IN THE MATTER OF SOUTHERN VOCATIONAL COLLEGE,
Respondent.

Docket No. 90-41-ST

Appearances: Linda Henderson, Esq., Tuskegee Institute, Alabama

Carol Bengle, Esq., United States Department of Education, Washington, D.C.

Before : Judge Daniel R. Shell

DECISION

Background

On July 17, 1990, the United States Department of Education (Education) issued a notice of intent to terminate the eligibility of the Southern Vocational College (Southern) of Tuskegee, Alabama, from participation in programs authorized under Title IV of the Higher Education Act.See footnote 1 *1* The programs include: Pell Grant - 20 U.S.C. § 1070a; Perkins Loan - 20 U.S.C. § 1087aa; College Work Study - 42 U.S.C. § 2751, Supplemental Educational Opportunity Grant - 20 U.S.C. § 1070b, and the Guaranteed Student Loan Programs - 20 U.S.C. § 1071, 20 U.S.C. § 1078-2, and 20 U.S.C. § 1078-1.See footnote 2 *2* Education also indicated an intention to fine Southern $500,000.

Education notified Southern that its action is based upon the following twelve violations:

1. Failure to demonstrate administrative capability, in violation of 34 C.F.R. §§ 668.14 and 668.15 (l988).

2. Failure to properly account for Federal funds received, in violation of 34 C.F.R. §§ 675.19 (1988) and 690.81 (1985);

3. Failure to act-as a fiduciary, in violation of 34 C.F.R. § 668.82 (1987);

4. Failure to make timely refunds under the Guaranteed Student Loan Programs, in violation of 34 C.F.R. § 682.607 (1987);

5. Withholding student funds without proper authorization, in violation of 34 C.F.R. §§ 682.604(d)(ii) (1987), 690.78 (1988);

6. Retaining Pell Grant funds for students no longer enrolled at the institution, in some cases for several months after the student was no longer enrolled, in violation of 34 C.F.R. § 690.78 (1988);

7. Disbursing Pell Grant payments to students who have not completed the payment period for which they have previously received Pell Grant Funds, in violation of 34 C.F.R. § 690.75(a)(iii) (1985);

8. Charging students a fee for processing Pell Grants, in violation of 20 U.S.C. § 1094(a)(2) and 34 C.F.R. § 668.12(b)(2)(iii) (1988);

9. Failure to adopt and apply an adequate satisfactory progress policy, in violation of 34 C.F.R. §§ 668.14(e) (1988), 668.16(e) (1984), and 668.43(c)(2) (1987);

10. Failure to properly identify Federal funds accounts, in violation of 34 C.F.R. §§ 690.81(b) (1985), 674.19 (1981) (updated 1988), 675.19 (1981)(updated 1988), and 676.19 (1981)(updated 1988);

11. Permitting bank service fees to be paid from a Federal funds control account, in violation of 34 C.F.R. § 668.16 (1988)

12. Failure to obtain and keep current adequate fidelity bond coverage, in violation of 34 C.F.R. §§ 668.15(f) (1981), 668.13(g) (1988).See footnote 3 *3*

To support the twelve allegations above, Education included in the notice the following program review reports: November 28, 1989See footnote 4 *4* , December 14, 1987See footnote 5 *5* , November 21, 1986See footnote 6 *6* , February 3, 1986See footnote 7 *7* and April 20, 1983.See footnote 8 *8* The 1989 program review covered the award years 1987-88 and 1988-89. The December 1987 review was for the 1986-87 and 1987-88 award years. The November 1987 program review does not specifically state what award year was covered. The February 1986 program review examined the period of July 1, 1983 to June 30, 1985. Finally, the April 1983 review covered the period of July 1, 1980, to June 30, 1982. The notice states:

The violations by Southern Vocational College were identified in a program review conducted by the Atlanta Regional Office of ED on July 17-21, 1989, the results of which were reported to the College on November 28, 1989. This program review is enclosed as Enclosure 1 to this notice and is incorporated by reference. Certain of the violations identified in this program review report are repeat violations, that is violations identical to or substantially the same as violations that occurred in previous years and that were identified in previous program reviews. Therefore, four earlier program reviews are also enclosed and are incorporated by reference.See footnote 9 *9*

In a special oral argument hearing held November 29, 1991, counsel for Education was asked about the significance of the inclusion of Education exhibits A-2, A-3, A-4, and A-5, the December 1987, November 1986, February 1986, and April 1983 program reports. Counsel responded:

[W]hat we're looking at is primarily repeat violations and that the earlier program reviews would be evidence the school has previously received notice that certain violations occurred and had been told to correct the violations . . . .[T]he program review process will ultimately result in

either a closure or a final program review determination . . . So I think you [the judge] do have to look at the specific findings in the earlier program review and see that indeed they were cited and that notice was given as a matter of fact so that you can then say it's a repeat violation.See footnote 10 *10*

Education counsel was asked: "Is a program review ever final? Is there any finality to the process?" Her response was: "I think at some point it would be within the judge's discretion to say that's an unreasonable action on the part of the Department . . . ."See footnote 11 *11* It is also significant that counsel for Education in a June 11, 1991, post-hearing brief commented further on the relevance of the previous years program reviews:

At the conclusion of the program review process, OSFA (Office of Student Financial Assistance) issues a closure or a final determination letter. This letter notifies the institution of any financial liabilities that must be repaid. An institution dissatisfied with the final determination may appeal that determination and obtain a hearing on the record under 20 U.S.C. § 1094(b).

OSFA's acceptance of corrective action or its closure of a review should not be confused with excusing the violations that occurred. The closure of a review simply means that all findings have been addressed and that any financial liabilities resulting from the liabilities have been identified. OSFA has the authority to and does frequently initiate limitation, suspension, or termination proceedings under 20 U.S.C. § 1094(c)(1)(d) and/or civil penalty (fine) proceedings under 20 U.S.C. § 1094(c)(2)(B)(i) before the program review process has run its course. (Emphasis added). In addition, OSFA has authority to and frequently does base these enforcement actions upon program review findings that have been closed.See footnote 12 *12*

Education counsel provided no basis for the statement that OSFA has the authority to bring enforcement actions based upon a program review that has been closed.

The parties stipulated that Education did not answer Southern's responses to the 1989 program review. Stipulation 58: "Prior to Ed's termination action of July 17, 1990, Ed had not written to SVC acknowledging receipt of, or otherwise correspond with SVC concerning, SVC's February 1990See footnote 13 *13* and April 1990See footnote 14 *14* responses to the 1989 program review." Mr. Ronald Lipton admitted that he had not seen either of the two responses prior to his recommendation to Molly Hockman to sign the termination letter which initiated this review.See footnote 15 *15* In addition, Mr. Lipton said that a member of his staff prepared Education exhibit A, the July 17, 1990 letter from Education which initiated this action. He referred to the exhibit as follows: "This is a letter that was approved by a member of my staff. I approved the letter gave it to my supervisor Molly Hockman to sign, which she did. "See footnote 16 *16*

Method of Discussion

The allegations are divided into general violations and specific violations. The specific violations numbered 4 through 12 require the occurrence of a distinct set of circumstances. The first three violations are primarily based upon specific actions found in one of the violations numbered 4 through 12. The discussion begins with the findings four through twelve. The

general violations, one through three, will be discussed later. To more fully understand the violations listed, Education stated the following in note 2 of the notice:

The citations to the Code of Federal Regulations (CFR) used herein correspond to the volumes in which the Federal Register notices cited in the program review report were first published. The following sections of this notice, the references to the year of publication are not included in the CFR citations, except where necessary for clarity.

After each of the twelve violations, the notice refers to the year "in which the Federal Register notices" were first published. For instance, finding one states: "Failure to demonstrate administrative capability, in violation of 34 C.F.R. 668.14 and 668.15 (1988)."See footnote 17 *17* While the notice refers to the date a regulation was first published, it is noteworthy to state that the violations cited by Education are considered in light of the regulations in effect at the time of the alleged violation. In the Matter of Temple University, Docket No. 89-26-S, an Education final decision issued March 13, 1990, the Secretary ruled as to which regulations are to be applied in a dispute before the Department of Education. The Secretary held: "[T]he regulations in effect during the period in issue govern."See footnote 18 *18*

This decision discusses each finding in three parts: section A. Statement of the Facts, section B. Regulatory Violation, and section C. Discussion and Finding.

Failure to make timely refunds under the Guaranteed Student Loan program - Finding four of the notice

A.

