr. Plourdes) and by means of a sample of all student aid recipients they sought to determine what, if any, overawards of funds occurred which Sinclair could be liable for. On the question of student enrollment in an "eligible program" as a Title IV requirement, Ms. Bogan verified that as a part of her office's normal review process for every Title IV applicant, they review whether there is proper student enrollment in advance of disbursing any Title IV aid., para. 34. Ms. Bogan specified there were five certificate programs at Sinclair which were ineligible for Title IV aid due to their short length. para. 35. She stated further that all other programs offered by Sinclair qualify as "eligible programs" under the federal regulations. para. 36. Of the 51 students challenged by the Department of Education as not enrolled in an eligible program, Ms. Bogan personally reviewed the records of those students and found that none were taking course sequences applicable to any of the five ineligible programs. para. 40. Her personal review of the transcripts and records of the 51 students showed that, for each of them, the classes taken by the student were creditable

toward an eligible program goal, as the term "eligible program" is defined in the Title IV rules and regulations. Sin. Ex. 3, Bogan Affidavit.

Michael W. Plourde is the Director of Accounting Services for Sinclair. He is responsible for administering the operations of the General Accounting, Payroll, and Bursar offices. In his prior position with the accounting firm of Touche Ross & Co., he received training and experience in statistical sampling techniques. Mr. Plourde used this knowledge and experience in conducting the review with Ms. Bogan as to how Sinclair's P&D Policy was applied during 1983-84 and 1984-85. Mr. Plourde details the sampling technique and methodology employed and how he arrived at a representative sample of Sinclair's student financial aid population. Sin. Ex. 5, Plourde Affidavit; Sin. Ex.3, Bogan Affidavit para. 20, 22.

Raymond G. Elash is the Assistant Director of Registration and Student Records at Sinclair. He has held that position from September 1986 until the present and prior to 1986, from 1979 to June 1984. Mr. Elash's office produced computerized grade report cards for each student and, if applicable, noted dismissal or probation status on student report cards. He is familiar with Sinclair's P&D Policy and how appeals for readmission are handled. Mr. Elash described most remedial courses at Sinclair as credit courses with the exception of two non-credit, GED-review type ones, and those were not counted as hours attempted or included in calculations under the Probation and Dismissal Policy. Mr. Elash filled the request for copies of 368 student transcripts made by Ms. Bogan in August 1987 and reviewed all of them to verify that Sinclair's Probation and Dismissal policy had been accurately applied. Mr. Elash also filled Ms. Bogan's later request for copies of 14 appeal petitions for re-enrollment, although approved petitions were located for only 10 of those. Sin. Ex.4, Elash Affidavit; Sin. Ex.3, Bogan Affidavit para. 24.

4. Publication of the SSP Policy in the Sinclair College Bulletin.

Dr. Ponitz has verified that in order to meet the publication deadline established by the printer for materials to be included in the 1983-1984 Sinclair Community College Bulletin, the SSP Policy had to be provided to the printer just about the time it was adopted by the Board of Trustees in March 1983. Yet, while the SSP policy was published in the Bulletin., it was at no time ever actually applied by Sinclair. The only policy on satisfactory progress that was ever established, published and applied during the 1983-84 and 1984-85 award years was Sinclair's long-standing P&D Policy. Sin. Ex. 1, Ponitz Affidavit para. 30. He stated that no effort was undertaken to notify students that the SSP Policy would not in fact be applied in 1983-1984, in view of the fact that no student would be adversely affected by having only the P&D Policy applied and in light of the enormous difficulties facing Sinclair as a result of the floods. Since Sinclair expected the SSP Policy would be implemented for the 1984-1985 period, the SSP Policy was again published in the 1984-85 Bulletin. Despite the second publication, Sinclair again found it could not implement the SSP Policy since the new SIS system was not generating needed data to use the policy. Despite non-use of the SSP Policy for both award years, Sinclair's Board of Trustees never officially revoked the SSP Policy. Sin. Ex.3, Bogan Affidavit. Nevertheless, it was in fact administratively revoked and never implemented. A new policy for measuring satisfactory progress was implemented in July 1985. Sin. Ex. 1, para. 34.

5. The Program Review Process.

In late 1982, Ms. Bogan as Sinclair's new Director of Financial Aid asked the U.S. Department of Education to conduct a program compliance review of the operations of her office. No follow-up took place until January 1985 when Sinclair's President was contacted by the Department's Chicago Regional Office stating it would be conducting a program review of Sinclair's compliance. Ms. Bogan was the primary contact person with the program reviewer during the on-site review on January 21-24, 1985.

In February 1985 Sinclair received oral word that it might be at risk for having awarded Title IV funds to ineligible students because of Sinclair's failure to implement the March 1983 SSP Policy. The Chicago Regional personnel indicated that Sinclair personnel must now undertake a retroactive review of all students during the two award years, applying the March 1983 SSP Policy to them. Based on Sinclair's retroactive review of thousands of student records, Sinclair's President advised the Department that no repayment liability should be assessed. The Department stated at the time it accepted Sinclair's position, but further stated the review materials could be subject to later verification. In late October 1986 Sinclair was notified the Department intended to conduct a follow-up compliance review. Sin. Ex.3, Bogan Affidavit.

6. Adverse Audit Review by the Department's Inspector General.

The subsequent review in 1987 by Mr. Dan Thaens of the Office of Inspector General concluded that Sinclair had erroneously awarded almost \$500,000 to students not making satisfactory progress in the 1983-84 and 1984-85 award years. The IG was to issue a written report on this finding. Sinclair, in a defensive posture, decided to analyze its student records for the two years under its P&D Policy to determine if there had actually been any overawards of funds. Based on its review and use of sampling methodology and extrapolation over the total financial aid population, Sinclair calculated a total overaward during the two years as \$34,095.28. The Department has not accepted Sinclair's conclusion and sought by its final program determination of March 1989 to recover liabilities in the amount of \$497,791 as to this satisfactory progress issue.

Sin. Ex.3, Bogan Affidavit.

V. OPINION and ADDITIONAL FINDINGS OF FACT.

A. Satisfactory Progress.

1. The standards for measurement of student's progress applied by Sinclair under the provision of 20 U.S.C. § 1091(a)(3) (1983) and 34 C.F.R § 668.16(e) for the academic years 1983-84 and 1984-85 were contained in its P&D Policy.

The findings of fact contain a discussion of Sinclair's P&D Policy as well as the published SSP Policy. OSFA has taken the position that Sinclair's P&D Policy did not comply with the requirements of 34 C.F.R § 668.16(e). Before we consider that issue we must answer a preliminary question. The subject regulation refers to an institution which "[e]stablishes,

publishes, and applies reasonable standards...." 34 C.F.R. § 668.16(e) (1980) (emphasis added). We are therefore initially concerned with the question as to what established and published standards were actually applied by the subject institution before we inquire into the question as to whether those standards complied with the law.

