IN THE MATTER OF ARISTOTLE COLLEGE
Respondent.

Docket No. 89-35-S
Student Financial Assistance Proceeding

DECISION

Appearances: Peter S. Leyton and Richard A. Fulton, Esq. of
Washington, D.C., for the Respondent

Brian P. Siegel, Esq. of Washington, D.C.,
Office of the General Counsel, United States
Department of Education for the Office of Student Financial Assistance

Before: Judge Allan C. Lewis

This is an action instituted by the Office of Student Financial Assistance (ED) after it was notified by the Higher Education Assistance Foundation (HEAF) that HEAF had terminated Aristotle College of Medical & Dental Technology (Aristotle) from participating in its guaranteed student loan program. In this action ED, pursuant to Section 432(h)(3) of the Higher Education Act of 1965, as amended by Section 402(a) of the Higher Education Amendments of 1986, Pub. L. No. 96-374, 100 Stat. 1263 (to be codified at 20 U.S.C. § 1082(h)(3) (hereinafter Section 1082(h)(3)) seeks to disqualify Aristotle from participating with all other guaranty agencies in their guaranteed student loan programs established under Title IV of the Higher Education Act of 1065, as amended (to be codified at 20 U.S.C. § 1071, et. seq.).

The initial dispute between the parties concerns the scope of this proceeding, i.e. whether, as ED asserts, the disqualification proceeding does not include an inquiry into the factual and substantive bases of the termination determination by HEAF. It is concluded that the nature of this proceeding includes an inquiry into whether the facts and law require the termination of the institution from its participation in the guaranteed student loan program offered by HEAF. The parties also differ as to whether, based on the facts and law, Aristotle should be disqualified nationally from its participation in the
guaranteed student loan program. For the reasons stated below, Aristotle is not disqualified from participating in the guaranteed student loan program.

I. FINDINGS OF FACT

1. Aristotle is a proprietary vocational school and a proprietary institution of higher education with locations in Indiana and Ohio.See footnote 1 1/ It was established in 1977 and presently, has approximately 500 students enrolled. Since 1978, Aristotle has graduated about 3,500 students and placed about 89% of those graduates in fields for which they were trained. Its retention rate

averages about 77%. Its cohort default rate for fiscal year 1988 was 20.8%. In addition, approximately 95% of its students who take state or national exams for certification pass these tests. Aristotle presently employs about 61 faculty and staff and has historically experienced minimal staff turnover.

2. Since 1981, Aristotle has participated in the following Federal student financial aid programs under Title IV of the Higher Education Act of 1965, as amended (HEA): the Guaranteed Student Loan (GSL) program, the Pell Grant program, the Supplemental Education Opportunity Grant program and National Direct Student Loan (now Perkins Loan) program.

3. Aristotle participated in the GSL programs in part through the Higher Education Assistance Foundation (HEAF) and in part through other guaranty agencies.

4. On April 12 and 13, 1989, Matthew T. Mikulski, a compliance specialist for HEAF, conducted a program review of Aristotle's administration of the GSL program. This was Aristotle's first review by a guaranty agency.

5. Mr. Mikulski prepared a report of his findings. That report was given to Wendie Doyle, Assistant Vice President and Compliance Officer at HEAF. Ms. Doyle wrote to Aristotle on April 24, 1989, informing it that Aristotle's participation in HEAF's loan program was immediately suspended and that HEAF intended to terminate Aristotle's participation in its program.

6. On April 24, 1989, Ms. Doyle, an Assistant Vice President of HEAF, wrote Aristotle as follows:

> You are hereby notified that the Higher Education Assistance Foundation (Foundation) immediately suspends Aristotle . . . from participation in the Foundation's Stafford Student Loan Program . . . . This action is in accordance with the Foundation's Rules and Regulations and Section 5 of Foundation Bulletin L/S #61, dated January 26, 1988.
>
> In addition to the immediate suspension, the Foundation hereby notifies you of its intent to terminate
> Aristotle . . . from the above programs. This action is in accordance with the Foundation's Rules and Regulations and Section 7 of Foundation Bulletin L/S #61, dated January 26, 1988.
>
> These actions result from a number of serious and ongoing problems at the school. The Foundation conducted a program review of the school on April 12 and 13, 1989. The results of the review are attached and made part of these actions. That review indicated, among other violations of Federal regulations, that the school has been improperly disbursing loans to students no longer attending and has been failing to pay tuition refunds when students withdraw from school. As a result of the program review conducted by the Foundation, the Foundation has determined that the violations are of such magnitude and severity that there is a likelihood of substantial loss to the students, the Foundation and the Department of Education. Furthermore, the Foundation has concluded that the school is either unwilling or incapable of properly administering the loan programs as required by the Foundation.

. . . If termination occurs, the school may not participate in the Foundation's program for an indefinite period of time and may not request reinstatement for a minimum of 18 months.

. . . .

Termination will be effective on May 24, 1989 unless a request for a hearing is submitted by May 9, 1989 or written material pertinent to the alleged violations is submitted by May 9, 1989. A request for a hearing or submission of written material will automatically delay the termination until final determination of this action, but will not remove the immediate suspension. If the school fails to request a hearing or submit written material by May 9, 1989, termination is final on May 24, 1989 and there is no further appeal. For your information a copy of HEAF Bulletin L/S #61 is enclosed.

7. Ms. Doyle's letter did not describe her authority as a "HEAF designated official" and did not inform Aristotle that HEAF was required to refer its termination to ED for purposes of consideration of national disqualification from participating in the Title IV student loan programs.

8. Aristotle received Ms. Doyle's letter.

9. Before HEAF, Aristotle did not respond to Ms. Doyle's letter of April 24, 1989 and did not request a hearing or otherwise appeal the proposed termination of its participation in HEAF's guaranteed loan programs.

10. Aristotle did not appeal the proposed termination of its participation in HEAF's guaranteed loan programs before HEAF and therefore its termination action became final on May 24, 1989. HEAF's action in terminating Aristotle's participation in its GSL program due to its failure to file an appeal before that organization was in accordance with its rules of procedure.

11. HEAF referred its termination action to the Department of Education as required by § 432(h)(3) of the HEA (20 U.S.C. § 1082(h)(3)) on June 2, 1989.

12. Mr. Michael Walker, Aristotle's deciding official, made the decision not to challenge HEAF's proposed action for two reasons. First, at the time of HEAF's proposed action, Aristotle was also participating in the guaranteed student loan programs offered through USA Funds, another guaranty agency. Aristotle was, therefore, not dependent on HEAF's guarantees and, in fact, at the time of the notice of intent to terminate, Aristotle was not relying on HEAF to guarantee new loans. Second, at the time of the notice from HEAF, the institution was being audited by the ED's Office of Inspector General (OIG). In Mr. Walker's ignorance, he failed to realize the distinction between HEAF and the OIG and the fact that they represent two separate agencies which, at times, review the same matters. Therefore, he thought HEAF's proposed action would be delayed or held in abeyance by the ongoing audit. In addition, Mr. Walker was unaware that ED would institute a disqualification as a result of an adverse determination by HEAF.

13. On June 14, 1989, Ms. Dunn, the Deputy Assistant Secretary for Student Financial Assistance, sent the following letter to Aristotle:

This is to notify you that the United States Department of Education (ED) will shortly be reviewing the May 24, 1989, termination of the eligibility of Aristotle . . . to participate in the loan guarantee programs administered by the Higher Education Assistance Foundation (HEAF). The purpose of this review is to determine whether Aristotle should be disqualified from further participation in the Stafford Loan Program . . . . See 20 U.S.C 1082(h)(3).

On April 24, 1989, HEAF sent you a notice of its intent to terminate Aristotle from further eligibility to participate in the loan programs that it administers. As you know, HEAF's action was a result of a program review that it conducted at the school on April 12 and 13, 1989. That review indicated, among other violations of Federal regulations, that Aristotle has been improperly disbursing loans to students no longer attending school and has been failing to pay tuition refunds when students withdraw from school. HEAF concluded that Aristotle is either unwilling or incapable of properly administering the loan programs.

Aristotle failed to respond to HEAF's notice of intent to terminate, and HEAF therefore terminated Aristotle's eligibility effective May 24, 1989.

Aristotle is entitled to a hearing conducted in accordance with 5 U.S.C. 556-557, as to whether HEAF's termination action was taken in compliance with 20 U.S.C. 1078(b)(1)(T). A guarantee agency's termination action against a school is taken in compliance with Section 1078 (b)(1)(T) if--

1) it involves procedures that are substantially the same as those set forth in 34 C.F.R. Part 668, Subpart G, for ED's termination of a school's eligibility to participate in the Federal Insured Student Loan Program (FISLP);

2) it is based in factual conclusions that are not clearly erroneous based on the information the guarantee agency possessed when it reached those conclusions;

3) it is based on the correct application of the law; and

4) it is based on an application of a standard for termination that is substantially the same as ED's standard for termination of a school's FISLP eligibility, applied in a manner that does not constitute an abuse of discretion given the information that the agency possessed when it made its final decision. In this case, the applicable FISLP standard would require that termination be (a) based on a school's violation of an applicable statute, regulation, agreement, or limitation, and (b) otherwise warranted. See 34 C.F.R. 668.81(b); .90 (a)(2).