Finding four is based upon four factual situations: 1) the 1989 program review identification of the Love and Bryant cases, 2) the 1989 program review follow up identification of the [student name] circumstance, 3) the six refunds listed in stipulations 31, 32, 33, 35, 36, 37, and 38, and 4) the 1987 program review identification of [student name] and [student name] cases.

First, the notice incorporated language from the 1989 program review: "A sub-sample of five student folders was reviewed to determine if refunds had been made on a timely basis." In two of the five cases, the refunds were not made within 30 days. Mentioned in the 1989 program review for the 1987-88 award year were [student name] and [student name]. In both stipulation 29 and the program review, specific facts were provided: 1) that the date of last attendance of student #1A, [student name], was 12-1-87 and 2) that a GSL refund of $1400 was made on 7-20-88. Stipulation 30 states that student #1B, [student name], last attended Southern on 12-1-87 and a GSL refund of $155 was made to him on 7-20-88.See footnote 19 *19* Education admitted:

[O]n this particular finding, . . . the parties . . . are prepared to stipulate that the 1989 program review sites (sic) two instances of untimely payment of refunds, and that both of those instances were part of a follow-up to the '87 . . . program review . . . .[T]he school was told to go back and look at all . . . records and identify any other examples of untimely payment of refunds . . . The two who are cited in the '89 program review were students whom the school had previously identified and paid . . . refunds to in response to the '87 review . . . . [W]e are prepared to

stipulate that had the reviewers known of that fact when they were on site, they would not have cited them in the '89 report. . . .When the program reviewers went in and . . . picked out files to look to see if there were untimely refunds, they pulled up two files and found untimely refunds . . . . They didn't know that these were the very same files that in response to a prior review the school had already gone through and corrected. They wouldn't have said it is another violation . . . . They would have considered it part of the follow-up to the earlier program review . . . . So while it . . . wouldn't have been a basis for a finding in the '89 program review report, it would still be a basis for the termination action based on the 1987 program review and follow-up.See footnote 20 *20*

Counsel for Southern asked Nancy Mapes, the author of the 1989 program review:

[I]f you had known, at the time you were writing your program review report, that these two specific students had been refunded as part of the follow-up process from a prior program review, would you have made this finding number four? Nancy Mapes response was: "No"See footnote 21 *21*

Second, as part of the 1989 program review, Education required Southern to review its 1987-88 and 1988-89 award year files to determine the timeliness of the refunds. Southern exhibit M, an unsigned letter dated September 5, 1990, from the President of the school, was submitted to Education as a final response to the November 28, 1989 program review finding number four. In the letter; Southern admitted that a review of their files revealed that in the 1987-88 and 1988-89 award years one student, Mary Adams, had not been paid a refund at the time of their review. Stipulation number 34 states: "On 9/5/89 SVC paid a $1750 GSL refund for Mary Adams, whose last day of attendance was 1/12/89 and whose refund was required to have been paid by 2/11/89." No additional evidence was introduced.

Third, Education pointed to stipulations numbered 31, 32, 33, 35, 36, 37, and 38 as additional proof that Southern made untimely refunds.See footnote 22 *22* Those stipulations establish six refunds paid on July 20, 1988, and one payment on September 5, 1989.See footnote 23 *23* All payments were made more than 30 days after the students last date of attendance. The source of the information is not identified in the stipulations, but Southern exhibit M at 3 lists the same individual student loans.See footnote 24 *24* In Southern exhibit M, Southern admitted that the seven students' refunds were not timely made. It also asserted that the seven GSL refunds were resolved with prior program review responses. Southern stated: "These students were refunded earlier and were considered in a previous program review which covered part of the same time, (some (sic) award years)."See footnote 25 *25*

Fourth, Education relied on the December 1987 program review. The notice, in referring to the 1987 program review, states: "[T]he College was found not to have calculated or paid refunds due to the two students in the review sample who were due refunds."See footnote 26 *26* The 1987 program review alleges no finding entitled "Untimely refunds under the Guaranteed Student Loan Program." The 1987 report, under the section entitled "Refund Policy Not Applied," however, identified two students, Diann Davis and Mary Ann Yancey, whom Southern failed to properly calculate a refund after the student's withdrawal in the fall of 1987.See footnote 27 *27* Other than the statement in the 1987 program review finding, Education provided no

information on the miscalculation of a refund in the Yancey case. Stipulation number 23 states that Diann Davis received from Southern $1050 in Pell Grant funds on about September 2, 1987. The stipulation further admits that the student was not eligible to receive the money based on the number of hours of training completed. There is no evidence of the receipt of the money being an untimely refund. Southern provided no information to support or to reject Education's assertions.

B.

The notice refers to untimely refunds in the 1989 and the 1987 program reviews. The school is charged with violating 34 C.F.R. § 682.607 (1987). Since the period at issue is 1987-88 and 1988-89, the appropriate Guaranteed Student Loan regulatory language found at 34 C.F.R. § 682.607(c), effective November 10, 1986, is applicable: "A school shall pay a refund that is due (1) Within 30 days after the date of the student's withdrawal from the school . . . or (2) in the case of a student who does not return to school at the expiration of an approved leave of absence . . . . within 30 days after the last day of that leave of absence."

C.

In order to prove a violation of 34 C.F.R. § 682.607, Education must show that Southern failed to pay Guaranteed Student Loan refunds within 30 days after a student's withdrawal from the school or within 30 days of the student's last day of a leave of absence. The facts, herein, present four separate fact situations.

The first fact pattern originates from the 1989 program review. It only identified untimely refunds for [student name] and [student name]. Southern admitted in stipulations 29 and 30 to the truth of the untimely nature of the GSL refunds to [student name] and [student name], but asserted that they had resolved all problems with the 1987 program review. Education counsel admitted that the untimely nature of these two refunds had been reported and resolved in the 1987 program review. In fact, counsel stated: "[w]e are prepared to stipulate that had the reviewers known of that fact when they were on site, they would not have cited them in the "89 report."See footnote 28 *28* Furthermore, counsel's assessment of the validity of a repeat violation of the "refund within 30 day" rule based upon the same facts and circumstances would be barred by the previous action taken in the 1987 program review. The untimely refunds to [student name] and [student name] could not become a repeat violation by the mere restatement of the same facts. It is especially significant in light of the fact that the school made an adjustment. Therefore, one cannot find that the 1989 [student name] and [student name] allegation are current examples of untimely refunds.

Both Southern and Education admitted that the [student name] and [student name] situations were a part of the 1987 program review. Therefore, could the admission serve as a basis for finding four of the notice to terminate and fine, even though neither the notice to terminate and fine, nor the 1987 program review specifically cited Southern with untimely refunds to the two students? To answer this question, one must resolve three other matters. First, one must decide if the termination and fine action is limited-by a lapse of time between the occurrence of the facts and the charge by Education. Second, one must decide if a previously closed program review precludes Education's use of facts from a "closed" review as a basis for a current action. Third,

one must decide if information received from an erroneously generated 1989 program review demand could be used to prove the same allegation or if the subsequently received information is poisoned by the faulty basis that originated the demand.

The action to terminate and fine Southern is taken in accordance with the regulations under 34 C.F.R. § 668.86. Section 668.86 does not limit the actions of the institution to any specific time frame. The regulation only requires the Secretary to "identify the alleged violations which constitute the basis for the action." 34 C.F.R. § 668.86 (b)(i). There is no mention in the regulation of a time limit on the use of facts which form the basis of an action to terminate and fine. In addition, the regulation does not bar the action because the source of the facts arose in a "closed" program review. Education, unless it agrees otherwise, may use information from a "closed" program review to initiate and support an action to terminate and fine. .Here, there is no evidence of an agreement which would prevent Education from bringing the action. While an institution may expect some form of finality in a "closed" program review, the regulations do not so provide. Therefore, even though the 1987 program review was "closed," the regulation does not restrict Education's use of the facts from the 1987 program review to prove finding four of the notice to terminate and fine. Next, even though the notice relied upon the allegation in the 1989 program review which was admittedly charged in error as a duplicitous action, the improper action in the 1989 program review is not cause to require a denial of the existence of the fact that the parties have stipulated that Southern did cause an untimely refund to take place, even though the matter was resolved in an earlier program review. Therefore, one must find that Southern did cause an untimely refund to [student name] and [student name] based upon the facts in stipulation 29 and 30.