The SSP Policy was never applied. The parties have jointly stipulated to this fact as set forth in paragraph 46 of the Joint Stipulations. Sinclair's attempted use of the SSP Policy and abandonment of it for measuring student satisfactory progress happened not once, but twice. Paragraph 40 reflects this for the 1983-84 award year; while paragraph 45 reflects this for the 1984-85 award year.

The affidavits of three of Sinclair's officers contain explicit references as to why the SSP Policy was never applied during the relevant time periods, (Ponitz, Bogan and Blacklidge). Barry Blacklidge stated, "[W]e made several attempts during several terms to implement the satisfactory academic progress component as described in the March 1983 Standards of Satisfactory Progress policy, but we were never able to do so, as such implementation was entirely dependent upon the proper operation of that aspect of the SIS system." Sin. Ex.2. [See footnote 4](#)⁴

Dr. Ponitz stated that the only policy on satisfactory progress that was ever established, published and applied during the two year period in question was the P&D Policy. Sin. Ex. 1, . 30.

2. Sinclair's P&D Policy did comply with the requirements of 34 C.F.R. § 668.16(e) for the academic year 1983-84 until January 1, 1984.

Because of an amendment to the subject regulation in October 1983, the 1983-84 academic year must be separated into two parts in assessing the requirements of the regulation.

(a) The first period to consider is that from the beginning of the academic year 1983-84 up to January 1, 1984.

As a starting point here it must be recognized that two separate satisfactory progress regulations applied during the two-year audit period. After January 1984 a change in the language of the regulation is evident since it imposed a strict time computation requirement to be applied in determining whether satisfactory progress standards were met. The parties have stipulated that the effective date of 34 C.F.R. § 668.16(e)(3)(i) and (ii)(1984) published at 48 Fed. Reg. 45670 (1983) was January 1, 1984. Stip. . 66.

On and after January 1, 1984, the regulations required institutions to use satisfactory progress standards that included all the elements described in 34 C.F.R. § 668.16(e) (1984). In this case the most significant part is contained in 34 C.F.R. § 668.16(e)(3). Amongst the elements listed in that paragraph were the following:

(i) Grades, work projects completed, or comparable factors which are measurable against a norm; [and] (ii) A maximum time frame in which the student must complete his or her

educational objective, degree, or certificate. The time frame shall be-(A) Determined by the institution, (B) Based upon the student enrollment status, and (C) Divided into increments not to exceed one academic year. At the end of each increment, the institution shall determine whether the student has successfully completed a minimum percentage of the work toward his or her objective, degree, or certificate for all increments completed. The minimum percentage of work shall be the percentage represented by the number of increments completed by the student compared to the maximum time frame set by the institution;

However, prior to January 1, 1984, the relevant regulation provided, in part:

The Secretary considers an institution to have that capability if it...

(e) Establishes, publishes, 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;

34 C.F.R. § 668.16 (1980) (hereinafter cited as the "1980 Regulation").

It can be seen that during the pre-January 1984 period, the language of the regulation was very general in nature. Because of this Sinclair's P&D Policy did qualify under the 1980 Regulation. Furthermore, the IG's office is in error when it claims, as it did in its Final Audit Report, that during the entire 2-year audit period, Sinclair's P&D Policy "did not contain all of the elements required by the regulations." Sin. Ex. 22, at 9. This is apparent because the regulations the IG is relying on for its conclusion regarding the P&D Policy were not applicable before January 1, 1984. At page 4 of the Final Audit Report, the IG erroneously refers only to the new requirements of 34 C.F.R. § 668.16(e), as amended, effective January 1, 1984. Sin. Ex. 22, at 4.

Sinclair argues convincingly that the P&D Policy complied with the Federal Satisfactory Progress Standards for the period up to January 1, 1984. In fact, Sinclair's general policy for determining the maximum time frame for program completion is supported by Federal Register comments and explanatory references. These comments were made as to a prior version of the existing regulation which appeared in 45 C.F.R. § 168.16(e), published at 44 Fed. Reg. 56283 (1979). Comments there reflected the premise that it was up to the institution to develop and implement its own standards of satisfactory progress. Emphasis there was clearly on the institution's control over the content of satisfactory progress criteria.

Those comments were 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 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 (1979).

Prior to the comments of September 28, 1979, other comments of a similar nature made by the Commissioner of Education [See footnote 5](#)⁵ are found in 44 Fed. Reg. 5271. These were made in conjunction with the publication of regulations which included 45 C.F.R. § 190.75 (now codified at 34 C.F.R. § 690.75). There the Commissioner also stated that institutions should develop their own standards of satisfactory progress and went on to state:

An institution must have a written standard of satisfactory progress which is applicable for all student recipients of Title IV funds in order for its students to receive those funds. The content is strictly an institutional concern. 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 standard, 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.

44 Fed. Reg. 5271 (1979) (emphasis added).

The Commissioner of Education specifically declined to include in the final regulation a definition of the term "satisfactory progress."

The subsequent recodification of 34 C.F.R. § 668.16(e) at 45 Fed. Reg. 86860 (1980) contained no discussion or information as to how satisfactory progress was to be measured. It merely restated the terms as set forth in the September 1979 publication.

However, the publication and comment procedure in behalf of the revised 1984 Regulation at 34 C.F.R. § 668.16(e) shows a clear break from the past practice. The final regulations were published at 48 Fed. Reg. 45670 (1983). The explanatory comments included the following:

[T]he Secretary proposed revising § 668.16(e) to help ensure program integrity by providing parameters for institutions to use in establishing standards of satisfactory progress while preserving essential institutional discretion in setting their own specific standards....such parameters are necessary since the establishment and enforcement of reasonable standards are playing an increasingly critical role in the equitable distribution of limited program funds.
48 Fed. Reg. 45670 (1983) (emphasis added).

The preceding explanatory comments reflected a clear change from past practice which had given great deference to institutional control and discretion. The 1984 Regulation represented a new approach and greater oversight as to how institutions would establish and apply satisfactory progress standards. Prior to that if an institution wished to establish a definition of satisfactory progress that reflected its immediate and unique characteristics and concerns, but which involved certain implicit requirements as to the quantitative aspects of satisfactory progress, such was acceptable up until January 1, 1984. After that date, however, the Department set definite parameters and institutions had to set forth explicit time measurement requirements in their publication of the standards.

In considering the period during which the 1980 regulation was effective, we must examine the basis for OSFA's rejection of Sinclair's P&D Policy as an acceptable satisfactory progress policy.

Significantly, the parties' Joint Stipulations base OSFA's rejection on the ground that the P&D Policy did not contain a maximum time frame element as required.[See footnote 6](#)⁶ Stip. para. 65.