14. ED's letter of June 14, 1989, was the first time that Aristotle learned that, as a consequence of HEAF's action, other possible actions against the school would occur.

15. Almost immediately upon receipt of Ms. Dunn's letter, Aristotle acted to seek a resolution of the proposed serious consequences by contacting and speaking with Howard Fenton and responding in writing to Mr. Lipton, both of OSFA's Program Compliance Branch. It was Mr. Walker's hope and intent that his written report would result in ED's withdrawal of its proposed review and if not, it reflected his intent to contest the proposed disqualification.

16. On July 31, 1989, Ms. Duby of ED wrote HEAF as follows:

Enclosed are two letters received from Aristotle . . . .

After HEAF reviews Mr. Walker's submission of July 27, 1989, please inform the Program Compliance Branch if HEAF wants to continue to have the school disqualified or wants to reconsider its decision.

17. On August 25, 1989, Ms. Doyle wrote ED as follows:

HEAF has reviewed the material submitted by the school in response to HEAF's program review and subsequent termination action. This review was undertaken even though the response from Aristotle was untimely and HEAF's termination action was completed.

As noted in the review report, substantial liabilities were identified resulting from improper disbursements and unpaid refunds. The school's response to these findings shows over $20,000 was paid to lenders in reaction to HEAF's report. The liabilities paid by the school are significant considering that the sample size consisted of only 29 files. However, the school has made no effort to comply with the file review requirements in order to determine the full extent of the liabilities. HEAF finds the school's response to be inadequate as we believe that significant liabilities remain unpaid.

The balance of the school's response is also inadequate. Insufficient explanation and documentation (e.g., proof of borrower loan eligibility) was provided by the school. There is also a likelihood of significant liabilities existing in many of these cases.

The school was given every opportunity under HEAF's rules and regulations to respond to the report in a timely fashion, to submit written material regarding the termination action and to request a hearing on the matter. The school failed to respond in any way to HEAF's communications. The decision to terminate Aristotle College of Medical and Dental Technology's participation in HEAF's guaranty program is reaffirmed.

18. HEAF's rules of procedures for limitation, suspension and termination of a participant's eligibility in its program are set forth in HEAF Bulletin L/S No. 61, dated January 26, 1988. Aristotle received a copy of these rules with Ms. Doyle's letter of April 24, 1989.

19. HEAF Bulletin L/S #61, which was sent to lenders and schools, provides--

1. Purpose and Scope. These provisions establish rules and procedures for the limitation, suspension or termination of the eligibility of an otherwise eligible lender to obtain guarantees from HEAF for GSL, SLS and PLUS loans or schools to participate in the program . . . . They do not apply to a determination that an organization fails to meet the definition of a lender or school, nor to a school's loss of lending eligibility due to its default experience, nor to administrative action taken by the U.S. Department of Education.

2. Definitions. For purposes of this section, the following are the definitions of major terms used herein:

A. "Participant" means an otherwise eligible lender or school.

B. "Designated HEAF Official" means an individual specifically named or designated by title or position to whom the responsibility for initiating and pursuing limitation, suspension, and termination procedures has been delegated.

. . . .

D. "Presiding Officer" means an impartial person who has no prior involvement with the facts giving rise to a limitation, suspension or termination proceeding and who is selected by the President of HEAF to conduct the hearing.

. . . .

F. "Termination" means the removal of a participant's eligibility for an indefinite period of time...

. . . .

7. Limitation or Termination. A termination removes the eligibility of the lender or school to participate in the GSL, SLS and PLUS programs for an indefinite period of time. . . . Procedures for limitation or termination are as follows:

A. The designated HEAF official notifies the school or lender by certified mail, with return receipt requested, of HEAF's intent to impose limitations or terminate participation in the GSL, SLS and PLUS programs, citing the particulars and consequences of the intended action and identifying the alleged violations on which the proposed action is based. The initially designated beginning date of limitation or termination shall not be less than 20 days from the date the letter of intent is mailed.

B. The participant, subject to the limitation or termination notice, may request a hearing before a presiding officer and/or submit written material for consideration by the designated HEAF official or voluntarily agree to correct alleged violations. In the instance of voluntary correction, the process may be adjudged as completed by the designated HEAF official until and unless additional complaints or other information reinitiates the action. If the participant submits written materials and/or requests a hearing within 15 days of the limitation or termination notice being mailed, the designated limitation or termination date will automatically be delayed until after a final determination is made through the provided due process.

. . . .

D. If, under any of the cited conditions as set forth herein, the lender or school requests a hearing, the date of the hearing will be at least 15 days after the request is received.

1. A presiding officer will conduct the hearing and a written record will be made.

2. The presiding officer will consider any written material presented before the hearing and all evidence presented at the hearing.

3. The presiding officer will make an initial decision to either uphold the limitation or termination or overturn it. He may also make an initial decision to modify the nature of the initial finding, or place limitations on the participant, rather than terminating entirely from the program.

4. HEAF will review the initial decision and issue a final decision, as supported by the presiding officer's recommendations and the evidence available.

5. If the final decision is to limit or terminate a school or lender, a notice of such is promptly

mailed by HEAF to the affected participant and the limitation or termination takes effect on the date that was originally set by the designated HEAF official or immediately upon the date of mailing of the final decision notice, whichever is later.

. . . .

8. Appeal and Corrective Actions. Lenders and schools receiving a final decision of limitation or termination may appeal the final decision to the President of HEAF, but the final decision deadlines will stand pending the outcome of any such appeal. Corrective action may include required payment to HEAF or to any designated recipients of any funds that the lender or school improperly received, withheld, disbursed, or caused to be disbursed. If a final decision requires reimbursement or payment by the participant to HEAF, HEAF may offset these claims against any benefits due the participant.

9. Reinstatement After Termination. A terminated lender or school may file a request for reinstatement of eligibility only after 18 months have elapsed from the date of termination. Within 60 days of receiving the request, HEAF will act on the request. If HEAF denies or grants the request, subject to limitations, the lender or school will be granted an opportunity through a meeting, to show why all limitations should be removed.

20. HEAF's rules of procedure and its correspondence with Aristotle did not advise Aristotle that ED would institute a disqualification action in the event HEAF terminated the school from participating in its GSL program.

21. Finding 1.See footnote 2 2/ J.B. attended class on June 7th. Between June 8 and July 17, there was an initial period of 5 days with no classes, several days of absences by J.B. interspersed with days of no classes, and a period of vacation. J.B. withdrew on July 19, 1989, and the withdrawal was approved on the same day. J.B.'s refund was paid in early September 1989.

Regarding T.B., HEAF's conclusion that T.B. should have been terminated by March 31, 1988 was erroneous. Jt. Stip. Para. 4. T.B. attended class from February 16 through March 24, 1988. On April 18, Aristotle made a loan disbursement to her. On April 18, she was granted a leave of

absence which extended to April 25, 1988. T.B. did not attend class after March 24, 1988, and did not withdraw until June 17, 1988. Jt. Stip. Para. 4. During this period, Aristotle, pursuant to its policy to do all that it could to keep a student in school, repeatedly kept in touch with her about her enrollment and, as late as June 15, 1988, was told by her that she intended to continue her education. T.B.'s refund was paid in late July 1989.

R.K. began class on December 15, 1987. She attended school during January 1988 and withdrew on January 11, 1988. Aristotle disbursed loan funds to her on February, 24, 1988. Aristotle concedes that the disbursal was improper since it was made after she had withdrawn. Subsequently, Aristotle replaced the financial aid officer responsible for the error. R.K.'s refund was paid in November 1988.

E.L. had a last date of attendance of August 4, 1988. Aristotle disbursed loan funds some five days later on August 9, 1988. Aristotle concedes that the disbursal was improper. E.L.'s refund was paid in early September 1989.

Regarding B.T., it is not possible to ascertain from the HEAF report (Ex. R-22, at 5) the nature of the purported violation. ED's submission does not clarify the matter. B.T.'s refund was paid in early August 1989.

C.W. attended school for only one day on September 1, 1987. C.W.'s loan proceeds were disbursed on September 11, 1987 and she was not scheduled to return to class again until September 14, 1987. She did not return to class and subsequently withdrew on November 23, 1987. C.W.'s refund was paid in September 1988.

The total amount of loan funds disbursed to T.B., R.K., and E.L. was less than $8,000.

The financial aid officer who committed the error in the disbursement of the loan funds to R.K. was replaced and Aristotle has installed a computer system to monitor disbursements and prevent erroneous or late disbursement of loan funds in the future.