The second set of fact" is based on Education's reference to the [student name]'s situation. Southern's indication, in its exhibit M, to [student name] not receiving a GSL refund at the time of their review must be taken in conjunction with stipulation 34. Stipulation number 34 states: "On 9/5/89 SVC paid a $1750 GSL refund for [student name], whose last day of attendance was 1/12/89 and whose refund was required to have been paid by 2/11/89." The statement is an admission by the institution of a late refund being made by the school to [student name]. Education provided no other evidence of an untimely refund to [student name]. Neither the notice to terminate and fine nor the 1989 program review report makes a reference to [student name]. The first time that [student name]'s name appears in the record is found in the September 5, 1990, Southern response-to the November 28, 1989, program review. The September response came approximately two months after the notice to terminate and fine the institution. It is also significant that Education admitted that it would not have instituted the finding had it been aware that the [student name] and [student name] situations were properly considered and closed in the 1987 program review. Therefore, the [student name] case would not necessarily have been discovered had the evidence not been received as a result of an improper action on the part of Education.

Should Education be permitted to benefit from evidence improperly received? Should Education be permitted to make an allegation without foundation which permits it to embark on a fishing mission or to require an institution to engage in the additional program review expense without any specific proof of a charge? One must decide if the information received in a response to a flawed 1989 program review of the [student name] and [student name] allegation

could be used as evidence of the [student name] untimely refund. Even though Education's method in the presentation of the evidence is awkward, it matters not. The evidence is jointly submitted and accepted. Furthermore, it is clear - Southern admits that it made an untimely GSL refund to [student name].

The third fact pattern was presented by the parties on untimely refunds in the stipulations 31, 32, 33, 35, 36, 37, and 38. The stipulated facts are not part of the 1989 program review nor identified by Education as being part of another program review. However, Southern, in its exhibit M, submitted to Education on September 5, 1990, provides unrefuted evidence in its response to finding four that the seven students mentioned had been the subject of previous program reviews. This is not a new set of circumstances reported in the current notice. Like the [student name] case discussed above, these cases are reported by Southern to Education as a result of the 1989 program review response. Stipulation 31 concerning [student name] admits that a GSL refund was made late. Stipulation 32 admits that a GSL refund was made late to [student name]. Stipulation 33 admits that a GSL refund was made late to [student name]. The admissions concerning GSL refunds to [student name], [student name], and [student name] are jointly admitted for consideration by the parties. Each admission is proof that untimely GSL refunds were made to the three students. Stipulations 35 through 38 do not, however, identify what kind of refund was made. Education provides no other evidence concerning the type of student program for which a refund was paid. Therefore, it cannot be found that an untimely refund of a Guaranteed Student Loan was made to the students named in stipulations 35 through 38.

The last factual circumstance identified that Education relied upon for untimely refunds is the 1987 program review. The circumstances do not provide support for untimely refunds. It identified two students, [student name] and [student name]. In [student name]'s case, Education relied upon the naked statement in the program review with no reference report or other supporting evidence. The statement in the program review is a mere allegation. Furthermore, the allegation here provided no additional information upon which Education bases its claim. Not only can Southern not adequately defend against an unsupported allegation, but the trier of the fact cannot examine the foundation used by the program reviewers to make their conclusions contained in the report. A mere allegation is insufficient to establish a fact. Therefore, the claim based upon the [student name] case fails for insufficient evidence.

In the [student name] case, Education offered the evidence found in stipulation number 23: "SVC disbursed to [student name] on or about 9/2/87 $1050 in Pell Grant funds that he was not eligible to receive based on the number of hours of training completed." This stipulation does not support an untimely refund; it provides evidence of a premature Pell Grant. A premature Pell Grant, however, is not the allegation drawn in finding four. Finding four is a charge based upon untimely refunds under the Guaranteed Student Loan program. Education charged a violation of the wrong regulation. In short, the circumstances alleged in the 1987 program review fail to support a finding of untimely refunds.

Except for the [student name] admission, the 1989 program review does not prove any new violations; however, Education was able to provide evidence of violations from its previously considered program reviews. The events presented by Southern provide, however, certain

mitigating circumstance for the tribunal's consideration. The 1987 program review was closed. Southern exhibit W is a "Final Summary Letter" from Judith Brantley, Chief of the Atlanta Institutional Review Branch. Ms. Brantley stated:

Your response dated September 28, 1988 to the November 30 - December 3, 1987 program review has been received and evaluated. I am pleased to report that the information furnished satisfactorily responded to the remaining open review findings . . . This review will be considered closed upon receipt by Mr. Pouncey of documentation evidencing payment of this liability.See footnote 29 *29*

Lawrence Haygood Jr., on November 17, 1988, mailed a cashiers check to Mr. Pouncey for $565.35.See footnote 30 *30* There is no evidence from Education to refute Southern's payment. One, therefore, concludes that the 1987 program review was closed. According to the words of Ms. Brantley, it became final "upon receipt by Mr. Pouncey of the documentation evidencing payment of this liability." There were no outstanding issues or violations. Whatever discrepancies that may have existed at the time of the 1987 program review were cured. If the school had not made a refund, a violation would have continued to provide the basis for a violation of the regulations. That was not the case, however, the school had, as part of the previous program review, complied with the action requested by Education. As a result, it remedied the violation.

In conclusion, Education proved some elements of the charge of failure to make timely refunds under the Guaranteed Student Loan program. First, it is found that stipulations 29 and 30 admit that Southern made untimely GSL refunds to [student name] and [student name], even though both parties acknowledge that the two student files had been corrected before the 1989 program review was completed. Second, it is found that stipulation 34 admits Southern's GSL refund to [student name] in September 1989 was untimely, even though the basis for the 1989 program review demand was flawed by recharging the [student name] and [student name] situations after the 1987 program review closed the matters. Third, stipulations 31-33 and 35-38 contain Southern's admissions of untimely GSL refunds to [student name], [student name], and [student name]. Fourth, Education failed to show that the [student name] and [student name] cases were untimely refunds. There is no evidence in [student name]'s case of any kind to support the claim. The only evidence submitted in the [student name] cases tends to show a claim for premature Pell Grant payments. Education was not able to support any other allegations of untimely GSL refunds. In mitigation, with the exception of the [student name] admission, all of the untimely GSL refunds had been reported in prior program reviews and were finalized by "closed" reports.

Withholding student funds without authorization - Finding Five of the notice

A.

Finding five of the notice states: "Institutions are not permitted to retain Pell Grant or campus-based program funds in excess of amounts currently due to the institution. "See footnote 31 *31* It claims that "[i]n the 1989 program review, the reviewers found that the College had routinely credited awards to students' accounts in amounts exceeding unpaid charges owed to the college.

The College was cited for the same violation in the 1987 program review."See footnote 32 *32* The 1989 program review at finding nine provided the basis for finding five of the notice with the following:

LISTING OF STUDENTS WITH RETAINED CREDIT BALANCES

| Student | Title IV Program Causing Credit Balance | Range of Outstanding Credit Balance | Credit Balance |
|---|---|---|---|
| 1 | Pell, SEOG | 10/27/88-01/04/89 | $ 600.00 - $ 1075.00 |
| | | 04/03/89-06/26/89 | $ 74.50 - $ 824.50 |
| 2 | Pell | 12/22/87-03/21/88 | $ 26.22 - $ 1050.00 |
| | | 09/27/88-04/28/89 | $ 40.42 - $ 940.42 |
| 3 | Pell | 07/01/88-04/02/89 | $ 532.92 - $ 1289.92 |
| 5 | Pell, SEOG | 07/01/88-04/02/89 | $ 724.50 - $ 1474.50 |
| 6 | Pell, SEOG | 04/21/88-07/25/88 | $ 350.00 - $ 1050.00 |
| | | 09/27/88-02/15/89 | $ 139.30 - $ 900.00 |
| 7 | Pell, SEOG | 05/09/88-06/25/89 | $ 333.50 - $ 2083.50 |
| 9 | Pell, SEOG | 02/17/87-05/08/87 | $ 100.00 - $ 275.00 |
| 10 | Pell, SEOG | 07/01/88-06/12/89 | $ 279.82 - $ 1950.00 |
| | | (continuously) | |
| 11 | Pell, SEOG | 09/28/88-06/28/89 | $ 17.90 - $ 1057.10 |
| 12 | Pell, SEOG | 04/05/89-06/30/89 | $ 4.73 - $ 799.35 |
| 14 | Pell | 09/27/88-04/28/89 | $ 13.20 - $ 928.31 |

Appendix A to Education exhibit A-1 at page 17 lists the students by name: #1 - [student name]; #2 - [student name]; #3 [student name]; #5 - [student name]; #6 - [student name]; #7 - [student name]; #9 - [student name]; #10 - [student name]; #11 [student name]; #12 - [student name] and #14 - [student name].