The Department had earlier discussed this alleged defect in the IG Audit Report of September 15, 1988. In that report the IG's office stated that in:

its response, the College has supplemented its stated policy with a description and an explanation of how the cumulative minimum GPA requirements coupled with the minimum percentage of credit hours earned to credit hours attempted is used to arrive at the maximum time frame for program completion. The College acknowledged that the minimum work required to be completed at each increment was not separately stated in the College's Bulletin.

Sin. Ex. 22, at 11.

The IG took the position that a non-explicit maximum time frame was of questionable value in actual monitoring of students' satisfactory academic progress during the audit period. Sin. Ex.22, at 11.

However, Sinclair responds that the time frame element (quantitative element) was definitely part of its published P&D Policy. It explains how the cumulative minimum Grade Point Average (GPA) requirements coupled with the minimum percentage of credit hours earned to credit hours attempted is used to arrive at the maximum time frame for program completion.

For a student enrolled on a full-time basis, the maximum time frame for completing any of the College's two-year associate's degree programs is five years. Since a student must earn 90 credit hours to earn a degree[See footnote 7](#)⁷ and have at least a 2.00 GPA at the completion of the program, he must have attempted a maximum of 180 credit hours (if he failed 90 credit hours and received a 4.00 GPA in 90 credit hours, he would have a 2.0 cumulative GPA upon completion of the 90 credits). Since full-time enrollment is a minimum of 12 credit hours per term for 3 terms in a year, the maximum number of terms allowed for a full-time student to complete the program is five years, or 15 terms (180 credit hours divided by 12 credit hours/term = 15 terms). This maximum timeframe is then divided into one-year increments (3 academic terms plus a summer term) to determine the minimum percentage of work required to be completed at the end of each increment.

The number of credit hours that a student must complete by the end of each year is determined from the grade-point standards, and is defined to be the highest number of credit hours that a student can complete and still be below the grade-point threshold. This is then the minimum number of credit hours the student must complete by the end of the year. By definition, if a student fails to complete the minimum number of credit hours at the end of any year, he will also have failed to achieve the minimum GPA requirement, and will be placed on probation. On the other hand, if a student satisfies the cumulative GPA requirement at the end of an academic year, he will, by design, have completed the minimum cumulative number of hours for that increment, and will remain in good standing and be eligible to receive Title IV assistance the following term.

Sinclair outlined the pertinent time-frame minimums as follows: At the end of the first year, a full-time student must have attempted at least 36 credit hours (3 terms x 12 credit hours/term) and, according to the P&D Policy, must have attained a cumulative GPA of at least 1.80. The minimum number of credit hours a student would have to pass in order to have the highest possible GPA not exceeding 1.80 is 16 credit hours (i.e., if a student earned a 4.00 GPA for 16 credit hours and failed 20 credit hours, his cumulative GPA would be 1.78). At the end of the second year, a full-time student will have attempted at least 72 credit hours and, according to the P&D Policy, must have attained a cumulative GPA of at least 2.00. The minimum number of credit hours a student would have to pass in order to have the highest possible GPA not exceeding 2.00 is 36 credit hours.

Similarly, at the end of the third year, a full-time student will have attempted at least 108 credit hours and must have a cumulative GPA of at least 2.00. Therefore the student must have passed at least 54 credit hours by the end of the third year. At the end of the fourth year, a full-time student will have attempted at least 144 credit hours and must have a cumulative GPA of at least 2.00, and must therefore have passed at least 72 credit hours. In summary form, the minimum work completion, by increment, for a full-time student is as follows:

Increment	Minimum Cumulative # Credit Hours
End of 1st year	16
End of 2nd year	36
End of 3rd year	54
End of 4th year	72
End of 5th year	90

For part-time students, there are separate time-frame minimums. Under these maximum time-frames and increments for full-time and part-time students, Sinclair makes a combined determination for each student whether the student is satisfying the qualitative (GPA) and the quantitative (incremental completion) elements of its satisfactory progress policy. For example, a student who has completed one year as a full-time student will have attempted at least 36 credit hours. If the student has achieved the requisite GPA (1.80), he must, by definition, have completed at least 16 credit hours, and therefore also satisfies the cumulative credit hour requirement. Similarly, a part-time student who has completed three years will have attempted at least 54 credit hours. If the student has achieved the requisite GPA (2.00), he must have completed at least 27 credit hours, and will satisfy the cumulative credit hour requirement. Thus, the quantitative, incremental minimums are combined with the qualitative GPA requirements for all students. If the student satisfies the qualitative GPA requirement at the end of an academic year, he will by design have completed the minimum cumulative number of credit hours for that increment, and will remain in good standing and be eligible to receive Title IV assistance.

While the OSFA has objected to the fact the minimum quantity of credits required to be completed at the end of each increment was not separately stated in Sinclair's publication, the Sinclair Community College Bulletin, the fact is that this requirement is an integral element of the cumulative GPA requirement, and the GPA requirement is clearly publicized to all students in the Bulletin for the 1983-84 and the 1984-85 academic years. Therefore, Sinclair, in

applying its P&D Policy, has taken into consideration the normal time frame for completing a course of study.

Moreover, as Sinclair points out the implicit nature of this quantitative element is consistent with the broad discretion the College has to design its satisfactory progress policies. The applicable regulations do not specify any particular number of credits that must be completed by the end of each year, but, instead leave this determination to the individual institution's discretion. Sinclair contends that OSFA's only specific objection to the P&D Policy is that the maximum time frame or incremental completion standards were not separately stated and that is an insufficient basis on which to reject the policy.

For all of the above reasons, Sinclair has satisfactorily established that it was in compliance with federal satisfactory progress standards for the period up to January 1, 1984, and OFSA's objections to the same are not persuasive. [See footnote 8](#)⁸

(b) The second period to consider is that from January 1, 1984-June 30, 1984.

For the period before January 1, 1984, Sinclair's implicit statement of time computation and incremental measurement was sufficient given the generalized nature of the regulation concerning satisfactory progress policies. However, the same is not true for the post-January 1984 period. If this were the only consideration, it is clear Sinclair's measurement based on an implicit maximum time frame system would fall short of the 1984 regulation requirement. Yet, certain other instructions were given to Sinclair by the OSFA which cause a different interpretation for the period up to July 1, 1984. OSFA by means of guidance in its "Dear Colleague" letter, issued in December 1983, provides a way to interpret the 1984 Regulation as not immediately enforcing the strict time increment measurement but as allowing for a one time measurement at the end of the academic year, i.e. the end of the 1983-84 year.

The "Dear Colleague" letter can be read to delay implementation of the strict incremental time computation requirement of the new 1984 Regulation. The import of the letter is to sanction the existing method which Sinclair was using until the end of the 1983-84 year. As stated in the December 1983 "Dear Colleague" letter at page 2, the incremental measurement need not be applied until the end of the academic year. Sin. Ex. 27, at 2. The letter instructed institutions, as follows:

The concept of incremental measurement simply requires that along the continuum of student attendance, from the beginning of the student's activities at the institution until the completion of the maximum time period allowed, the institution make a determination at least once an academic year of the student's progress. Since an institution must determine that a student has made a certain amount of progress at the end of each academic year (if the institution chooses an academic year as its increment), this particular aspect of the institution's standard would not require a check immediately on January 1, 1984. Rather, such a check would not be made until the end of the academic year that the student began during the 1983-84 award year.