22. Finding 2.

Name Amount Refund Date Date Paid Months Late

J.B. $2,154 8/19/88 early 9/89 12
T.B. 2,069 5/18/88 late 7/89 14
R.K. 2,141 2/24/88 early 11/88 9
E.L. 1,660 8/9/88 early 9/89 13
B.T. 2,625 2/88 early 8/89 18
C.W. 2,154 12/23/87 mid 9/88 10
Total $12,803

Name Amount Refund Date Date Paid Months Late

H.G. $2,100 10/22/88 early 9/89 11
A.H. 1,988 3/3/88 early 12/89 18
A.O. 2,117 10/22/88 late 5/89 7
D.S. 1,703 6/11/88 ? early 11/89 17
C.T. 1,072 7/30/88 late 8/89 13
F.T. 882 9/24/87 12/23/87 3
786 9/24/87See footnote 3 3/ late 8/89 23
J.W. 1,412 4/8/88 late 7/89 15
L.H. 1,544 11/15/86 -- --
Total $13,604

23. Finding 3. Aristotle's policy on satisfactory progress provided in pertinent part--

Just as there are certain requirements for eligibility for Title IV fund there are also requirements that must be met in order to maintain these funds.

I. REQUIREMENTS TO MAINTAIN TITLE IV ASSISTANCE

1) SATISFACTORY PROGRESS
Aristotle College defines satisfactory progress by the following criteria:
a. A minimum grade or average of 70%.
b. An average monthly attendance of 75% Satisfactory progress will be evaluated monthly.
2) MAXIMUM COMPLETION TIME
To remain eligible for federal funds, aid students must complete their scholastic program within a specified time frame of eight months, excluding a leave of absence.

II. RESULTS OF FAILURE TO MAINTAIN SATISFACTORY PROGRESS

1) If a student fails two modules or has an absentee record higher than 15%, a consultation with a school official will be scheduled with that student.
2) At that time, the student will be placed on a one month probation during which financial assistance checks will still be disbursed.
3) At the end of the probationary period, if the student has not satisfied the specified requirements, financial assistance checks will then be withheld.

III. REINSTATEMENT OF FINANCIAL AID ELIGIBILITY

Students who have lost eligibility for financial aid can be reinstated by improving either their academic average, or their attendance average, or both, to the designated standards of the satisfactory progress definition. In cases of extenuating circumstances, special arrangements may be made with school officials. These will be handled on an individual basis through the appeal process.

Aristotle's policy on satisfactory progress parroted the language of an example proffered by its accrediting agency, ABHES, regarding the maximum time frame standard. This illustration was

drafted by ABHES with the knowledge that the Federal government required that the policy must define a maximum time frame to complete the educational objective as opposed to simply setting a time limit on eligibility for Title IV financial aid.

Aristotle's catalog and the contract with each student provided, that the course of study is for a fixed period of time, i.e. 28 weeks including the externship. This period may be extended at no cost should the student's rate of learning necessitate additional time and attention and provided the student maintains a receptive attitude and makes an honest effort.

Aristotle's policy on satisfactory progress adopted the proposed model developed by ABHES and provided for monthly reviews of each student's progress. Aristotle's minimum acceptable criteria was a grade average of 70% and an average monthly attendance of 75% of the classes. Where a student fails two modules or has an absentee record higher than 15%, the student is placed on a one month probation during which financial assistance will continue to be disbursed. However, at the end of the probationary period, financial assistance was withheld where the student had not satisfied the specified requirement.

Aristotle has corrected the deficiencies in its policy of satisfactory progress as determined by HEAF.

24. Finding 3. R.B. was placed on probation, suspended, and readmitted due to reasons of satisfactory progress.

25. Finding 4. Aristotle maintained attendance records and conducted follow up on cases of excessive absences during the period of the HEAF review.

In the cases of students T.B. and J.W., Aristotle should have contacted each student earlier regarding her excessive absences and required each student to show cause why she should not be suspended from the program. In addition, Aristotle should have terminated each student earlier than when it did.

26. Finding 6. Student Y.D. was admitted on her certification that she was a high school graduate and documentary evidence was subsequently obtained before she graduated.

27. Finding 7. Students H.B. and T.R. were classified by Aristotle as independent students and they were, in fact, dependent students.

Aristotle had documentary material regarding Federal income tax information for the student K.F. for 1987 and evidence of income for the student R.H. for 1986 and 1987, but these documents were either not in the files reviewed by the HEAF investigator or were in the files but not seen by the investigator.

28. Finding 8. Regarding T.S., Aristotle was under no obligation to secure a transcript in her case since the previous school attended by T.S., Central Nine Vocational School, was an institution that did not participate in Title IV student aid programs.

29. Finding 9. The HEAF report does not indicate the source of the purported default rate of 32% or the manner in which the default rate was calculated. Aristotle's cohort rate for fiscal year 1988 was 20.8%, the most recent completed fiscal year at the time of the HEAF review. HEAF did not pursue the second stage required by Reg. § 668.15, namely an examination of Aristotle's latest financial statement.

Student, L.E., received an exit interview.

30. Finding 10. Regarding the use of the methodology to compute the family contribution figure for B.S., Aristotle used the methodology applicable for the loan period immediately prior to July 1, 1988, for a loan commencing in August 1988 rather than the newly revised method. This error was caused by the fact that it did not have the newly revised Congressional methodology on a computer disc. Aristotle did recalculate the need of B.S. using the correct methodology.

31. Finding 14. Student A.H. was enrolled on December 4, 1987, and attended classes during that month.

32. Finding 15. Student M.R. completed her externship program 30 days after her written examination and student D.H. completed her externship program within 80 days after her written examination. Aristotle has revised its student information record system to reflect properly the student's graduation date.

33. In Aristotle's view, it will cease operating and go out of business if it is disqualified.

II. OPINION

A. The Scope of the Controversy. The initial controversy concerns the nature and scope of the disqualification proceeding. Both parties agree that one issue before the tribunal under Sections 1078(b)(1)(T) and 1082(h)(3)(A) is whether HEAF's procedures and standards applied in its termination proceeding were substantially the same, i.e. not more onerous, as ED's procedures and standards under the Federal Insured Student Loan program. Beyond this, the parties disagree regarding the scope of this proceeding. Under ED's current view, the tribunal's task is completed and nothing remains for it to resolve once it has passed on the above issue.See footnote 4 4/ Under Aristotle's view, Sections 1078(b)(1)(T) and 1082(h)(3)(A) require a full evidentiary hearing by the tribunal after which it then weighs the evidence as to whether Aristotle violated HEAF's restrictions and, if so, whether these violations were sufficiently severe in nature to warrant termination of its participation in HEAF's program. In the event these violations are sufficiently severe to warrant termination, then the tribunal may disqualify the institution from participating in the guaranteed student loan program with all other guaranty agencies.

A disqualification action is based upon Sections 1078(b)(1)(T) and 1082(h)(3)(A). Section 1082(h)(3)(A) provides that--

(A) The Secretary shall, in accordance with sections 556 and 557 of Title 5, United States Code [the Administrative Procedure Act], review each . . . termination imposed by any guaranty agency pursuant to section 1078(b)(1)(T) . . . . The Secretary shall disqualify such institution

from participation in the student loan program of . . . [other] guaranty agencies . . . unless the Secretary determines that the . . . termination was not imposed in accordance with the requirements of . . . section [1078(b)(1)(T)].

Section 1078(b)(1)(T) provides that the student loan insurance program of a guaranty agency such as HEAF may not have--

> restrictions . . . which are more onerous than [the] eligibility requirements for institutions under the Federal student loan insurance program as in effect on January 1, 1985 unless--
> (i) that institution . . . is ineligible pursuant to criteria issued under the student loan insurance program which are substantially the same as regulations with respect to such eligibility issued under the Federal student loan insurance program;

Aristotle's position is consistent with the statutory language and its legislative history. Under Section 1082(h)(3)(A), the Secretary determines factually and substantively whether Aristotle violated HEAF's restrictions in resolving whether the termination imposed by HEAF was "in accordance with the requirements of Section 1078(b)(1)(T)."

In addition, the plain language of Section 1082(h)(3)--"in accordance with sections 556 and 557 of Title 5, United States Code [the Administrative Procedure Act]" which mandates a full evidentiary hearing process--also clearly indicates that factual and substantive determinations are made by the tribunal in the disqualification proceeding. Sections 556 and 557 set forth the ground rules with respect to hearings and decisions issued under the Administrative Procedure Act. The exercise of the powers, duties, and responsibilities set forth in these provisions may only be accomplished in a trial type setting.See footnote 5 5/ Moreover, under Section 556(e), the "exclusive record for a decision in accordance with section 557" is "[t]he transcript of testimony and exhibits" received in the proceeding before the administrative law judge. Therefore, the language of Sections 1078(b)(1)(T) and 1082(h)(3)(A) clearly support Aristotle's position.