Stipulation number 12 states: "SVC disbursed to [student name] on or about 12/28/87 $1050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed." Stipulation number 13 states: "SVC disbursed to [student name] on or about 11/4/88 $1100 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed." Stipulation number 14 states: "SVC disbursed to [student name] on or about 12/28/87 $1050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed." Stipulation number 15 states: "SVC disbursed to [student name] on or about 12/28/87 $1050 in Pell Grant funds that he was not eligible to receive based on the number of hours of training completed." Stipulation number 16 states: "SVC disbursed to [student name] on or about 11/4/88 $1100 in Pell Grant funds that he was not eligible to receive based on the number of hours of training completed."

Stipulation 19 states: "SVC disbursed to [student name] on or about 12/28/87 $1050 in Pell Grant funds that she was not eligible to receive based on the number of hour of training completed." Stipulation number 20 and 21 state: "SVC disbursed to [student name] on or about

8/1/88 $1100 in Pell Grant funds that he was not eligible to receive based on the number of hours of training completed. . . SVC disbursed to [student name] on or about 10/26/88 $1100 in Pell Grant funds that he was not eligible to receive based on the number of hours of training completed." Stipulation number 24 states: "SVC disbursed to [student name] on or about 9/27/88 $1100 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed."

As additional proof for finding five, Education relied on its exhibit A-2, the December 14, 1987 program review report. Education counsel in her November, 1991 argument at 35 referred to finding four of the 1987 program review to support the repeat violation charge:

Finding: Credit balances Held Without Student Authorization.

Federal regulations do not permit an institution to pay a student's Pell or Campus-based award by credit to the student's account in excess of amount currently due the institution, or to retain GSL proceeds in excess of such amounts, except that, in the case of the GSL Program, the student may request in writing that the institution retain such excess proceeds to assist the student in managing his/her loan funds for the remainder of the academic year. Southern Vocational College has routinely credited awards to student accounts without regard to whether, or to what extent, the student had unpaid charges due the institution.

Nancy Mapes, the author of the 1989 program review, testified that the regulations require the student's authorization for an institution to hold the student's credit balances for either Pell Grants or campus-based program funds:

[I]f they do retain credit balances, . . . the student must authorize the institution to hold these funds in writing . . . we did not find evidence that Southern Vocational had requested . . . these students who . . . retain credit balances . . . the student . . . can rescind his voluntary authorization at any time, and his credit balance needs to be given to him. . . .[A]n institution cannot retain monies for funds other than institutional costs. . . . [I]f they do retain credit balances then . . . the student must authorize the institution to hold these funds in writing . . . We did not find evidence that these students [for whom] they retained credit balances [provided] . . . any voluntary authorization . . . signed by the student, nor was . . . the student . . . aware that he [could] rescind this voluntary authorization at any time, and his credit balance . . . [could] be given to him . . . .[Section] 690.78, which deals with the Pell, says that the student must grant permission . . . for the institution to hold any additional funds other than those for tuition fees, room and board . . . . The Department has - - - although Pell Grant does not say specifically that it has to be in writing, the Department has interpreted that to mean that the student would grant his permission in writing.See footnote 33 *33*

She was unable to recite where Education published its interpretation requiring the authorization to be placed in writing. Counsel for Southern asked Ronald Lipton, Chief of the Program Compliance Branch Division of Audit and Program Review, Office of Post Secondary Education of the U.S. Department of Education, where in 34 C.F.R. § 690.78 a requirement exists that mandates written authorization to hold credit balances. Mr. Lipton admitted that the

regulation does not preclude a student's verbal authorization to retain credit balances.See footnote 34 *34* The transcript notes:

Counsel: Okay. If, in fact, a student had verbally agreed for the school to retain their credit balances, then that would not be a violation of the regulation would it?

Lipton: It would not be a violation of the regulation . . . .See footnote 35 *35*

The school's view of the facts on this finding was presented by Rovetta Watson and Lawrence Haygood Jr. Rovetta Watson, Southern's director of financial aid, testified as to the procedure employed by students to transfer Pell Grants or college work-study money into their school accounts. In an exchange that took place between Education counsel Sampson and Ms. Watson, Ms. Watson explained that credit balances occurred "[i]f there was more money on the account than was charged, then a credit balance would be carried." If the student was out of school, the balance was to be refunded to the student. If the student was still in school, Mr. Haygood or Mr. Davis would counsel the student on their balance. She stated that she was aware of the procedure because she was called upon, from time to time, to verify the balances and she heard the counselling. Specifically, she said:

Q. How is the counseling -- could you paraphrase what was said?

A. It is just a simple matter of, you know, going over a student's account, basically what they have been charged for this -- this is your outstanding charge for this particular quarter; this is what has been credited to your account; you have a balance of blah-blah-blah. . . .And a student . . . can request what is on the account. If they don't want to pay it -- if they don't want a deduction taken from their GSL account, none is taken. If I fill out their form and they decide: Well, I don't want to pay that right now -- they don't pay it because we can't arbitrarily just do that.

Q. I am not talking about the funds that are due the college; I am talking about the other funds. What is the student told regarding the funds that are not due to the college?

A. They are basically told they have a credit balance. I mean, I don't know how much blunter you can get than that: that you have excess funds on your account.

Lawrence Haygood, President of Southern, provided additional information on the school's handling of credit balances:

[A] credit balance occurs . . . when we have received more money or the student has paid more money than we have charged him at . . . a given point in time for that current period of attendance . . . We were holding the balances after meeting with the individual students . . . and we would talk with them. The student had the option to receive the money or hold a certain amount on account for payments of future periods of attendance on upcoming periods of attendance. . . . .[T]hey ask us to hold it on account for them and then give them the balance . . . Therefore, you, in fact, will have a credit balance if the student has not yet begun attendance for the next quarter. . . We had some written authorizations. We had just begun a process of

obtaining written authorizations . . . however, we didn't have written authorizations for all students because we had just begun the process.See footnote 36 *36*

After a previous program review, a sample authorization form was conceived by Southern.See footnote 37 *37* Haygood explained that the bottom of the form had a place for retroactive acknowledgement of verbal authorization to hold a Title IV money balance. He referred to Southern exhibit CC. It is a seven page document which illustrates that at least seven of the eleven students listed in the chart at finding nine, shown above, signed a written authorization form permitting the school to retain credit balances. The exhibit is signed by student #2, [student name] - 4-4-90; student #5, [student name] - 3-21-90; student #6, [student name] - 3-20-90; student #7, [student name] - 4-4-90; student #10, [student name] - 9-26-88; student #11, [student name] - 3-21-90 and student #12, [student name] - 4-2-90. He admitted that the school still did not have written authorizations from all students because the school could not locate some former students.See footnote 38 *38*

According to the testimony of the program reviewer, Philip Knight, Southern's April 1990 response informed him that the school had updated their files with authorization documents.See footnote 39 *39* In February 1991, when he assisted in an unannounced follow-up review to the November 28, 1989 program review, he claimed that he requested copies of the authorization form (Southern exhibit J or CC). However, they were not made available to him.See footnote 40 *40*

B.

The notice claims that Southern withheld Pell Grant or campus based program funds in amounts exceeding unpaid charges owed to the College. The 1989 program review refers to the withholding of Title IV credit balances for eleven students during the 1987-88 and 1988-89 award years. The notice also refers to violations arising from the 1987 program review which covers the 1986-87 and 1987-88 award years. Education relied on 34 C.F.R. § 682.604 (d)(ii) (1987) and 690.78 (1988). 34 C.F.R. § 682.604 (d)(ii), effective November 10, 1986, states:

The school may credit a registered student's account with only those loan proceeds covering costs of attendance owed to the school by the student for which substantially all of the school's students incurring those cost have been billed, and any additional loan proceeds that the student requests in writing that the school retain in order to assist the student in managing his or her loan funds for the remainder of the academic year.

The regulation 34 C.F.R. § 690.78, effective October 10, 1987, states:

(a)(1) The institution may pay a student directly by check or by crediting his or her institutional account.
(2) Unless a student has agreed otherwise, the amount an institution may credit to a student's account may not exceed the amount the student is required to pay the institution for-
(I) Tuition and fees;
(ii) Board, if the student contracts with the institution for board; and
(iii) Housing, if the student contracts with the institution for housing.

(3) An institution may not require a student to grant permission to credit his or her account for the costs of other goods and services the institution provides to the student.

(4) The institution shall notify the student of the amount he or she can expect to receive and how that amount will be paid.

(b)(1) The institution may not make a payment to a student for a payment period until the student is registered for classes for that period.