Sinclair's ability to wait until the end of the 1983-84 academic year as the length of its time increment, is set forth in the following excerpts from the Question and Answer portion of the Department's "Dear Colleague" Letter:

Q: According to individual program regulations, an institution is required to determine that a student is maintaining satisfactory progress for each payment period and for institutional certification of each GSL or PLUS Loan application or Pell Grant ADS Request for Payment form. If an institution chooses an academic year as the length of its increment for determining work completion, what elements of its progress standards does it check each payment period?

A: An institution must check whatever elements of its satisfactory progress standards are applicable for that payment period. For example, an institution that requires a 2.0 GPA and completion of one-sixth of the work required for a degree each academic year, would only have to check that a student had a 2.0 GPA for each payment period throughout the academic year. At the end of the academic year increment, the institution would then have to determine if the student still had a 2.0 GPA and had completed the required percentage of work.

Applying this methodology in Sinclair's case, the 1984 Regulation would not have had any actual effect as to the content of the institution's standards and their effect on a student's Title IV aid eligibility until the beginning of the 1984-1985 academic year.

3. Sinclair's P&D Policy did not comply with the requirements of 34 C.F.R. § 668.16(e) for the academic year 1984-85.

As stated at paragraph 2 above, the amendment to 34 C.F.R. § 668.16 (e), effective January 1, 1984, was a substantial departure from the 1980 regulation and imposed strict time requirements for determining whether satisfactory progress standards were met. For the purposes of this proceeding the most significant elements which were to be included in the institution's standards are as follows:

(i) Grades, work projects completed, or comparable factors which are measurable against a norm;

(ii) A maximum time frame in which the student must complete his or her education objective, degree, or certificate. The time frame shall be-

(A) Determined by the institution,

(B) Based on the student's enrollment status and

(C) Divided into increments, not to exceed one academic year. At the end of each increment, the institution shall determine whether the student has successfully completed a minimum percentage of work toward his or her educational objective, degree, or certificate for all increments completed. The minimum percentage of work shall be the percentage represented by the number of increments completed by the student compared to the maximum time frame set by the institution;

34 C.F.R. § 668.16(e)(3)(1984).

The recognition of the need for parameters reflected in the publication of the 1984 Regulation demonstrates that a more exacting way of measuring satisfactory academic progress was to be the guiding rule.

Sinclair's P&D Policy explicitly set for a minimum grade point average requirement, and thereby satisfied § 668.16(e)(3)(i). However, as to the specific terms of § 668.16(e)(3)(ii), the P&D Policy was incomplete. The terminology in the regulation as well as the comments in the Federal Register which accompanied its publication [See footnote 9](#)⁹ made it clear that the time requirements for an institution's standards of satisfactory progress must be explicitly set forth in the published standards. This is now true of the maximum time frame within which a student must complete his educational objective. This is also true of the requirement that the time frame be divided into increments not to exceed one academic year and that at the end of each increment a determination be made as to whether a student has successfully completed a minimum percentage of work toward his or her educational objective. [See footnote 10](#)¹⁰

4. The liability of Sinclair for any failure to comply with the satisfactory progress regulations is limited to the amount of money which Sinclair has admitted to owing (\$34,095.00). [See footnote 11](#)¹¹

Even though Sinclair's P&D Policy did not comply with the regulation [668.16(e)], for the 1984-85 academic year, OSFA has not submitted adequate evidence to prove any amount of liability for violation of any satisfactory progress regulations.

OSFA must present a prima facie case as to any alleged liability.

While Sinclair bears the ultimate burden of persuasion under 34 C.F.R. § 668.116(d), OSFA, as the proponent of the determination and order, bears the burden of production (of going forward) to present a prima facie case, that is, it must first present evidence sufficient to establish to a reasonable person what, if any, liability Sinclair owes for its failure to comply with any satisfactory progress regulations. *State of Maine v. United States Dep't of Labor*, 669 F.2d 827, 829-830 (1st Cir. 1982); *Environmental Defense Fund. Inc. v. E.P.A.*, 548 F.2d 998 (D.C. Cir. 1976); *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals*, 523 F.2d 25, 36 (7th Cir. 1975); *In re Kentucky Polytechnic Institute*, Docket. No. 89-56-S, U.S. Dep't of Education (Apr. 27, 1990) (order).

The same analysis conducted in *In re Kentucky Polytechnic Institute*, supra, is applicable to the present proceeding. This analysis recognizes the Administrative Procedure Act and caselaw which provides that the government agency or department is the proponent for purposes of 5 U.S.C. § 556(d) and bears the initial burden of production of a prima facie case in an administrative proceeding such as this, while the ultimate burden of persuasion to prove that the disallowed expenditures were otherwise proper or that the institution complied with program requirements is borne by the institution pursuant to 34 C.F.R. § 668.116(d).

The controlling section of the APA is set forth at § 556(d) which states, in part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." The legislative history of the APA suggests that the term "burden of proof" was intended to denote

the "burden of going forward." Thus the Senate report states, in part: "That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain." S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945), reprinted in S. Doc. 248, 79th Cong., 2d Sess. 208, 270 (1946). [See footnote 12](#)¹²

In *Environmental Defense Fund, Inc. v. E.P.A.*, 548 F.2d 998, 1013 (1976), the Court addressed the applicability of the APA to the E.P.A.'s suspension order and held that the "burden of proof" it casts upon the "proponent" is the burden of coming forward with proof, and not the ultimate burden of persuasion. The court's examination of precedents from other Circuits failed to disclose a case holding that under the APA the proponent of an order bears the burden of persuasion. The Court stated that most of the cases cited by Velsicol (petitioner) appear to think of "burden of proof" as the burden of producing evidence.

In an earlier case, *Old Ben Coal Corp v. Interior Board of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975), the regulation governing the burden of proof was 43 C.F.R. § 4.587. The Court in *Old Ben* noted at page 40 that: "Although 43 C.F.R. § 4.587 might have been more artfully drafted, we read it to mean simply that the petitioner who initiates the proceedings - here *Old Ben* - has the ultimate burden of persuasion. We do not think that the regulation was intended to relieve - nor indeed, can it relieve - the proponent of an imminent danger order from the burden of putting forth a prima facie case in the administrative hearings."

In the more recent case of *State of Maine v. United States Dep't. of Labor*, 669 F.2d 827 (1st Cir. 1982), the proceeding involved a final decision of the Secretary of the Department of Labor that "maintenance of effort" provisions of the Comprehensive Employment and Training Act had been violated by the recipient Office of Maine CETA (OMC), by operation of one of its school districts. The recipient, OMC, sought review of that determination.