The legislative history of Section 1082(h)(3) also supports this conclusion. Section 1082(h)(3) was proposed by a floor amendment to Section 432 of the Higher Education Act of 1965 in 1985. The floor debate reflects that it represented a fine compromise between competing factions and was clearly intended to allow a full evidentiary administrative law hearing on whether the factual and substantive merits warranted a disqualification--

> My [Congressman Goodling's] amendment . . . would do the following: The Secretary will conduct a hearing under the provisions of the Administrative Procedure Act for any lender or institution which has received a limitation, suspension or termination (LS&T) by any guarantee agency under the provisions of section 428(b)(1)(T) and (b)(1)(U). Such a hearing shall occur within 60 days and unless the Secretary determines that the LS&T was not imposed in accordance with requirements of those sections, the Secretary shall disqualify such lender or institution from participation in the Student Loan Insurance Program of each of the guarantee agencies . . . .
> . . . .
> at the time the gentleman offered his amendment in committee, I [Congressman Ford] was

torn between people that we heard at the hearings. The State agencies wanted more or less autonomous power to cut off banks and cut off colleges of their choice for whatever reason they set up in that particular State, for whatever standards they established.

On the other hand, there were people who were giving us legitimate concerns about the failure of the Department of Education heretofore to respond when a State called bad practices of an institution or a school, to the attention of the Department.

Now what the gentleman has done is to find a fine compromise between those concerns. He makes it necessary for the Secretary to take action when a State triggers a complaint, but at the same time he insulates the lenders and the institutions against arbitrary action by requiring that they cannot be suspended [disqualified] until they have first been given an administrative law hearing with all that that entails under the statute. I compliment the gentleman for finding this nice balance. The gentleman has satisfied what we perceived to be legitimate concerns on both sides of the argument. For a schoolteacher, the gentleman makes an awfully good lawyer. (emphasis added)

131 Cong. Rec. 34177 (1985).

Thus, the statute and its legislative history support Aristotle's position.

In ED's view, the only issue before this tribunal is whether the substantive rules and procedure applied by the agency were not more onerous than ED's regulations in effect on January 1, 1985. ED argues that the factual merits of the purported HEAF violations or the substantive merits of the purported HEAF violations are not matters properly before and considered by the tribunal.See footnote 6 6/ The basis of ED's position is that the Secretary indicated, on November 20, 1990, in the preamble to the proposed regulations to revise 34 C.F.R. Part 682 that, where a school is terminated by a guaranty agency, the factual and substantive merits of the controversy were "conclusively determined against the school" and therefore "the school . . . is thereafter precluded from disputing those findings [before the Secretary] under traditional principles of collateral estoppel." 55 Fed. Reg. 48,335 (1990).

ED relies on this statement not as a means of interpreting the proposed regulation, if and when it is adopted; rather, the preamble constitutes a new forum, apparently, for rule making since it announces the Secretary's current interpretation of Section 1082(h)(3). Thus, in ED's view, there is now no need for the proposed regulation because this position has been adopted by the Secretary when the preamble was published. Therefore, in view of this action, ED found no need to analyze whether ED's current position is consistent with the statute and its legislative history.

The function of the preamble is to provide the reasoned analysis of the regulation to assist a court in its construction. Wiggins Bros., Inc. v. DOE, 667 F.2d 77, 88 (Tem.Emer.Ct.App. 1981), cert. denied 456 U.S. 905 (1982) and thus ED would employ it for an unintended use. "Within traditional agencies--that is, agencies possessing a unitary structure--adjudication operates as an appropriate mechanism not only for factfinding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation." Martin v. OSHRC, 111 S.Ct. 1171, 1177 (1991). Thus, the tribunal is part of the lawmaking process as well.

The tribunal will defer to the Secretary's regulations and his Secretarial decisions issued in response to appeals of ALJ decisions. These are accepted means of expressing policy and interpretations. But where, as here, ED relies upon a passing comment in the preamble to proposed regulations which have no effect themselves, this tribunal believes it inappropriate to give it binding effect. This is especially so in light of the fact that ED's position appears clearly inconsistent with Congressional intent and abdicates, in favor of private or state guaranty agency organizations, the responsibility of the Department to oversee the guaranteed student financial assistance program and to disqualify those schools which, by virtue of their actions, should not be allowed to continue to participate in the program.See footnote 7 7/ In addition, the comment in the preamble does not, in fact, interpret the proposed regulation. Rather, it suggests an independent legal ground outside the proposed regulation, i.e. the doctrine of collateral estoppel, under which the tribunal should adopt the facts and law as determined by the guaranty agency in the termination action. In this context, it is appropriate, in the tribunal's view, for the Secretary to consider the views of his tribunal concerning the interpretation accorded a statute governing the nature of the adjudicative process within the Department. Thereafter, the Secretary may reverse, affirm, or modify the tribunal's decision in a manner which appropriately reflects his considered opinion.

In addition, it should be noted that ED's current position embraces an interpretation of Sections 1078(b)(1)(T) and 1082(h)(3)(A) which is, in part, consistent with the tribunal's view, namely, that the Secretary and the tribunal have the authority or power to determine facts and substantive law in the disqualification proceedings. It is only, but for the possible application of the doctrine of collateral estoppel, that ED believes that the tribunal and the Secretary will not decide to inquire into these matters. Collateral estoppel is a doctrine of judicial and administrative law which the second forum invokes to "enforce repose" by virtue of the resolution of disputed facts in the first action. University of Tennessee v. Elliott, 478 U.S. 788, 798 (1986). Thus, actual litigation in the first action is a prerequisite to the application of collateral estoppel. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (offensive collateral estoppel occurs "when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party" (at 326 n.4) and its application is a matter of broad discretion by the trial court); Commissioner v. Sunnen, 333 U.S. 591 (1948). Here, Aristotle did not appear before the guaranty agency HEAF and therefore there was no litigation or disputed contest before HEAF which was resolved by that organization. Accordingly, even if collateral estoppel may be generally applied in this type of proceeding (which the tribunal believes it does notSee footnote 8 8/), it cannot be applied in Aristotle's situation by virtue of the nature of the application of the doctrine itself. Thus, it is appropriate for the tribunal and the Secretary, if the tribunal's decision is appealed, to resolve this matter based on the facts and substantive law.

B. The Substantive and Factual Merits of the Controversy. In its notice of immediate suspension and notice of intent to terminate Aristotle, HEAF made 16 findings relating to purported violations by Aristotle and concluded that "the violations are of such a magnitude and severity that there is a likelihood of substantial loss to the students, the Foundation and the Department of Education." The table below summarizes the tribunal's analysis of the evidence vis-a-vis the charges. Fifty percent or 8 of the 16 charges are not supported by the record in whole or in part. Regarding the remaining charges, the minimal number of students allegedly affected was

overstated by HEAF. When the nominal number of students affected by the nature of the violations is factored into this analysis, the tribunal concludes that termination was clearly not warranted under HEAF's rules. Rather, the appropriate sanctions under HEAF's rules was 1) to require corrective action regarding the deficiencies in its satisfactory progress policy (Finding 3), 2) to order repayment regarding the 11 unpaid refunds in the total amount of $23,000 (Finding 2), and 3) to limit Aristotle to no new loans with HEAF until the latter of--three months or the repayment of these refunds and the institution of actions necessary to correct the minor deficiencies in its program. Thus, in this circumstance, disqualification by ED is clearly not appropriate.

The detailed analysis will follow the summary of the tribunal's findings and conclusions below.

Finding RatingSee footnote 9 9/ Students Descrip. of Purported Violation
No. Affected
1. 4 3 of 6 --improper loan disbursements
2. 5 11 of 13 --failure to make refunds
3. 2/3 unknown --deficiencies in satisfactory progress policy
4. 3 2 of 2 --failure to timely terminate students for lack of attendance
5. no viol. 0 of 3 --absence of available documentation
6. no viol. 0 of 1 --no documentary evidence re ability to benefit
7. 3 3 of 5 --necessary documentation re dependency status
8. no viol. 0 of 2 --failure to obtain financial aid transcripts
9. no viol. n/a --unacceptable default rate
10. 1 1 of 3 --calculation of need by wrong methodology
11. no viol. unknown --absence of written policies on verification
12. no viol. 0 of 1 --absence of Pell Grant calculation
13. 1 1 of 2 --lack of certified information re income
14. no viol. 0 of 1 --mismatching of loan period and academic period
15. 3 2 of 2 --inaccurate enrollment information
16. no viol. n/a --failure to respond to HEAF inquires

Finding 1. According to HEAF, there were six instances in which Aristotle improperly disbursed loan funds to students or retained loan funds which should have been returned to lenders. These six instances constituted, in HEAF's view, "serious problems" in the school's handling of loan funds. HEAF's determination was based in part on its view that Aristotle's accrediting agency, ABHES, requires that students be terminated no later than seven calendar days after the last day of attendance.