(2) The earliest an institution may directly pay a registered student is 10 days before the first day of classes of a payment period.

(3) The earliest an institution may credit a registered student's account is three weeks before the first day of classes of a payment period.

(c) The institution shall return to the Pell Grant account any funds paid to a student who, before the first day of classes

(1) Officially or unofficially withdraws; or

(2) Is expelled.

(d)(1) If an institution intends to pay a student directly, it shall notify him or her before the payment is made when it will pay the Pell Grant award.

(2) If a student does not pick up the check on time, the institution shall still pay the student if he or she requests payment within 15 days after the last date that his or her enrollment ends in that award year.

(3) If the student has not picked up his or her payment at the end of the 15 day period, the institution may credit the student's account for any amount owed to the institution for the award year.

(4) A student forfeits the right to receive the payment if he or she does not pick up a payment by the end of the 15 day period.

(5) Notwithstanding paragraph (d)(4) of this section, the institution may, if it chooses, pay a student who did not pick up his or her payment, through the next payment period.

20 U.S.C. 1070a(e) serves as the authority for the regulation 34 C.F.R. § 690.78:

Payments under this section shall be make in accordance with regulations promulgated by the Secretary for such purpose, in such manner as will best accomplish the purpose of this section. Any disbursement allowed to be made by crediting the student's account shall be limited to tuition and fees and, in the case of institutionally owned housing, room and board. The student may elect to have the institution provide other such goods and services by crediting the student's accounts.

C.

Education's presentation of this finding is a puzzle. It makes several attempts before locating a path to its point. Much of the evidence presented focused on the matter of written authorization to hold credit balances and what Southern did to implement Education's demand to have written authorizations in the student files. The issue, however, is whether Southern withheld student funds. Education alleged violations of 34 C.F.R. § 682.604 (d) (ii) and 34 C.F.R. § 690.78. To prove the violations, Education claimed that: 1) Southern withheld funds without authorization in the GSL program, 2) a list of SEOG funded students establishes credit balances, 3) students must

authorize in writing the institution's authority to hold credit balances, and 4) premature Pell Grant payments is withholding student funds without authorization.

First, section 682.604 is found in subpart F - entitled "Requirements, Standards, and Payments for Participating schools in Guaranteed Student Loan (GSL) and PLUS programs." The facts presented in the stipulations, testimony, and program review report indicate that the funds in question are either Pell Grant or Supplemental Educational Opportunity Grant (SEOG) programs. Since the notice cites a violation of the GSL program and there is no evidence submitted concerning GSL students, there can be no violation of 34 C.F.R. § 682.604, a GSL program regulation.

Second, Education cited in its notice only violations for the unauthorized withholding of GSL and Pell Grant fund money. Yet, the reference to the 1989 program review indicates that students numbered 1, 5, 6, 7, 9, 10, 11, and 12 received SEOG funds. A SEOG program violation is found in Part 676 of the Code of Federal Regulations. There is no citation to a SEOG regulation violation. In addition, Education provided no facts of SEOG violations other than the reference in the 1989 program review chart. The chart shown on page 12 of this decision lists eight students with both Pell and SEOG funds. The chart alone does not provide any method of determining if the range of credit balances is the result of Pell money or SEOG money. None of the stipulations provide any information on SEOG funds, nor is there testimony regarding SEOG funds. From only the evidence shown on the chart, it is insufficient to prove either a violation of withholding student funds from either Pell or SEOG credits balances. Since Education has not charged Southern with a SEOG violation, the SEOG statements in the chart are of no relevance to the violations.

Third, Education failed to show that Southern violated 34 C.F.R. § 690.78 by arguing that the regulation requires written authorization to hold credit balances. Section (a)(2) states only that the student "agree otherwise." This is not a requirement to agree in writing to hold credit balances. Furthermore, the student authorization required is not permission to hold credit balances in the student's account; it is authorization to credit a student's account for " other such goods and services" to be provided by the institution. A discussion of this point will be more fully discussed in finding six below.

Fourth, the only evidence of significance submitted to prove this finding centers on Pell Grant funds. The source of information is found in the program review reports and in the stipulations. The statements in the program review alone are insufficient to support Education's claim. The stipulations do, however, provide sufficient facts to discern that certain sums of money for various students came from Pell Grant funds. In the cases of [student name], [student name], [student name], [student name], [student name], and [student name], stipulations were submitted to support the statements in the chart shown in finding nine of the 1989 program review. [student name], [student name], [student name], [student name], [student name] and [student name] received money at different times for which they were not eligible based on the number of training hours completed. [student name] received $1050 on 12/28/87 and $1100 on 11/4/88 (Stipulations 12 and 13). [student name] received $1050 on 12/28/87 (Stipulation 19). [student name] received $1100 on 8/1/88 and $1100 on 10/26/88 (Stipulation 20 and 21). [student name]

received $1100 on 9/27/88 (Stipulation 24). In each of the cases cited above, the money was received before the students acquired a sufficient number of completed training hours.

Stipulations 17-18 ([student name]), 22 ([student name]), 23 ([student name]), 25 ([student name]), 26-27 ([student name]), and 28 ([student name]) are written in the same manner as stipulations 12, 13, 19, 20, 21, and 24. They recite that various students retained balances in the student's account based upon a receipt of funds prior to attaining the requisite number of training hours. The students mentioned in these stipulations are not individuals cited in the notice. The notice was never amended to include these students. The stipulations are, however, admitted by the parties as evidence of the truth of the statements. The stipulations admit that certain students received premature Pell Grant payments. All of the cases cited in the previous paragraph refer to Pell Grant funds and are alleged to be a violation of 34 C.F.R. § 690.78.

Other students mentioned in the 1989 program review chart are [student name], [student name], [student name], [student name], and [student name]. But there is no additional evidence and no stipulations covering these students which show violations connected to these students. Therefore, Education failed to provide convincing evidence that the cases of [student name], [student name], [student name], [student name] and [student name] were subject to "retained credit balances."

To analyze the facts and apply them to the regulation, one must look to the regulation for direction. Section 690.78 is entitled "Method of disbursement - by check or credit to a student's account." This section is found in Subpart G entitled "Administration of Grant Payments" of Pell Grant awards to students.See footnote 41 *41* Sections.(a) and (b) of §690.78 permit the disbursement of Pell Grant funds to the student's accounts or directly to students. These sections do not address withholding student funds without proper authorization. The regulation at (a)(1) permits a credit to a student's account, but the credit may not exceed the amount the student is required to pay the school for tuition, board and housing. The institution may not credit the account of the student until three weeks before the first day of classes of a payment period. Section (c) of the regulation does discuss withholding funds or returning funds in three situations: 1) student withdrawal, 2) student expulsion, and 3) student's failure to pick up the request for direct payment within 15 days of enrollment. Parts (c) and (d) of the section consider returning or withholding funds from the Pell Grant account not from withholding funds from the student.

The heading of this finding states: "Withholding Student Funds Without Proper Authorization."See footnote 42 *42* Therefore, the important fact in this violation is the withholding of the funds. As stated earlier in this discussion, this finding is primarily based on the 1989 program review report. That report states: "Southern Vocational College has routinely credited awards to students' accounts without regard to whether or to what extent, the student had unpaid charges due to the institution."See footnote 43 *43* The violation charged is withholding student funds, but the facts presented by Education to prove the charge do not show withholding funds. The facts demonstrate that the student accounts were paid. The only evidence submitted supports the proposition that certain students received Pell Grant money for which they were not eligible based upon the number of training hours completed. The regulation cited by Education is a regulation which describes the method of disbursement of funds, not the withholding of funds.

The only portion of the regulation which refers to withholding or returning funds is specifically described as student withdrawal, expulsion, or failure to pick up Pell Grant funds. There is no evidence to show that an enrolled student withdrew, was expelled, or failed to request his/her Pell Grant within 15 days of enrollment.

In summary, Education failed to prove violations of either 34 C.F.R. §§ 682.604(d)(ii) or 690.78. Section 682.604(d)(ii) applies to GSL funds. No evidence of GSL funds was presented to prove the violation of a GSL regulation. While the program review mentions SEOG funds, there is no citation of a SEOG violation. Education's argument that the institution must have written authorization to hold credit balances has no support in the regulations cited and will be discussed in detail in finding six below. The only credible facts submitted concern the premature payment of Pell Grants. There is no evidence to show that the school withheld Pell Grant funds. The only evidence shows that Southern credited students' accounts. Therefore, Education failed to prove that Southern either failed to credit or pay the students or withheld funds from the Pell Grant account.