Therein, the Court recognized the Department of Labor as the "proponent" in the case for purposes of 5 U.S.C. § 556 (d) definitions, and therefore responsible for the burden of production in the case. The Court at n.5 recited its conclusion to wit: "There appears to be no question that the 'proponent' in this case is the Department of Labor and that its 'order' is the final determination by the Grant Officer."

However, the Court went on to state that once the Department's burden of production was met, the burden was on (the recipient) OMC to prove compliance with the Act. Its allocation of the burden of proof (persuasion) was proper in light of a regulation placing the burden on the party requesting a hearing. The Court stated that the burden of persuasion in a proceeding arising under the CETA Act is set forth at 20 C.F.R. § 676.90(b) (1979) and provides: "Burden of Proof. The party requesting the hearing shall have the burden of establishing the facts and the entitlement to the relief requested." Relying on this regulation, the Administrative Law Judge correctly assigned the burden of persuasion to recipient OMC. [See footnote 13](#)¹³

The effect of the burden of proof regulation in 34 C.F.R. § 668.116(d) as well as the effect of the burden of proof requirements of the APA are compatible and can be accommodated. Therefore,

under the law enunciated in the foregoing cases, the burden of production (of going forward) to present a prima facie case falls upon OSFA while the ultimate burden of persuasion to prove that the disallowed expenditures were otherwise proper or that the institution complied with program requirements falls upon the institution requesting the review, as required by 34 C.F.R. § 668.116(d).

In reviewing the question as to whether OSFA has presented a prima facie case it is clear that no actual complete foundation for OSFA's allegations as to an amount of money claimed to be owing has been submitted on the record. There are certain items of evidence, which fall short of the establishment of a prima facie case, such as a report from the Office of Audit of the Office of the Inspector General dated September 1988 which Stated that their review of certain records disclosed that a certain amount of money relating to Pell and Campus Based program funds was inappropriately awarded to students for the 1983-84 and 1984-85 academic years. A "Schedule of Inappropriate Awards" is attached to the IG report which indicated \$264,936 of funds under a column entitled "Unsatisfactory Progress" for the 1984 Award Year and \$232,785 of funds for the 1985 award year under the same column.

As to these funds the Joint Stipulations of Fact stated:

After auditing a sample of 1,002 students who had been awarded federal student financial aid funds, the auditor concluded that those students received \$497,721 of such funds for terms following the period at which they were determined not to be making satisfactory progress and orally advised Sinclair of this conclusion. (emphasis added).

Stip. para. 55.

However, the record does not contain any proof to sustain this conclusion. There is no way of knowing the basis for the total figure or how these figures were individually developed or calculated.

The IG report states that 43 student records were reviewed from the 1002 identified by Sinclair and then the report goes on to set forth some general information as to various categories of students such as the fact that five students were awarded SFA funds for the fall quarter of 1983 who did not meet either the P&D Policy or the SSP Policy. However the report does not identify who these students were, the individual amounts of money involved, or set forth any facts showing the foundation for these conclusions.

Although it could have done so, OSFA filed no exhibits which provided the missing facts. 34 C.F.R. § 668.116(e)(1)(i) provides that ED audit reports and audit work papers for audits performed by the United States Education Department Office of Inspector General may be submitted as evidence in this type of proceeding. [See footnote 14](#)¹⁴ It may be that such working papers would have provided the missing evidence.

As stated in *State of Maine v. United States Dep't. of Labor*, supra., at 830: "A party will have satisfied his burden of production if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established." However, under the factual

presentation as now contained in the record of this case, the judge has no basis upon which to make a finding as to an amount due under OSFA's theory.[See footnote 15](#)¹⁵

In contrast Sinclair did provide substantial evidence in the way of records, working papers and affidavits to sustain its allegations as to its liability as to payments made to students not making satisfactory academic progress. In fact, Sinclair supplied worksheets for calculation of liability of the 14 dismissed students upon which it based its finding of improperly received student assistance funds amounting to \$34,095. Sin. Ex. 10. Sinclair's Exhibits 9, 16, and 17 as well as Stipulation .. 56-63 are relevant to this subject. These are sufficient to sustain any burden of persuasion, if it were needed.

A Sinclair worksheet was entitled "Applying SCC's Probation & Dismissal Policy to 1983-84 and 1984-85 Financial Aid Recipients." It identified the following information: Student Name, Type of Aid, Term Rec'd. Title IV Aid, Amt. Rec'd., Academic Status at End of Term, Approved Petition on File, Comment (i.e. if and when student was readmitted), Title IV Liability (per term), and Total Title IV Liability. Sinclair's Initial Brief discusses the review procedure used as to dismissals for failure to comply with the P&D Policy. Based on this student sample, the determination was made whether readmission was properly handled. The conclusion was drawn that 4 of the 368 students in the total sample improperly received Title IV funds. Using a means of extrapolating the \$1, 782 in funds awarded the 4 students, after (improper) readmission, over the entire Title IV population, results in a total amount of 534,095 found to be incorrectly awarded to Title IV Recipients during the two subject academic years.[See footnote 16](#)¹⁶

B. Eligible Program.

There is no proof adequate to sustain OSFA's claim that Title IV Program Funds were awarded to students not enrolled in eligible programs.

In conducting its audit, OSFA determined that 51 students whose college records indicated "undecided" or "no major" were not regular students because they were not enrolled in eligible programs leading to a degree or certificate and, on that basis, that the financial aid awards to these students of \$24,561 violated the Title IV program requirements. This claim cannot be sustained since OSFA either misapplied the eligible program requirements in arriving at its conclusion or it was not cognizant of the actual facts.

Under applicable regulations, it is clear that Title IV financial aid programs require, among other things, that a student be a "regular student" enrolled in an "eligible program" in order to receive Title IV financial aid.[See footnote 17](#)¹⁷ A "regular student" is defined as a "person who is enrolled or accepted for enrollment, in an eligible program at an institution of higher education for the purpose of obtaining a degree or certificate." [See footnote 18](#)¹⁸ An "eligible program" is a program that, among other things, leads to a bachelor, associate, or undergraduate professional degree, is at least a two-year program acceptable for full credit towards a bachelor's degree, or is at least a one-year program leading to a certificate or degree, which prepares students for gainful employment in a recognized occupation.[See footnote 19](#)¹⁹

In analyzing the application of the pertinent regulations there are a number of factors to consider. First, there is no federal requirement that a student identify or be enrolled in a specific degree or certificate program. Thus, it was legally sufficient for Sinclair to do what it did; namely, verify that its students were enrolled in programs of study leading to a degree or certificate. In any event, Sinclair did not require its students to declare a major at any specific time, and, in fact, many students did not do so until they had been enrolled for several terms. Bogan Affidavit, Sin. Ex. 3, . 34. Second, although a student's declaration of a major is one method of establishing that a student is a regular student enrolled in an eligible program, it is not the only one. Sin. Ex. 19, at 2.