Initially, the parties stipulated that ABHES' refund policy does not specifically state an absolute requirement of termination on the part of the institution after seven calendar days of a student's unexcused absences. Jt. Stip. Para. 3. Therefore, without further development by ED on this point, it cannot be concluded that, as a matter of fact, Aristotle should have terminated these six students no later than seven days after their last day of attendance.

Of the six purported violations, Aristotle made three errors. Regarding student J.B., HEAF determined that J.B. attended only one day of class--June 7, 1988--and under ABHES's standard,

Aristotle should have terminated J.B. on June 14, 1989. Hence, the loan disbursement of July 1, 1989, should not have been made and the amount of the disbursement should have been returned to the lender.

Based on the evidence, Aristotle properly disbursed the loan proceeds to J.B. in the latter part of June 1989. J.B. attended class on June 7th. Between June 8 and July 17, there was an initial period of 5 days with no classes, several days of absences by J.B., and a period of vacation. Since ABHES' refund policy does not specifically state an absolute requirement of termination on the part of the institution after seven calendar days of a student's unexcused absences, it is, based on this record, concluded that Aristotle did not have to terminate her enrollment as of June 14th or before she notified the school of her request to withdraw on July 19.See footnote 10 10/ Accordingly, the disbursement was proper.

Regarding T.B., HEAF determined that she attended school from February 16 through March 24, 1988, and that she was granted a leave of absence from April 18 to April 25, 1988. Based on these determinations, HEAF concluded that her enrollment should have been terminated by March 31, 1988, and therefore, the loan disbursement of April 18, 1988, should not have been made. In addition, HEAF determined that even if the leave of absence had been properly granted, Aristotle still erred as it disbursed the loan funds to a student on a leave of absence which is contrary to the Federal regulations.

Based on the evidence, it is concluded that the loan disbursement to T.B. was improper. Initially, the parties stipulated that HEAF's conclusion that T.B. should have been terminated by March 31, 1988, was erroneous. Hence, the dispute narrows as to whether the leave of absence precluded the disbursement.

Aristotle argues that a leave of absence is not a withdrawal under 34 C.F.R. § 682.605(c) and therefore T.B. was an enrolled student and, as an eligible student at that time, the disbursement was proper. ED disagrees and raises Reg. § 682.605(b)(2) which provides--

(2) If the student has not returned to school at the expiration of a leave of absence approved under paragraph (c) of this section, the student's withdrawal date is the date of the first day of the leave of absence.

Here, the disbursement was made on the first day of the leave of absence and T.B. did not subsequently return to school. Thus, there has been a technical violation by Aristotle in this instance. However, the tribunal recognizes the problem inherent in the administrative application of this section where the two events--disbursal and application for leave--occur on the same day and, more than likely, concern different offices or employees of the school. In addition, it is equally likely that the disbursal occurred prior to the application for the leave and hence there was nothing the school could do, in any event, to prevent the violation. Hence, the tribunal views this particular violation as having nominal adverse effect on Aristotle in resolving the ultimate question regarding disqualification.

Regarding R.K., HEAF determined that she attended for one day-- December 15, 1987--and that Aristotle disbursed her loan funds on February 24, 1988, long after she should have been terminated.

Based on the evidence, the parties agree that HEAF erred in determining the length of R.K.'s attendance. R.K. attended during January 1988 and withdrew on January 11, 1988. However, Aristotle concedes, and correctly so, that the loan funds were improperly disbursed since they were disbursed after she had withdrawn. In an apparent effort for mitigation, Aristotle notes that the financial aid officer responsible for the error was replaced.

Regarding E.L., HEAF determined that Aristotle disbursed loan proceeds to her on August 9, 1988, some 5 days after her last day of attendance on August 4, 1988. Aristotle concedes that the disbursal was improper.

Regarding B.T., it is not possible to ascertain from the HEAF report the nature of the purported violation. ED's submission does not clarify the matter. Aristotle suggests that HEAF's concern was that its records did not show that the loan funds had been applied to her account. However, the parties stipulated that B.T.'s account was credited with the GSL proceeds. Accordingly, there is no apparent violation concerning B.T. regarding the disbursement of funds.

Regarding C.W., HEAF determined that C.W. attended school for one day only on September 1, 1987, and that Aristotle completed a notice of termination on September 12, 1987. Subsequently, Aristotle credited the student's loan proceeds to her account on September 14, 1987. Since she was no longer enrolled, according to HEAF, Aristotle should have returned the check to the lender and not credited her account.

Based on the evidence, it is concluded that the loan funds were properly disbursed to C.W. The parties stipulated that C.W.'s first and last day of attendance was September 1, 1987. The dispute between the parties is whether C.W. withdrew from school before Aristotle disbursed the funds. ED asserts that Aristotle had knowledge of this fact before the funds were disbursed and relies upon the statement by the HEAF reviewer that Aristotle completed a notice of termination on September 12, 1987. ED has not proffered the purported notice of termination. Moreover, the statement by the HEAF reviewer is unsworn and unsigned. Based upon other apparent errors made by this reviewer-investigator, infra, these errors adversely affect his credibility. On the other hand, Aristotle asserts, via sworn testimony and testimony that otherwise appears credible, that her loan proceeds were disbursed on September 11, 1987, before her termination notice, that she was not scheduled to attend class again after the disbursement until September 14, 1987, and that she did not withdraw until November 23, 1987. Based on this evidence, it is concluded that C.W.'s loan proceeds were disbursed on September 11, 1987, that she was not scheduled to return to class again until September 14, 1987, and that she did not withdraw until November 23, 1987. Accordingly, the loan funds were properly disbursed.

In summary regarding Finding 1, Aristotle disbursed loan funds to three students (T.B., R.K., and E.L.) in violation of ED's regulations of which T.B.'s disbursement represented a technical violation. The total amount of loan funds disbursed to these three students was less than $8,000. In all other respects, there is no evidence that Aristotle disbursed loan funds to other students

improperly. Under these circumstances, there is no evidence which supports a conclusion that "serious problems" exist in the school's handling of the disbursement of loan funds. Moreover, the financial aid officer who committed the errors was replaced and Aristotle has installed a computer system to monitor disbursements and prevent erroneous or late disbursement of loan funds in the future.

Finding 2. According to HEAF, there were 13 instances in which Aristotle failed to make refund payments to lenders on behalf of its students. Six instances were set forth in Finding 1 and seven instances were set forth in Finding 2.

Based on the evidence, there were only 11 outstanding refunds totalling approximately $23,000 as of April 1989. The period of nonpayment ranged between six and 14 months. These refunds were ultimately paid by Aristotle and the period of outstanding nonpayment for these refunds ranged generally between 7 and 18 months.

Aristotle argues that its nonpayment as of April 1989 and the subsequent late payment of these refunds was caused by a depletion of its cash reserves due to an unusual and unexpectedly heavy refund demand. This heavy refund demand was due to refund requests by many of its students who withdrew from the school because the State of Indiana would not allow Aristotle's students to take a test to obtain a license to operate a diagnostic machine immediately upon their graduation.

While it may be unfortunate for an institution to experience financial difficulties which are not of its own making, it must nevertheless still maintain a sufficiently strong financial condition to execute properly its obligations under the student financial assistance programs. The number of unpaid refunds in this instance is, however, relatively small and the magnitude of the unpaid amount, while meaningful, is not significant. E.g. In re Southern Institute of Business and Technology, Dkt No. 90-62- ST, U.S. Dep't of Education (Final Dec. 1991) (terminated due to, in part, $148,000 of unpaid refunds); In re Deloux Schools of Cosmetology, Dkt No. 89-59-S, U.S. Dep't of Education (Final Dec. 1990) (termination action due to, in part, to $500,000 of unpaid refunds).

Finding 3. According to HEAF, it had several concerns regarding Aristotle's policy on satisfactory progress. The overall effect of the school's academic progress policy should be to ensure that students are enrolled and progressing satisfactorily at the time loan applications are certified and funds disbursed. HEAF determined that Aristotle's policy was deficient in several respects. It failed to identify a maximum time frame for completion of the student's course of study although it limited a student's eligibility period for Title IV aid to eight months. The policy standard lacked a schedule identifying the minimum percentage of work which must be completed during each of the school's evaluation periods. The policy failed to address the effect of a withdrawal, incomplete, and course repetition on the student's progress and his or her continued eligibility for financial aid. In addition, according to HEAF, the policy did not deal with the effect on progress of noncredit or remedial courses.

Initially, Aristotle argues that the Federal standards under Reg. § 668.14(e) are not applicable where, as here, the school has a policy of satisfactory progress which conforms to the suggested

policy of its accrediting agency and has been approved by the accrediting agency. ED's response is a somewhat disjointed general denial.

Under Reg. § 668.14(e), the school must publish and apply reasonable standards for measuring whether a student is maintaining satisfactory progress in his or her course of study. The Secretary considers an institution's standards to be reasonable under Reg. § 668.14(e)--

> 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 those standards;
> . . . .
> (3) Include the following elements:
> . . . .
> (ii) A maximum time frame in which the student must complete his or her educational objective, degree, or certificate. The time frame must 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.