Retaining Pell Grant funds for students no longer enrolled Finding Six of the notice

A.

Education counsel stated that finding six is similar to the charge in finding number five. The only difference is that the students shown in the chart below were no longer enrolled in the school. Counsel stated: "[I]t showed a credit on their account that should have been returned to the lender if it was [G]uaranteed [S]tudent [L]oan money or to the program department."See footnote 44 *44* Education counsel stated in her brief at 24 that: "the College also retained Pell Grant credit balances for students after they ceased attending the College. Stips. 42 through 45. . . . [A]n institution is not permitted to retain Pell Grant . . . funds in excess of the amounts currently due the institution." Later, counsel stated: "When a student ceased attending SVC, SVC was required to return any retained credit balance as a refund."See footnote 45 *45* The notice states:

In addition to retaining Pell Grant and campus-based funds in excess of the amount of unpaid charges due to the College for enrolled students, the College also retained Pell Grant credit balances for students after they ceased attending College. This practice also violates 34 C.F.R. § 690.78. ED cited the College for this violation in both the 1987 and the 1989 program review reports.See footnote 46 *46*

The following portion of the 1989 program review at finding nine provided the basis for finding six of the notice:

CREDIT BALANCES FOR NON-ENROLLED STUDENTS

| Student | LDA | To Acct. | Program | Amount | Outstanding Credit Balance as of the Week 07/21/89 |
|---|---|---|---|---|---|
| 1C | 12/13/88 | 07/01/88 | Pell | $1100 | $350 |

| | | | | | |
|---|---|---|---|---|---|
| 1D | 03/15/89 | 02/21/89 | Pell | 650 | 275 |
| 1E | UNK | 10/27/88 | Pell | 1075 | 676 |
| 1F | UNK | 11/21/88 | Pell | 1100 | 50 |

The students are identified in Appendix A on page 17 of Education exhibit A-1. Student 1C - [student name], student 1D [student name], student 1E - [student name], and student 1F [student name].

Education's 1989 program review required the school to return the funds to the four students or to Education. After disbursing the funds, the institution was required to report the completion of the task. Education also mandated that Southern submit a plan to ensure that the school not hold credit balances without written authorization for non-enrolled students.See footnote 47 *47* Stipulations 42 through 45 address this finding:

42. SVC retained $350 in Pell Grant funds belonging to [student name] until 7/21/89.

43. [student name]'s last day of attendance at SVC was 12/13/88.

44. SVC retained $275 in Pell Grant funds belonging to [student name] until 7/21/89.

45. [student name]'s last day of attendance at SVC was 2/21/89.

Southern counsel admitted the [student name] and [student name] statements in stipulations 42 through 45 were true.See footnote 48 *48* There was no evidence submitted by either party on the two remaining students, [student name] and [student name], shown in the chart above.

The program reviewer testified that credit balances must be given by the students in writing. Ronald Lipton, Chief of the Program,Compliance Branch testified, however, that the student's authorization need not be in writing. The details of the testimony was set forth earlier in this decision at finding five above. Southern presented no evidence that it had either written or verbal authorization from the four students mentioned in the chart.

The notice does not give reference to a specific finding in the 1987 program review to examine. The notice in finding four states: "In the December 14, 1987 program review report, the College was found not to have calculated or paid refunds due to the two students in the review sample who were due refunds."See footnote 49 *49* Finding four of the notice is a charge of a GSL violation, but the facts of this charge relate to Pell Grant funds. The December 1987 program, under the finding entitled "Refund Policy Not Applied," refers to the failed calculation of the refunds to [student name] and [student name].

The only suggestion of evidence is found in a letter to Nancy Mapes from the President of Southern. In a response written April 9, 1990, to finding nine, he writes:

We have reviewed the student ledgers and identified students for whom credit balances were held. We are issuing the credit balances to students where applicable and have obtained signatures of student for whom such balances were held. The institution as a practice currently

no longer holds such balances for students. In the upcoming quarter, the institution will change to charging according to cost of program which will help to avoid credit balance accounts. The response to this finding will be completed with review and confirmation of resolution by the Certified Public Accountant.See footnote 50 *50*

Southern counsel maintained that it had corrected the problems of retaining Pell Grant funds of attending students or students no longer enrolled after the December 14, 1987 program review.See footnote 51 *51* To eliminate the problem of credit balances, Haygood indicated that they changed the system of billing.See footnote 52 *52* He claimed that Mr. Pouncey of Education's Atlanta District office suggested, after Southern questioned him, that Southern change its method of assessing charges. Haygood claimed Pouncey's instruction was: "You may want to consider doing what other schools do: go to cost of program."See footnote 53 *53* On cross examination Ms. Mapes admitted that if a student signed up for a 12 month program, the student is required to pay tuition for the program length agreed upon regardless of whether it is paid monthly, quarterly, weekly, or all up front.See footnote 54 *54* No further evidence was submitted to support the 1987 charge of retaining Pell Grant funds of students no longer enrolled.

Counsel for Education insisted, as she did in finding five of the notice above, that finding four of the December 14, 1987 program review verified that finding nine of the 1989 program review is a repeat violation. Therefore, finding six of this notice charges the school with the carrying credit balances without student authorization the same as the charge in finding five above. The testimony of Ronald Lipton, Rovetta Watson, Lawrence Haygood Jr.; and Philip Knight, discussed above in finding five, should be reviewed for its application to finding six.

B.

This finding relies on section 34 C.F.R. § 690.78 (1988) which is the same authority as finding five above.

C.

For Education to establish finding six, it must prove that a student is no longer enrolled at the school and that Southern retained Pell Grant funds of the students contrary to the provisions of 34 C.F.R. § 690.78. Education's two arguments must be rejected because: 1) it failed to provide sufficient evidence that Southern failed to refund monies in accordance with 34 C.F.R. § 690.78 and 2) it failed to show proof that the institution must have written authorization to hold credit balances. Refunds or a return of funds is specifically set forth in § 690.78(c): "[t]he institution shall return to the Pell Grant account any funds paid to a student who, before the first day of classes - (1) officially or unofficially withdraws or (2) is expelled." In § 690.78(d)(4), a third specific possibility is approved - if the student fails to pick up a direct payment within 15 days of enrollment a refund may be made.

Counsel stated in her brief at 20: "Institutions are not permitted to retain Title IV, HEA program funds in excess of amounts currently due to the institution." Further, she said: "the college . . . retained Pell Grant credit balances for students after they ceased attending college. Stips., 42 through 45." Also, counsel argued that "When a student ceased attending SVC, SVC

was required to return any retained credit balance as a refund."See footnote 55 *55* Counsel, in her brief, at 26 states: "[R]efunds must be made in accordance with the refund policy."

First, Education counsel argued that the chart listing nonenrolled students Sparks, Richardson, Denson and Stinson "showed a credit on their account that should have been returned to . . . the program department."See footnote 56 *56* Here, the information available from the program reviewers' report contains allegations that four students withdrew on specific dates and Southern had credit balances. In the case of [student name], it was stipulated that she last attended on 12/13/88 and funds belonging to her were retained until 7/21/89. In the case of [student name], it was stipulated that his date of last attendance was 2/21/89 and funds belonging to him were retained until 7/21/89. Sufficient proof exists based upon the stipulations to show that [student name] and [student name] were former students who had Pell Grant funds carried in the student's account after the students left school. To establish retained Pell Grants funds for the non-enrollment of a former student, proof of the date of last attendance must be shown. There is no information available in the case of [student name] and [student name] as to dates of last attendance. Education's proof of the specific date that [student name] and [student name] withdrew or were expelled does not exist; therefore, the allegation citing [student name] and [student name] based upon 34 C.F.R. § 690.78(c) fails for insufficient proof of the element of the last day of attendance or other circumstances which would warrant a refund under the three conditions set out in sections (c) or (d).

Furthermore, while it is true that the stipulations confirm that [student name] and [student name] were former students, proof of a violation of 34 C.F.R. § 690.78 (c), nevertheless, fails because there is no proof that the dates of last attendance for [student name] and [student name] occurred before the first day of classes. Return of funds to the Pell Grant account, under the regulation charged, requires student withdrawal or expulsion prior to the first day of classes. No evidence is presented upon which a finding may be made that the withdrawal from school occurred before the first day of class as required by section 690.78(c).See footnote 57 *57* Additionally, there is no evidence to show that any of the students failed to pick up their funds after a direct payment request.