OSFA in its initial brief indicated other ways that Sinclair could establish that these students were regular students enrolled in eligible programs. OSFA stated as follows:

As indicated on page 61 of Sinclair's brief OSFA also indicated other ways that Sinclair could establish that these students were regular students enrolled in eligible programs. These methods included demonstrating that the students earned degrees or certificates at Sinclair or transferred to four year institutions, or demonstrating from class records that the students were enrolled at Sinclair for the purpose of obtaining degrees or certificates under one of Sinclair's eligible programs. (emphasis added).[See footnote 20](#)²⁰

OSFA Initial Brief, at 41.

Sinclair and OSFA have stipulated that only five specific "ineligible programs" were being offered during the 2-year audit period.

The following are the five "ineligible programs": Dietetic Assisting Certificate (18 credit hours); Gerontology Certificate (10 credit hours); Human Services Certificate (33 credit hours); Infant/Toddler Care Certificate (28/30 credit hours); and Urban Administration Certificate (31 credit hours). During the 1984-85 academic year Sinclair offered only three of these "ineligible programs." (Slips., para. 72, 73). Sinclair and OSFA also stipulated that with the exception of the five specific "ineligible programs" every other program offered by Sinclair qualified as an "eligible program" under the federal regulations. Stip., para.71.

Moreover, the parties have further stipulated that Sinclair undertook a review of the transcripts of each of the 51 students whose records allegedly did not indicate enrollment in a program of study eligible for SFA funding. As a result of that review, Sinclair determined that each student was enrolled in an eligible program at the time he or she received financial aid. Stip., para. 74. Sinclair determined that in none of the 51 cases cited by OSFA was the student taking a course sequence applicable to any of the ineligible programs. Stip., para. 74. Sinclair's student by student review of the 51 transcripts supplies the necessary evidence to rebut OSFA's allegations that those Sinclair students were not enrolled in eligible programs.

Sinclair's Director of Financial Aid, Janice Bogan, stated in her affidavit that she personally reviewed the records of each of the 51 students and that she determined that each student was enrolled in an eligible program during the 1983-84 and 1984-85 award years. She verified that students who enrolled in programs that were ineligible for Title IV aid, due to their short length,

were advised upon their enrollment that they would not be eligible for Title IV assistance. The ineligible certificate programs have been fully identified in the parties stipulations. After Ms. Bogan undertook the review of the records of the 51 students she presented findings in para. 39-42 of her affidavit of May 12, 1989, as follows:

39. With respect to the 51 students identified by the Department of Education as having no major or being undecided as to a major, I personally reviewed the academic transcript for each student, his or her registration forms, his or her statements of intent completed by the student, if any, and his or her records maintained by the various academic counselors at the College. What these students all had in common was that they were all enrolled in Sinclair for only a short period of time (one to three quarters), and withdrew before declaring a major and before completing their degree or certificate program.

40. Based upon my personal review of the records for each of the 51 students, I can and do so state that none of the 51 students was taking a course sequence applicable to any of the five ineligible programs, and thus that each of these 51 students was enrolled in an eligible program.

41. In addition, according to the program review report ... all students receiving federal financial aid must be enrolled in an eligible program for the purpose of obtaining a degree or certificate, and one of the ways in which the College can demonstrate this is from "records such as classes taken, etc., that student would have been considered to be enrolled in an eligible program....Under all these methods, classes taken would have to be creditable (at least as an elective) or matriculated remedial toward eligible program goal."

42. My personal review of the transcripts and records of the 51 students questioned by the Department of Education showed that, for each of them, the classes taken by the student were creditable toward an eligible program goal, as the term "eligible program" is defined in the Title IV rules and regulations. Therefore, I have concluded that all of these students were properly awarded Title IV funds by my office. (emphasis added).

Through its review of the individual records of each of the 51 students, Sinclair determined that each was enrolled in an eligible program at the time he or she received financial aid. Sinclair has placed transcripts of the 51 students in the record as Sinclair's Exhibit 18.

The combination of the stipulated facts, the statement under oath by Sinclair's Director of Financial Aid, and the actual transcripts of each of the subject 51 students clearly establishes that these students were enrolled in programs of study leading to a degree or certificate.

The stipulations established almost all of the facts required to reach this conclusion. The stipulations established, during this period in question:

(1) that there were only five specifically identified "ineligible programs," Stip., para. 72, 73;

(2) that, with the exception of the five "ineligible program", every other program offered by Sinclair qualified as an "eligible programs" under the federal regulations, Stip., para. 71; and

(3) that Sinclair undertook a review of the transcripts of each of the subject 51 students and determined that each was enrolled in an eligible program at the time he or she received financial aid and that none of the 51 was taking a course sequence applicable to any of the "ineligible programs." Stip., para. 74.

The statement, under oath, by affidavit of Sinclair's Director of Financial Aid, Sin. Ex. 3, established that a review of the academic transcripts, registration forms, statements of intent, if any, and academic counselors records for the subject students, during the period in question, showed:

(4) that none of the 51 students took a course sequence applicable to any of the five "ineligible programs"; and

(5) that the classes taken by each of them were creditable toward an "eligible program" goal, as the term "eligible program" is defined in the Title IV rules and regulations.

[These findings are further supported by Sin. Ex. 18, the 51 student transcripts, and Sin. Exs. 6 and 7, the excerpts from Sinclair's Bulletins of 1983-84 and 1984-85.]

These facts clearly establish that the 51 subject students were "regular students" enrolled in "eligible programs" of study leading to a degree or certificate as required by the applicable regulations. [See footnote 21](#)²¹

C. Allowance for Room and Board.

Sinclair does not contest the finding and the recommendation that awards totalling \$1,610 be refunded to OSFA as relates to an allowance for room and board. Sinclair's concession of this amount appears in its Exhibit 21 and its Initial Brief. Sinclair Exhibit 21 is a letter from Blain B. Butner, Esq. to Robert G. Seabrooks, Regional Inspector General for Audit, which contains Sinclair's response to the draft audit report dated January 1988. Therein, at page 21, it is stated: "The College does not contest this finding and the recommendation that awards totalling \$1,610 be refunded to the Department."

The concession is further restated in Sinclair's Initial Brief at page 3. At footnote number 4 it is said: "ED's third determination that Sinclair improperly awarded seven students a total of \$1,610 for room and board allowance (Exhibit 26, at 2) is not challenged."

VI. CONCLUSIONS OF LAW.

A. The standards for measurement of student's progress applied by Sinclair under the provisions of 20 U.S.C. § 1091(a)(3) (1983) and 34 C.F.R. § 668.16(e) for the academic years 1983-84 and 1984-85 were contained in its Probation and Dismissal Policy.