Thus, while an institution's policy may conform to the standards of its accrediting agency, it may still, nevertheless, be insufficient to satisfy the regulation unless it includes all of the elements set forth in subparagraph (3). Accordingly, Aristotle's position is rejected in this regard.

Turning to Aristotle's policy on satisfactory progress, it provided in pertinent part--

> I. REQUIREMENTS TO MAINTAIN TITLE IV ASSISTANCE
> . . . .
> 2) MAXIMUM COMPLETION TIME
> To remain eligible for federal funds, aid students must complete their scholastic program within a specified time frame of eight months, excluding a leave of absence.

Based on this, HEAF determined that, though Aristotle's policy limited a student's eligibility period for Title IV aid to a fixed period of 32 weeks, it failed to identify a maximum time frame for completion of the student's course of study as required by Reg. § 668.14(e)(3)(ii) above.

Based on the evidence, it is apparent that Aristotle's policy on satisfactory progress parroted the language of an example proffered by its accrediting agency, ABHES, regarding the maximum time frame standard. It is also evident that ABHES's illustration for its members was drafted with the knowledge that the Federal government required that the policy must define a maximum time frame to complete the educational objective as opposed to simply set a time limit on eligibility for Title IV financial aid.

ED's position overlooks, however, the statements in Aristotle's catalog and the contract with each student which provided, in effect, that the course of study is for a fixed period of time, i.e. 28 weeks including the externship.See footnote 11 11/ Thus, Aristotle did, in fact, have an identified

maximum time frame for completion of the student's course of study. In any event, ED has not proffered the rational behind this specific regulation and none is readily apparent which would justify treating a deficiency such as this, even if it existed, as a significant matter in a disqualification or termination proceeding.

HEAF also determined that Aristotle's policy standard lacked a schedule identifying the minimum percentage of work which must be completed during each of the school's evaluation periods. Under Reg. § 668.14(e)(3)(iii), the standard for satisfactory progress includes the element of--

(iii) A schedule established by the institution designating the minimum percentage or amount of work that a student must successfully complete at the end of each increment in order to complete the educational objective, degree, or certificate within the maximum time frame.

Again, Aristotle's policy adopted the proposed model developed by its accrediting agency and provided for monthly reviews with minimum criteria of a grade average of 70% and an average monthly attendance of 75% of the classes. It appears that ABHES's model assumes that ED's authorization of increments "not to exceed one academic year" within Reg. § 668.14(e)(3)(ii) permitted an institution whose program was less than one year to have only one increment. While such a construction is a possible interpretation, it would defeat one of the purposes served by dividing the maximum time frame into more than one increment, namely, it encourages students to complete their program for which student aid has been provided and eliminates this aid where the students do not progress in an acceptable pace. Thus, in this regard, Aristotle's policy was deficient. However, at the same time, Aristotle had monthly reviews, established minimum criteria regarding grades and attendance which, if not satisfied, lead to probationary status and ultimately the withholding of financial aid. Thus, in all likelihood, these criteria eliminated most of the students who were not progressing at an appropriate pace.

Lastly, HEAF determined that Aristotle's policy failed to address the effect of a withdrawal, incomplete, and course repetition on the student's progress and his or her continued eligibility for financial aid. In addition, Aristotle's policy did not deal with the effect on progress of noncredit or remedial courses. Under Reg. § 668.14(e)(3)(vi), the standard for satisfactory progress includes the element of--

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

Here, these elements were omitted from Aristotle's policy of satisfactory progress. There is no evidence regarding the impact of this omission on the student financial aid program.

In summary, HEAF's determination regarding the deficiencies of Aristotle's policy of satisfactory progress is incorrect regarding the existence of an identified maximum time frame for completion of a student's course of study. HEAF's other determinations were correct, i.e. Aristotle's policy omitted a schedule identifying the maximum percentage of work which must be completed during each of the school's evaluation periods and failed to address the effect on a student's continued eligibility for financial aid of a withdrawal or incomplete in a specific course.

The deficiency with regard to the absence of the schedule identifying the maximum percentage of work had, in all likelihood, little impact. The absence of a policy dealing with the effect of withdrawals or incompletes in courses is more serious. However, absent other and more significant violations, this factor clearly does not warrant a disqualification on the ground that Aristotle lacked the administrative capability to administer the student financial assistance programs. Moreover, Aristotle has corrected these deficiencies and therefore this problem will not occur in the future.

HEAF determined that, with respect to student H.B., Aristotle had not followed its satisfactory progress policy. In this instance, HEAF found that H.B. had a below satisfactory average of 61% during her first month and had raised her cumulative average to 65% by the end of her second month which was still below the satisfactory level of 70%. In HEAF's view, H.B. should have been placed on probation after the first month and suspended from further participation in the financial aid program after the second month. HEAF determined that Aristotle did not suspend her from participation in the financial aid program as required. While she subsequently attended and failed two more modules and did not receive any more financial aid, HEAF's concern was that nothing in the school's records would have prevented her from receiving aid had she applied and otherwise been eligible.

The parties stipulated that R.B. was placed on probation, suspended, and readmitted due to reasons of satisfactory progress. Thus, HEAF's determination was in error.

Finding 4. HEAF determined that Aristotle responded inadequately to the lack of attendance by students, that is, it should have terminated the enrollment of students much earlier. In its view, a slow response to excessive student absences can lead to improper disbursements, unpaid and late refunds and results in the late notification of lenders and HEAF of the withdrawal of students. HEAF cited two instances involving students T.B. and J.W. in which it concluded that Aristotle should have followed up on the lack of attendance earlier.

Initially, the factual dispute between the parties is whether this purported lack of attendance extends to the two situations referred to in the reviewer's report or extends to include other situations. Aristotle argues that the finding is limited to the two situations and ED refuses to agree asserting "[t]he HEAF report does not state that its conclusion that the finding was based solely on the two students." As is evident from this finding as well as the other findings, the HEAF investigator- reviewer developed broad generalities based on a few, limited situations. There is nothing in the HEAF determination which indicates that the basis for this finding was more than the two instances cited. Accordingly, ED's argument is without merit and it is concluded that the determination was limited to the two instances.

Next, ED refuses to agree that Aristotle maintained attendance records and conducted follow up on cases of excessive absences during the period in issue. The basis for ED's refusal is that the stipulation entered into between the parties "is in the present tense and . . . does not suggest that it [Aristotle] maintained attendance records or conducted appropriate follow up at the time covered by the HEAF review. Thus, the HEAF program review finding remains uncontradicted." ED's semantical dance is rejected. Stipulations will be construed in a reasonable manner taking into consideration the nature of the conflict.See footnote 12 12/ Here, the potential controversy

centers on Aristotle's actions where students had excessive absences. Thus, it is concluded that Aristotle maintained attendance records and conducted follow up on cases of excessive absences during the period of the HEAF review.

Regarding T.B. and J.W., Aristotle admits that the two students should have been terminated earlier and the record reflects that they should have been contacted earlier by Aristotle to show cause why they should not be suspended from the program. Aristotle explains that its efforts were aimed at keeping the students enrolled rather than terminating them. While these views may be admirable, it is also incumbent upon the schools to police their programs in an appropriate manner. Where a student is not participating in the school's programs as required by its policy and suspension or termination is warranted, the school owes an obligation to respond in the proper manner. Two instances do not establish a pattern of conduct and, in this light, these violations are in and of themselves insufficient to warrant disqualification.

Finding 5. According to HEAF, there were 3 cases in which "the school did not have the [various] documentation readily available during the program review." In its view, "missing documentation is a serious problem and indicative of administrative weaknesses." In its view, this constituted a violation of Reg. §§ 668.14 and 682.610. The former provision requires an institution to allow ED access to the records required by the programs and the latter provision requires the institution to maintain various records.

The parties stipulated that "Aristotle did have copies of certain documents which HEAF indicated were missing but those documents were either not in the files reviewed by the reviewer or were in the files but were not seen by the reviewer." This reflects that, at best, there was apparently a lack of inquiry by the reviewer questioning the absence of the various documents and, at worst, a failure on the part of the reviewer to thoroughly examine the files. Thus, ED's position is not supported by the record.

Finding 6. According to HEAF, Aristotle improperly disbursed student loan funds to student Y.D. since there was no documentary evidence that she had demonstrated an ability to benefit from the school's program. In her situation, she received a failing mark on two occasions on the standardized entrance test. She was then scheduled to begin attending the school's academic assistance program in order to fulfill certain remediation requirements. However, there was no evidence in the file that she began the remediation courses. As explained by Aristotle to the HEAF investigator, the absence of documentation indicated that the instructor determined that it was not necessary for the student to actually participate in the academic remediation.

Based on the absence of documentation to show that a determination was made that she was not required to participate in the remediation program and the two failed attempts on the standardized entrance test, HEAF apparently concluded that Y.D. had not demonstrated an ability to benefit under Reg. § 668.7.