Second, Education argued that Southern failed to obtain written authorization to retain credit balances. In fact, the program reviewer stated: "We did not find evidence that these students [for whom] they retained credit balances "provided] . . . any voluntary authorization . . . signed by the student . . . nor was . . ..the student . . . aware that he [could] rescind this voluntary authorization at any time, and his credit balance . . . [could] be-given to him."See footnote 58 *58* Education counsel argued that Southern may not hold credit balances in excess of the amount of the currently due to the institution. Nevertheless, Education's argument that the school may not have a credit balance in the student's institutional account is inconsistent with the requirement to obtain written authorization to hold a credit balance. To argue that Southern must have written authorization to retain credit balances acknowledges that the school may have a credit balance.

The testimony provided much information concerning credit balances in a student's account from Pell Grant funds. Southern's Rovetta Watson and Lawrence Haygood admitted that credit balances occurred. Mr. Haygood, stated that the school held balances after talking with the students. He said: "the student had the option to receive the money or hold a certain amount on

account for payments of future periods of attendance . . . .See footnote 59 *59* The program reviewer testified that section 690.78 requires written authorization from a student in order for the institution to hold student credit balances.See footnote 60 *60* At another point in her testimony, she admitted that the regulation does not specifically state that permission to hold additional funds must be in writing. She said Education interpretated the regulation to require permission in writing, but she provided no authority to support her argument.See footnote 61 *61*

In addition, the regulation allegedly violated is entitled the "method of disbursement of funds - by check or credit to a student's account." Section (a) (1) permits an institution to transfer Pell Grant account funds to a student's institutional account. Section (a) (2) limits the money that may be credited to the student's account to funds for tuition and fees, board and housing. The regulation and the United States Code state that the student may agree "otherwise." The regulation and code both state that a student may agree to do something, but there is no requirement that the agreement be a written agreement. The regulation merely states "unless a student agrees otherwise." "Otherwise," used by itself, requires further explanation. Therefore, one must look to the authority for the regulation. The regulation is based upon 20 U.S.C. § 1070a(2) which states:

Any disbursement allowed to be made by crediting the student's account shall be limited to tuition and fees and, in the case of institutionally owned housing, room and board. The student may elect to have the institution provide other, such goods and services by crediting the student's account. (emphasis added)

The section permits credit to a student's institutional account, but it does not state that a credit balance may or may not exist in the student's account. It merely permits the institution to credit a student's account. The regulation does say the amount of credit may not exceed the amount the student is required to pay for tuition, fees, board and housing or otherwise agreed goods or services. The only limitation in the regulation and U.S. Code limits the categories of disbursement allowances. "Otherwise", as used in the regulation at (a)(2), refers to the permission required to credit Pell Grant funds to a student's account for any educational expenses other than tuition fees, housing, room and board. The student agreement required by the regulation and the code permits an institution to credit "other such goods and services to the student's accounts." The authorization required is not authorization to retain credit balances. but permission to credit other goods and services. In addition, while it may be good business practice, neither the regulation nor the code require the agreement to be in writing.

In summary, Southern is charged with a failure to refund sums to students who have withdrawn. A violation of 34 C.F.R. § 690.78(c) requires proof that the student's withdrawal took place before the first day of classes. Education failed to provide evidence of this element of the regulation. Furthermore, the program reviewer is not correct in stating that the regulation requires written authorization to hold credit balances. Section (a)(2) states only that the student "agree otherwise." This is not a requirement to agree in writing nor an agreement to hold credit balances. It is authorization to credit a student's account for "other such goods and services" to be provided by the institution.

Disbursing Pell Grant payments to students who have not completed the payment period for which they have previously received Pell Grant funds - Finding Seven of the notice

A.

The notice at finding seven states:

Under 34 C.F.R. § 690.75(a)(6), an institution may not disburse second and subsequent Pell Grant payments to a student before the student has completed the clock hours the last previous Pell Grant was intended to cover. The College disbursed Pell Grants to students in violation of this requirement. ED cited the College for this violation in both the 1987 program review report and the 1989 program review report.See footnote 62 *62*

To prove finding seven, Education relied upon the testimony of program reviewer, Nancy Mapes, the program review reports, the stipulations, and Education exhibits D and E. In the 1989 program review at finding three, Education named students that received additional Pell Grant payments without first completing the hours for which they had already been paid.See footnote 63 *63* The chart below was extracted from the students' files by Ms. Mapes. She looked at the students' records to see how many hours they had attended as of a certain date, and then determined if the students had enough hours to justify the payments made. For the basis of her conclusions made in the 1989 program review, she sampled 26 student files. Nancy Mapes testified that finding three of the 1989 program review provided a random sample fairly selected:

Finding three [premature disbursement of Pell Grant funds] included not only students that I had selected . . . randomly from their reimbursement requests, but also included the students who had been randomly selected from the listing provided by the institution of students who received Title IV monies . . . . They could not request Pell Grant funds because the student simply wasn't eligible. He had not moved over into the next Pell Grant payment period.See footnote 64 *64*

Education counsel referred to finding three at page five of Education exhibit A-1 for Mapes' to justify her conclusions:

Southern Vocational is a clock hour system. They defined their academic year as 900 clock hours. Within that academic year, they elected to have two payment periods. That means that the student would be paid from zero to 450 clock hours, and he would be paid from 451 to 900 clock hours . . . . We found that . . . Southern Vocational had requested Pell Grant payments for students who had not reached the next payment period for which they were entitled to receive Pell Grant monies. The student had not earned the hours.See footnote 65 *65*

In particular, she reviewed the school's certification statements of the student hours completed.See footnote 66 *66* She said:

[I]f there was enough back-up documentation sent by Southern to determine that yes, the student did have the required number of hours, or no they didn't have the required number of hours, that particular adjustment was made to their . . . monthly cash request . . . .See footnote 67 *67*

Education counsel Bengle gave the following explanation of the chart below:

[The] [h]ours completed column tells you how many hours the student has as of the date that the payment was made and the hours needed time tells how many hours the student needed to have in order to get the payment that was being made. If you essentially compare those three columns and then look at the date the payment was made you'll see how many hours the student was short.See footnote 68 *68*

| Student# | Amount | Payment # | Date Paid | Hours Completed | As Of | Needed |
|---|---|---|---|---|---|---|
| 1 | $1050 | 2 | 10/22/87 | 350.25 | 12/25/87 | 451-900 |
| | 1100 | 4 | 10/27/88 | 1299.25 | 10/28/88 | 1351-1800 |
| 2 | 1050 | 2 | 12/22/87 | 360 | 12/25/87 | 451-900 |
| 3 | 1050 | 2 | 12/22/87 | 396.25 | 12/25/87 | 451.900 |
| | 1100 | 3 | 7/01/88 | 896.25 | 7/01/88 | 901-1350 |
| | 1100 | 4 | 10/26/88 | 1173.75 | 10/28/88 | 1351-1800 |
| 4 | 1050 | 2 | 12/20/87 | 355 | 12/25787 | 451-900 |
| | 1100 | 3 | 7/01/88 | 845.5 | 7/01/88 | 901-1350 |
| 5 | 1050 | 2 | 12/14/87 | 358.75 | 12/25/87 | 451-900 |
| 6 | 1100 | 3 | 9/27/88 | 896.5 | 9/30/88 | 901-1350 |
| 7 | 1100 | 2 | 7/01/88 | 385.5 | 7/01/88 | 901-1350 |
| | 1100 | 3 | 10/26/88 | 1066.75 | 10/28/88 | 1351-1800 |
| 8 | 1050 | 2 | 12/28/87 | 427.5 | 1/01/88 | 451-900 |
| 9 | 1100 | 3 | 10/26/88 | 622.5 | 10/28/88 | 901-1350 |
| 10 | 1050 | 2 | 12/25/87 | 342.5 | 12/25/87 | 451-900 |
| | 1100 | 4 | 9/27/88 | 1234.5 | 9/30/88 | 1351-1800 |
| 11 | 1050 | 2 | 12/25/87 | 371.25 | 12/25/87 | 451-900 |

Education exhibit A-1 at 17 identifies the students reviewed in the 1989 program review: Year 1987-88: 1. [student name], 2. [student name], 3. [student name], 4. [student name], 5. [student name], 6. [student name], 7. [student name], 8. [student name], 10. [student name]. Year 1988-89: 9. [student name], 11. [student name]. Concerning the 1989 program review facts related to the chart above, the parties submitted the following stipulations to support or defend its position:

12. SVC disbursed to [student name] on or about 12/28/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

13. SVC disbursed to [student name] on or about 11/4/88 $1,100 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

14. SVC disbursed to [student name] on or about 12/28/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

15. SVC disbursed to [student name] on or about 12/28/87 $1,050 in Pell Grant funds that he was not eligible to receive based on the number of hours of training completed.