B. Sinclair's Probation and Dismissal Policy, did comply with the requirements of 34 C.F.R. § 668.16(e) for the academic year 1983-1984 until January 1, 1984, the effective date of the amendment of that regulation which was published in the Federal Register on October 6, 1983.

C. As relates to Sinclair, the effective date for enforcement of the strict time increment measurement requirements of the amendment to 34 C.F.R. § 668.16(e), which was published on October 6, 1983, was the end of the 1983-84 academic year.

D. Sinclair's Probation and Dismissal Policy did not comply with the requirements of 34 C.F.R. § 668.16(e) for the academic year 1984-85.

E. OSFA, as the proponent of the determination and order in this case, has the burden of production (of going forward) to present a prima facie case, that is, it must present evidence sufficient to establish to a reasonable person what, if any, liability the institution owes for any failure to comply with 34 C.F.R. § 668.16(e) or any other applicable regulations.

F. Once OSFA has presented a prima facie case the ultimate burden of persuasion to prove that disallowed expenditures were otherwise proper or that the institution complied with program requirements falls upon the institution requesting the review, as required by 34 C.F.R. §668.116(d).

G. OSFA failed to establish a prima facie case as to Sinclair's liability for any failure to comply with the provisions of 34 C.F.R. § 668.16(e) or any other applicable regulation during the academic years 1983-84 or 1984-85.

H. Sinclair's liability for noncompliance with the regulation at 34 C.F.R. § 668.16(e) or any other applicable regulations for the 1983-84 and 1984-85 academic years, is limited to the amount which Sinclair has admitted and demonstrated it owed, namely, \$34,095.

I. OSFA has failed to establish a prima facie case as to its claim that Title IV Program funds were awarded to students not enrolled in eligible programs, in violation of basic Title IV requirements. Aside from OSFA's failure to establish a prima facie case, Sinclair has established that the 51 subject students to whom Title IV Program funds were awarded were enrolled in eligible programs.

J. Sinclair has a legal obligation to refund \$1,610 to the United States Department of Education which it concedes it owes for an inappropriately awarded room and board allowance.

K. The final audit review determination issued by the Chief of the Audit Review Branch of OSFA is therefore supportable in part.

VII. DETERMINATIONS AS TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In addition to their briefs both parties have filed proposed stipulations of fact which are in dispute. Such proposed stipulations and briefs, insofar as they can be considered to have

contained proposed findings and conclusions, have been considered fully, and except to the extent that such proposed findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. ORDER.

Based on the foregoing findings of fact and conclusions of law, IT IS ORDERED that:

Sinclair Community College, Inc. reimburse the United States Department of Education in the amount of \$35,705.00.

John F. Cook
Administrative Law Judge

May 31, 1991
Washington, D.C.

NOTICE

34 C.F.R. §§ 668.119 thru 668.122 provide as follows:

§668.119 Appeal to the Secretary.

(a) Within 15 days of its receipt of the initial decision of the administrative law judge, a party wishing to appeal the decision shall submit a brief or other written material to the Secretary explaining why the decision of the administrative law judge should be overturned or modified.

(b) The party appealing the initial decision shall, simultaneously with its filing of the appeal, provide the opposing party with a copy of its brief or other written material.

(c) In its brief to the Secretary, the party appealing the initial decision may submit proposed findings of fact or conclusions of law. However, the proposed findings of fact must be supported by-

(1) The admissible evidence already in the record;

(2) Matters that may be given official notice; or

(3) Stipulations of the parties

(d) The opposing party shall file its response to the appeal, if any, with the Secretary within 15 days of that party's receipt of the appeal to the Secretary.

(e) The opposing party shall, simultaneously with the filing of any response, provide a copy of its response to the appeal to the party appealing the initial decision.

(f) Neither party may introduce new evidence on appeal.

(Authority: 20 U.S.C. 1094)

§ 668.120 Decision of the Secretary.

(a) Following an appeal from the administrative law judge's initial decision, the Secretary issues a decision that affirms or, for good cause shown, modifies, remands, or overturns the initial decision of the administrative law judge.

(b) If the Secretary modifies, remands, or overturns the initial decision of the administrative law judge, the Secretary issues a decision that-

(1) Includes a statement of the reasons for this action;

(2) Is provided to both parties; and

(3) Unless the decision is remanded to the administrative law judge for further review or determination of fact, becomes final upon its issuance.

(Authority: 20 U.S.C. 1094)

§ 668.121 Final decision of the Department.

(a) In the event that the initial decision of the administrative law judge is appealed, the decision of the Secretary is the final decision of the Department, unless the administrative law judge's decision is remanded by the Secretary.

(b) In the event that the initial decision of the administrative law judge is not appealed within the time limit specified in § 668.119(a), the initial decision automatically becomes the final decision of the Department.

(Authority: 20 U.S.C. 1094)

[52 FR 30115, Aug. 12, 1987; 52 FR 46354, Dec. 7, 1987]

§ 668.122 Determination of filing, receipt, and submission dates.

(a) The request for review, appeals, and other written submissions referred to in this subpart may be either hand-delivered or mailed.

(b) All mailed written submissions referred to in this subpart shall be mailed by certified mail, return receipt requested.

(c) Determination of filing, receipt, or submission dates shall be based on either the date of hand-delivery or the date of receipt indicated on the original U.S. Postal Service return receipt.

(Authority: 20 U.S.C. 1094)

S E R V I C E L I S T

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

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Footnote: 1 ¹ The parties had filed stipulations concerning Sinclair's Exhibits 1-18 which supply background information as to the disputed Exhibits. Those stipulations are included in the Order.

Footnote: 2 ² The terms award year and academic year are used interchangeably in this proceeding. As indicated in Sinclair's initial brief, Sinclair equated an award year with its academic year. (See fn.3, p.2.) An award year is a period of time beginning on July 1 of one year

and ending on June 30 of the subsequent year. Thus, the 1983-84 award year runs from July 1, 1983 through June 30, 1984, and the 1984-85 award year runs from July 1, 1984 through June 30, 1985.

Footnote: 3 ³ Subsequent to the issuance of the regulations in October 1983, the Department revised the third sentence of subsection (3)(ii)(C) to permit institutions additional flexibility in determining the minimum percentage of work toward a student's degree that the student must complete at each increment. Rather than using a uniform percentage at the end of all increments, an institution could establish a graduated scale. Although the 1983 regulation, as published, was not revised by a new regulation during the audit period, the Department made this change in an advisory to all schools, effective January 1, 1984. See Dear Colleague Letter 84-P-121(December 1983). (Sin. Ex. 27).

Footnote: 4 ⁴ In view of the fact that the SSP Policy was never applied by Sinclair any references to the SSP Policy or any actions which were taken as to it are not relevant to the determination in this case.