The ability to benefit requirement is applicable where a student does not have a high school diploma. Reg. § 668.7(a)(3). The parties stipulated that student Y.D. was admitted on her certification that she was a high school graduate and documentary evidence to this effect was

subsequently obtained before she graduated. Accordingly, Y.D. was an eligible student under Reg. § 668.7. Thus, the finding by HEAF and ED's position are without merit.

Finding 7. According to HEAF, there were five instances in which Aristotle did not obtain the necessary documentation to verify the student's dependency status. HEAF determined that each of the five students was classified as independent without sufficient information to verify that he or she was not claimed as a dependent on their parents' federal income tax returns.

A student is considered a dependent student unless he or she is an independent student under the criteria in Reg. § 668.1a. Reg. § 682.301(d). Under Reg. § 668.1a, a student is considered an independent student if he or she qualifies under Section 480(d)
of the Higher Education Act, as amended. Section 480(d)(2) provides that an independent student--

(F) is a single undergraduate student with no dependents who was not claimed as a dependent by his or her parents (or guardian) for income tax purposes for the 2 calendar years preceding the award year . . . or
(G) is a student for whom a financial aid administrator makes a documented determination of independence by reason of other unusual circumstances.

The parties stipulated that Aristotle had documentary material regarding federal income tax information for the student K.F. for 1987 and evidence of income for the student R.H. for 1986 and 1987, but that these documents were either not in the files reviewed by the HEAF investigator or were in the files but not seen by the investigator. Since the governing statute requires that the parents of the student not claim her as a dependent for the two preceding years, the documentary information for K.F. is insufficient for K.F. to claim independent status. With respect to student R.H., a similar result is in order. Here, the record does not reflect that there was documentary material in her file which indicated that she was not claimed by her parents in their federal income tax returns as a dependent. Therefore, it was not appropriate to process R.H. as an independent student. Aristotle concedes also that T.B. was classified as an independent student in error.

With respect to students T.B. and C.T., Aristotle treated these students as independent due to special conditions and filed special condition forms for each student. In these cases, as noted above in Section 480(d)(2)(G), the dependency matter is not a relevant factor. Thus, Aristotle's treatment was proper and HEAF's finding and ED's position is in this regard in error. Therefore, ED's position is sustained in three of the five instances.

Finding 8. According to HEAF, Aristotle failed to obtain financial aid transcripts for two students (K.F. and T.S.) in violation of Reg. § 668.19. Before disbursing proceeds under a GSL loan, Aristotle is required, under Reg. § 668.19(a), to obtain a transcript from each "eligible institution" attended by the student, i.e. each postsecondary school.

Regarding T.S., the parties stipulated that Aristotle was under no obligation to secure a transcript in her case since the previous school attended by T.S., Central Nine Vocational School, was an

institution that did not participate in Title IV student aid programs and therefore was not an eligible institution.

Regarding student K.F., HEAF's finding was that the school "did not obtain" the transcript. The parties stipulated that Aristotle obtained a financial aid transcript from the eligible institution. ED now argues that the stipulation "does not contradict the finding that Aristotle did not have the required transcript at the time of the review." As noted previously, stipulations will be interpreted in an reasonable manner by this tribunal. The fair and reasonable inference in this case is that the school had the transcript at the time of the investigation. Accordingly, it is concluded that Finding 8 by HEAF had no merit and therefore ED's position is rejected.

Finding 9. According to HEAF, Aristotle had "an unacceptably high 32%" default rate as of March 31, 1989, which was an indicator of a school's impaired capability of properly administering Title IV loan programs. HEAF admitted that Aristotle required its students to view a video on loan repayment in the exit counseling and this video met the Department of Education's minimum requirement for loan exit counseling. Yet, HEAF's determination inferred that additional, but undesignated measures were warranted in order to reduce Aristotle's default rate.

HEAF's determination involved Reg. § 668.15. It provides that where an institution has a default rate above 20 percent, the Secretary may require the institution to submit a profit and loss statement, balance sheet, or audit for its latest complete fiscal year and, after an examination thereof, may require the institution to take reasonable and appropriate measures to alleviate any condition which impairs its capability to administer the financial aid programs.

Initially, HEAF misconstrued the applicable regulation. Reg. § 668.15 addresses, by virtue of its focus on the financial statements, whether the high default rate has adversely affected the financial condition of the institution and therefore impaired its ability to administer the programs. Thus, in this context, the mere existence of a high default rate, without more, does not constitute a violation. HEAF should have, but failed, to move on to the next phase required by the regulation, namely an examination of Aristotle's latest financial statement. Thus, HEAF's determination lacks any support for its termination decision and it offers no support in this disqualification action.

In addition, Aristotle disputes factually HEAF's determination of a 32% default rate. The HEAF report does not indicate the source of the default rate or manner in which the default rate was calculated. The parties stipulated that Aristotle's cohort rate for fiscal year 1988 was 20.8%. This was the most recent fiscal year at the time of the HEAF review. While this unexplained discrepancy bears on the overall credibility of the HEAF investigator as does the other findings which are not supported by the record, it does not dismiss the applicability of Reg. § 668.15, since it applies to any institution whose default rate is in excess of 20%. However, as noted above, HEAF failed to pursue the second stage required by the regulation. It is appropriate to disregard this determination as it is incomplete and, therefore, defective.

HEAF also asserted in Finding 9 that one student, L.E., was not provided loan exit counseling. The parties stipulated that this student received an exit interview. Thus, Finding 9 proffers no

support to justify a disqualification of Aristotle's eligibility to participate in the student financial assistance programs.

Finding 10. According to HEAF, Aristotle failed to retain, in its student's file, the need analysis document reflecting the school's determination of the family contribution figure for two students (J.B. and P. Grubb.). In addition, Aristotle failed, in one instance (B.S.), to use the correct methodology for the need analysis calculation as it used the prior year's method rather than the newly revised method.

The parties stipulated that Aristotle had the need analysis documentation for the above two students in the student file with the award package and that these documents were either not in the files reviewed by the reviewer or were in the files but not seen by the reviewer. This reflects that, at best, there was apparently a lack of inquiry by the reviewer questioning the absence of the need analysis documents or at worst, a failure on the part of the reviewer-investigator to thoroughly examine the files. Thus, ED's position is in error in this regard.

Regarding the use of the methodology to compute the family contribution figure for B.S., Aristotle admits that it used the incorrect methodology. It used the methodology applicable for the loan period immediately prior to July 1, 1988, for a loan commencing in August 1988 rather than the newly revised method. This error was caused by the fact that it did not have the newly revised Congressional methodology on a computer disc. Aristotle did recalculate the need of B.S. using the correct methodology; however, the record does not indicate when or whether it made any difference.

Finding 11. According to HEAF, it noted "concern" that the school does not have written policies and procedures for the verification of students' information which was required as of July 1, 1986, by Reg. § 668.53.

The parties stipulated that Aristotle had its own internal policies and procedures for verification of student information under Reg. § 668.53. These policies and procedures are contained in Aristotle's financial aid manual.

ED argues that Aristotle has not established that the manual was being used at the time of the review by HEAF. However, this factual argument is rejected. The tribunal's findings are based upon the record. This includes the stipulation and the normal inferences flowing therefrom, namely that all facts set forth therein are pertinent to the period in issue unless specifically stated otherwise. Accordingly, it is concluded that HEAF's finding and ED's position are in error inasmuch as Aristotle had a written policy and procedure for the verification of student information.

Finding 12. According to the HEAF report, Aristotle did not have a Pell Grant calculation in the file at the time of the loan application for P. Grubb was certified. The parties stipulated that Aristotle "had the Pell Grant calculation information [of P. Grubb] on file" (Jt. Stip. Para. 32) and accordingly, the information was present at the time of her certification. Thus, HEAF's finding and ED's position are erroneous.

Finding 13. According to HEAF, Aristotle failed to obtain certified information regarding the income status of two students for purposes of determining the student's loan eligibility as required by Reg. § 682.301(c). As indicated in the HEAF report, the only documentation in P. Grubb's student file was an unsigned schedule B obtained from her Federal income tax return. In the other case, T.R.'s loan eligibility was calculated using her parents' income which was not certified.

Under Reg. § 682.301(c)(1), "[t]he institution shall determine the adjusted gross family income of the student's family based upon data provided, and certified to, by each person whose income is required to be considered."

The parties stipulated that P. Grubb's husband signed the certifications attesting to the accuracy of loan eligibility information, the verification worksheet and the student aid report. In addition, Mr. Walker, President of Aristotle, stated under oath that "Aristotle certificied [sic] the student's eligibility based on certifications of Ms. Grubb and her husband." Based on this record and the weight of the evidence, it is found that Aristotle had a certification attesting to the accuracy of P. Grubb's loan eligibility at the time of her attendance at the institution. Therefore, Aristotle was in compliance with Reg. § 682.301(c) regarding P. Grubb.