Footnote: 5 ⁵ In 1979, the Commissioner of Education of the Office of Education of the Department of Health, Education, and Welfare was responsible for administering the Title IV, HEA Programs. When the Department of Education was established, the duties of the Commissioner of Education were transferred to the Secretary of Education. See 20 U.S.C. 3400 et seq. For convenience, any reference to the Secretary of Education will include the Commissioner of Education, and any reference to the Department of Education or ED will include the Office of Education.

Footnote: 6 ⁶ As indicated in its catalogs, Sinclair's P&D Policy, in its entirety, provided as follows:

Probation and Dismissal Policy

You will be placed on academic probation if your cumulative grade point average after attempting 12 or more credit hours is shown as below, or if you have been granted admission on probation as a result of academic or dismissal status from another college.

Total Credit Hours Attempted Cumulative Grade Point Average

12-30 Below 1.60

31-50 Below 1.80

51 or more Below 2.00

You will be returned to good standing when your cumulative grade-point average exceeds the levels indicated above. Full-time students will be continued on probation if they achieve a minimum grade-point average of 2.00 for the quarter (next 12 credit hours attempted for part-time students) following placement on probation and if their cumulative grade-point average is below the minimums stated above. You will be dismissed if you are a full-time student and (1) earn less than a 2.00 grade point average for the next quarter (next 12 credit hours

attempted for part-time students) after you have been placed on probation, and (2) if your cumulative grade point average is below the minimums above. (emphasis added).

[Footnote: 7](#) ⁷ Sin. Ex. 6, at 14.

[Footnote: 8](#) ⁸ It is significant to note again the Federal Register comments which accompanied the final publication of the 1980 regulation in which it was stated that the Commissioner would not make any reference to qualitative or quantitative aspects of a satisfactory progress definition and that each institution should establish a definition of satisfactory progress that reflects its immediate and unique characteristics and concerns. 44 Fed. Reg. 56294 (1979).

[Footnote: 9](#) ⁹ 47 Fed. Reg. 19288 (1982); 48 Fed. Reg. 45670 (1983).

[Footnote: 10](#) ¹⁰ In view of the fact that the P&D Policy was inadequate in these respects no further discussion will be considered as to any other possible shortcomings of that policy.

[Footnote: 11](#) ¹¹ The computation of this overaward figure is detailed on page 51 of Sinclair's Initial Brief, as based on the methodology outlined in the Bogan Affidavit, Sin. Ex. 3, .. 20, 30 and the Plourde Affidavit, Sin. Ex. 5, at 3. This amount owed also covers the 1983-84, as well as the 1984-85 academic years

[Footnote: 12](#) ¹² [A] prima facie case is made when the party having the burden of proof has produced evidence sufficient to support a finding and adjudication for him of the issue in litigation.

A prima facie case is ... one in which the evidence in favor of a proposition is sufficient to support a finding in its favor, if all the evidence to the contrary be disregarded....

32A C.J.S. Evidence § 1016 (1964). hearings."

[Footnote: 13](#) ¹³ See also *Hess & Clark. Division of Rhodia. Inc. v. Food and Drug Admin.*, 495 F. 2d 975 (D.C. Cir. 1974)

[Footnote: 14](#) ¹⁴ Similarly 34 C.F.R. § 668.116(e)(1)(iii) and (v) provide that ED programs review reports and work papers for program reviews may be submitted as evidence and also that other ED records and materials, if they were provided to the judge no later than 30 days after the institution filed its request for review, may be submitted as evidence.

[Footnote: 15](#) ¹⁵ It is also significant that the amounts referred to in the OIG audit were apparently arrived at by using the elements of the SSP Policy. Since that Policy was never applied by Sinclair, OIG had no valid basis for using it to analyze the issue as to what Sinclair students, who were in fact not maintaining satisfactory progress, may have received funds.

Footnote: 16 ¹⁶ Sinclair's Initial Brief, at pp. 47-52; Bogan Affidavit, Sin. Ex. 3; Plourde Affidavit, Sin. Ex. 5.

Footnote: 17 ¹⁷ 34 C.F.R. §§ 674.9(a)(1)-(2)(NDSL); §§ 675.9(a)(1)(2)(CWS); §§ 676.9(a)(1)-(2) (SEOG); §§ 690.4(a)(1), (3)(PELL)(1983).

Footnote: 18 ¹⁸ 34 C.F.R. §§ 674.2 (NDSL); § 675.2 (CWS); § 676.2 (SEOG); § 690.3 (PELL) (1983).

Footnote: 19 ¹⁹ 19 Id. [There is a fourth category which is not relevant to this discussion.]

Footnote: 20 ²⁰ An OSFA program review report transmitted by a February 13, 1985, letter to Dr. Ponitz of Sinclair at page 2 thereof, set forth a similar list of methods by which an institution can show that a student was enrolled in an eligible program. Amongst them was the following: "3. Institution can determine from records such as classes taken, etc., that student would have been considered to be enrolled in an eligible program." Sin. Ex. 19 (emphasis added). However at the beginning of the listing of methods for showing that a student was enrolled in an eligible program was the following: "1. Institution can obtain statement that student was enrolled for degree or certificate." In conformance with this method, Sinclair sent form letters to students with undecided majors in order to obtain a statement as to their enrollment status for the period in question. Many responses were received. However, the fact that responses were not received from certain students did not mean that those students were not entitled to Chapter IV financial aid. In the case of the 51 students involved herein, for whom there was no statement by the student, the alternate method outlined by OSFA was used and the students records were then reviewed by Sinclair.

Footnote: 21 ²¹ In contrast to the comprehensive presentations of evidence by Sinclair, OSFA's evidence is inadequate to present a prima facie case or to counter the presentation of Sinclair showing that the 51 students were enrolled in programs of study leading to a degree or certificate. OSFA's evidence essentially consists of OSFA Ex. G-4, a memorandum as to the sending of form letters to students with "undecided majors", OSFA Ex. G-5, a form letter, OSFA Ex. G-6, a list of the 51 students in question with the amount of financial aid disbursed to each, and Sin. Ex. 22, the IG Final Audit Report of September 1988. This report essentially contains the auditor's conclusions that "The College inappropriately provided \$24,561 of SFA funds to 51 students whose records did not indicate enrollment in a program of study eligible for SFA funding." The report further stated that:

College personnel identified all students who computerized records indicated undecided or no major. The College, for example, sent letters to 646 students with undecided or no majors for the fall quarter of 1984 and the winter quarter of 1985. Their evaluation, which included a review of registration form, statements from students, and the nature of the courses taken, resolved all but 51 of the cases identified.

The College determined that \$23,461 was paid to these students. Our sample review of 10 student files disclosed no exceptions to the eligible program determination. However, our comparison of amounts listed by the College with award amounts per the College's SFA master

file for the 51 students increased the amount by \$1,100 due to the omission of the student's SEOG and NDSL awards.

OSFA has not produced any concrete evidence, either documentary, or under oath by affidavit, which rebuts Sinclair's comprehensive presentation of evidence as to the essential issues.