The parties stipulated that T.R.'s file does not contain a written certification from her parents regarding the accuracy of the income information and that her mother was present during the completion of the income information in the offices of Aristotle and made oral representations regarding the accuracy of the financial data. Aristotle certified her eligibility based on her mother's representations.

ED argues that Reg. § 682.301 does not authorize oral certifications. While the regulation requires that a student submit an application to the lender and that the application must include a certification from the student's institution regarding the student's adjusted gross family income and other information, Reg. § 682.301 is silent whether the financial information relied upon by it can be certified in writing or orally. The regulation provides only that the adjusted gross family income determination is made by the institution "based upon data provided, and certified to, by each person." While the construction proffered by each party is feasible, i.e. certification orally or in writing, one of the underlying functions of the regulations is to provide a means for auditing the activities of the institutions. In this regard, the written form is most definitely preferred as it leaves a paper trail. Accordingly, a reasonable construction of the regulation requires that the institution should receive these certifications in written as opposed to oral form. Under this view, Aristotle was not in compliance with the regulation in this one instance. However, there is no evidence that the student was not eligible to receive the interest benefits, and therefore, there does not appear to be any harm suffered by the student, the guaranty agency, or ED as a result of this occurrence.

Finding 14. HEAF determined there was one instance involving student A.H. in which the beginning of the student's loan period did not match the actual starting date of the program. In its view, a student's loan period must correspond to an academic period and, therefore, the beginning date of the loan period should correspond to the student's actual starting date.

The parties stipulated that the loan period, as determined by Aristotle, was correct inasmuch as A.H. was enrolled on December 4, 1987, and attended classes during that month. Accordingly, HEAF's conclusion and ED's position are in error.

Finding 15. HEAF determined that Aristotle reported inaccurate information regarding the enrollment status of two students to the lender. Aristotle reported the students' graduation dates as the dates the students completed their final written examinations rather than the dates they completed their externship programs. The effect of this inaccuracy status is that the student was prematurely placed into repayment status. With respect to student M.R., she completed her externship program 30 days after her written examination and, with respect to student D.H., she completed her externship program within 80 days after her written examination.

Aristotle admits an error was committed in both situations and has modified its student information system to prevent this problem from occurring in the future.

Finding 16. HEAF determined that Aristotle had failed to respond "on several occasions" prior to the review to requests for information from HEAF concerning whether a borrower's account was handled properly. In its view, "this failure to acknowledge HEAF's inquiries indicates a lack of administrative capability under . . . Reg. § 682.14 (sic)."

HEAF's finding is a generalization which is not supported by any specific evidence of HEAF's inquires or Aristotle's failure to respond properly. Although ED had ample opportunity to supplement the record in this proceeding and provide specific instances of misdoings, it proffered no additional evidence. Thus, the finding is not supported by any facts established in this proceeding and, accordingly, it is rejected.

As is evident from the above analysis, it is clearly inappropriate for ED to disqualify Aristotle from participation in the guaranteed student financial assistance programs.See footnote 13 13/

III. CONCLUSION

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

ORDERED that the request by the Office of Student Financial Assistance to disqualify Aristotle from participating in the guaranty student loan programs administered by the guaranty agencies is denied; and it is further

ORDERED that this matter is dismissed with prejudice.

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

Issued: August 21, 1991
Washington, D.C.

SERVICE

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On August 21, 1991, a copy of the attached decision was sent by certified mail, return receipt requested, to the following:

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Footnote: 1 1/ To the extent that proposed findings of fact or conclusions of law by a party have not been adopted in this decision, they are rejected as being inaccurate or unnecessary to the disposition of this case.

Footnote: 2 2/ Where material facts are in dispute between the parties regarding the 16 "Findings" by HEAF, these matters are addressed in the opinion, infra.

Footnote: 3 3/ This amount was due as a result of a recalculation of the refund.

Footnote: 4 4/ ED's position has vacillated. Its original position was based on a November 1987 "Dear Guarantee Agency Director" letter. According to ED, ED's review of the guaranty agency's action was limited under these sections to an appellate type review of HEAF's determination, that is, it is--

1. whether the factual conclusions by the agency are clearly erroneous based on the information possessed by the agency;
2. whether the action was based on the correct application of the law;
3. whether the action involved an abuse of discretion by the agency based on the information possessed by the agency; and
4. whether the agency's procedures and standards were substantially the same, i.e. not more onerous, as ED's procedures and standards under the Federal Insured Student Loan program.

Earlier in the proceeding the parties presented the tribunal with the question of whether the tribunal functions in this proceeding as a factfinder or as an appellate reviewer. On April 19, 1990, the tribunal held in favor of Aristotle, namely that the nature of the proceeding required an evidentiary hearing under the Administrative Procedure Act, 5 U.S.C. §§ 556 and 557 as opposed to an appellate type hearing. In re Aristotle, Dkt. No. 89-35-S, U.S. Dep't of Education (Order).

Subsequently on September 26, 1990, ED filed a motion in limine to preclude the receipt of evidence from Aristotle in the forth coming hearing. While not articulated in its motion, it is now readily apparent that the basis of ED's position therein reflected a drastically altered legal position which abandoned, apparently, its appellate type review position in favor of its present position. In re Aristotle, Dkt. No. 89-35-S, U.S. Dep't of Education (Order Oct. 26, 1990).

Footnote: 5 5/ For example, Section 556(c) provides that administrative law judges "presiding at hearings may" administer oaths, rule on offers of proof and receive relevant evidence, and regulate the course of the hearing. Section 556(d) designates the "proponent" of an order as the party bearing the burden of proof, a standard which is applied in a trial context and inapposite in a purely comparative analysis of rules as presently advocated by ED or in an appellate type context as previously advocated by ED.

Footnote: 6 6/ As a matter of administration, ED has not followed this narrow view of limited review. ED's notice of disqualification to Aristotle reveals a much broader review than ED currently advocates and is therefore inconsistent with this position. (Finding 14.) Moreover, following Aristotle's request for a hearing before the Department, ED also submitted materials received from Aristotle to HEAF for its reconsideration, an action inconsistent with its proposed limited review. (Finding 16.)

Footnote: 7 7/ The inability of a school to challenge,in any manner, the findings and substantive interpretations by the guaranty agency before the Department assures that the disqualification process before the Department is futile. Moreover, the purpose of the legislation was to require the Department to consider disqualification as a result of the action by a guaranty agency, not to bind the Department to the possible irrational or unsupported decision reached by the agency as is possible and is illustrated by the case at bar, infra. The tribunal's position allows the guaranty agency to decide the institution's fate as it sees fit and, yet, permits the Department the latitude to make an independent judgment which will then affect the other guaranty agencies under the program which the Department administers. This is not to imply that the record before the guaranty agency is meaningless. The record or any part thereof may be offered as evidence in the present proceeding by either or both parties.

Footnote: 8 8/ This matter is more fully discussed in In re Aristotle, (Order Oct. 26, 1990).

Footnote: 9 9/ The standard employed by the tribunal for rating the nature of the violations was as follows: 1 = minimal violation; 2 = minimal-to-moderate; 3 = moderate; 4 = severe; 5 = very severe.

Footnote: 10 10/ Under Reg. § 682.605(b)(1) (1988), the student's date of withdrawal is the earlier of the date the student notifies the school of his or her withdrawal or the date of withdrawal as determined by the school.

Footnote: 11 11/ This period may be extended at no cost to the student where the student's rate of learning necessitates additional time and attention and provided the student maintains a receptive attitude and makes an honest effort.

Footnote: 12 12/ Thus, absent a specific reference to the contrary, all matters in the stipulation are regarded as pertinent to the underlying merits of the controversy.

Footnote: 13 13/ In its findings, HEAF relied upon the then current regulations of the Department, 34 C.F.R. Parts 668 and 682 (1988), as the substantive rules governing its program review of Aristotle. These regulations, including the standards for participation in Title IV programs in 34 C.F.R. Part 668, Subpart B, are not significantly different than the regulations in effect as of January 1, 1985. Substantive changes in the Guaranteed Student Loan Program over the years are, as expected, reflected in the regulations through additions, deletions, and modifications to the regulations as are appropriate. HEAF's procedural rules for termination are similar in most respects to the Department's regulations governing termination proceedings; however, HEAF's rules do not indicate that an adverse termination decision by it will result in a subsequent disqualification action by the Department and that, in that action, the Department will consider the facts and substantive determinations made by HEAF as conclusively established. In this respect, there is a significant difference between the rules of the two organizations; however, HEAF's rules are not more onerous than the Department's regulations.

Lastly, Aristotle argues that ED failed to establish that HEAF acted properly through its "designated official" and that ED's Deputy Assistant Secretary for Student Financial Assistance had been delegated the authority by the Secretary to initiate the disqualification action. The record was closed on February 21, 1991. Aristotle raised this argument for the first time in its brief filed on March 22, 1991, some 30 days after the record was closed. Accordingly, its argument is rejected as it was raised too late in the proceeding.