16. SVC disbursed to [student name] on or about 11/4/88 1,100 in Pell Grant funds that he was not eligible to receive based on the number of hours of training completed.

17. SVC disbursed to [student name] on or about 12/28/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

18. SVC disbursed to [student name] on or about 7/1/88 $1,100 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

19. SVC disbursed to [student name] on or about 12/28/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

20. SVC disbursed to [student name] on or about 8/1/88 $1,100 in Pell Grant funds that he was not eligible to receive based on the number of hours of training completed.

21. SVC disbursed to [student name] on or about 10/26/88 $1,100 in Pell Grant funds that he was not eligible to receive based on the number of hours of training completed.

22. SVC disbursed to [student name] on or about 12/28/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

24. SVC disbursed to [student name] on or about 9/27/88 $1,100 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

The 1989 program review required Southern to comply with the regulations by executing certain actions. The institution was required to review the student files to determine if premature payments were made to students during the period January 26, 1988, through the end of the 1989 award year. Any student who subsequently completed the required hours was not to be listed. A format was described and repayment instructions were given. Finally, the college was to insure a future system of prevention of the practice .See footnote 69 *69*

Education also relied on information contained in the 1987 program review. The 1987 program review at finding one sets forth Education's claim that premature payments of Pell Grants were made during that review:

Prior to 7/1/87, the institution's academic year was 1248 hours and its payment period was 624 hours. Effective 7/1/87 the academic year was changed to 900 hours, and the payment period to 450 hours. Within the sample group, four students who received Pell payments prior to 7/1/87 received additional payments after that date, without having first completed the hours for which they had already been paid. These students are:

| Name | Amount | PMT.# | DATE PAID | HRS.COMPL. | AS OF |
|---|---|---|---|---|---|
| Diann Davis | $1,050 | 2 | 08/26/87 | 627 | 10/01/87 |
| Sylvia Harris | 1,050 | 3 | 09/23/87 | 1,028 | 11/13/87 |
| Stella Macon- | 1,050 | 2 | 08/25/87 | 454 | 08/25/87 |

| | | | | | |
|---|---|---|---|---|---|
| Stella Macon | 1,050 | 3 | 10/22/87 | 602 | 11/06/87 |
| Brenda Reese | 1,050 | 3 | 08/26/87 | 625 | 10/27/87 |

Because [student name] and [student name] subsequently completed the hours necessary to qualify for their last payment, no action is necessary on these two students.

The institution must review all students who received payments both before and after 7/1/87, identifying in the above format all students who received 1987-88 award year payments but who had not completed the number of hours for which they had previously been paid. Students who subsequently met the required number of hours need not be listed. The date used for the last column should be the current date, which may be the date of response to this report.See footnote 70 *70*

The following are stipulations to support or defend the respective positions concerning the 1987 program review:

23. SVC disbursed to [student name] on or about 9/2/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

25. SVC disbursed to [student name] on or about 9/29/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

26. SVC disbursed to [student name] on or about 9/2/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

27. SVC disbursed to [student name] on or about 10/22/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

28. SVC disbursed to [student name] on or about 9/2/87 $1,050 in Pell Grant funds that she was not eligible to receive based on the number of hours of training completed.

A comparison of the students identified in the two charts above to stipulations 12 through 28 indicate agreement to all of the entries, except the following five entries: [student name] (#3) fourth payment, [student name] (#6) third payment, [student name] (#9) third payment, [student name] (#10) second payment, and [student name] (#11) second payment. Concerning the 1989 chart above, other than the testimony of the program reviewers no additional Education evidence is presented to document the allegations of the five entries made but not covered by the stipulations. In the five cases mentioned here, Southern neither provided a specific admission of a payment irregularity, nor submitted evidence to contradict the assertions of irregularity made by Education.

Education counsel proposed that Education exhibits D and E are the two documents that prove Southern's repeated requests for premature unearned Pell grant payments. Education exhibits D and E do not indicate that they were issued as a part of the 1987 or 1989 program reviews. They are separate actions independent of the program reviews relied upon in this notice. To explain the significance of Education exhibits D and E, counsel stated:

We were relying on cash requests that had been submitted at that time and I believe monthly request forms called PMF 270 . . . We're also relying on information of the school's cash on hand which could have been derived from either the PMF 270 forms or actually looking at the school's accounts.See footnote 71 *71*

Education exhibit D attempts to clarify the dates Southern was placed on the reimbursement system of payment.See footnote 72 *72* Exhibit D, the letter dated March 8, 1990, from Judith Brantley, Chief of the Atlanta Institutional Review Branch, gave instructions as to how the school was to receive payments. The letter initiated, without specific factual reference, the transfer of the school to the "reimbursement request" system of payment. The letter recites: "We have taken this action because the Cash Advance Request System your institution was previously on has been discontinued by the Department."See footnote 73 *73* The exhibit provided, however, no facts concerning premature payment of Pell Grants.See footnote 74 *74* Education counsel further asserted:

E is a letter basically telling Mr. Haygood that in response to receiving cash requests from him, the Department had found that the requests aren't actually accurate and it states that the amount that they had requested is $36,004 in excess of the amount of expenditures that they've documented. . . .There is nothing other than the letter and the testimony on that point.See footnote 75 *75*

Education's exhibit E is a September 1988 letter from William Pouncey, a former Atlanta Regional Education institutional review specialist. He advised the school it had insufficient evidentiary documentation for many of the accounts of the 1986-87 award year and denied the claims. The denial of the claims, in turn, caused excessive funds drawn for the 1986-87 award year. Education exhibit E restated the demand for a "reimbursement requested" basis of payment. The requirements for payment, however, changed from executive certification to a more specific request. Education, through Pouncey's letter, required documentation on each student in the following manner: 1) copy of student aid report, 2) clock hours in student's education program, 3) clock hours completed to date, 4) copy of complete student account ledger, showing that the reimbursement amount requested had been posted to each student's account.See footnote 76 *76* Exhibit E, dated September 9, 1988, refers to a "history of not being able to account for all Title IV funds" and a repayment agreement that predated the 1982 delinquent audit report.See footnote 77 *77* Education in its brief states:

Even after its receipt of this letter [Ed. Ex. E.], however, SVC continued to make false claims for reimbursement based on its projections of what it hoped to earn in the future. E.g., stips. 13, 16, 21, and 24 all involved students for whom SVC claimed and disbursed funds for which the students were not eligible at the time the funds were claimed and disbursed. It is important to note also that SVC did not ultimately earn all of the funds it falsely claimed based on its projections. Ed. Ex. E at 2.See footnote 78 *78*

Other than the program review reports, exhibits D and E, Education counsel said: "I don't think we have any other written documents in evidence."See footnote 79 *79* Education, however, called Carolyn Boykin and James Sturdivant to testify in an effort to show that the school received excess cash due to the premature payment of Pell Grants. Their testimony is general in

nature and does not specifically describe the method of receipt of the excess cash by premature payment. Nevertheless, Education, in its November 1991 summary of the finding, indicated its reliance upon these two witnesses to prove finding seven.

Carolyn Boykin, an accountant for Education, testified as to Southern's cash accountability, its debt to Education, and the school's cash reporting problem. She claimed that as early as 1984 she began to give special attention to Southern. As a result of her reconciliations, she recalled the excess cash in the school's account totaled between $700,000 and $900,000. She did not arrange any repayment plan with the school, but claimed that Education and Southern agreed that there was excess cash in Southern's possession. Therefore, a note was signed by the parties which permitted the school to continue operations.See footnote 80 *80* At the time of her testimony in March 1991, she claimed that the school still owed between $600,000 and $700,000. She provided no specific documentation to support any of her allegations. On cross examination, she admitted that Southern's only cash accountability problem was the note which is being offset.See footnote 81 *81*

James Sturdivant, an accountant for Education's loans and accounts receivable branch, testified that he is familiar with the Southern accounts receivable. He worked to negotiate the note for Education. The original agreement was made in 1985 and was subsequently modified to $1,000,490.See footnote 82 *82* He said: "It provided for the College to return monies that were excess cash drawn down out of a payment system and to pay it back over a number of years . . . .See footnote 83 *83* He said that the terms set monthly payments of $10,676 and should be paid off in November 1996. The current balance at the time of the hearing was $629,272.47. According to his records,- the school is not in default. "They have been paying each month . . . [W]here they found that they were running into a problem, they usually came to us, and we would do something to suspend payments or make an arrangement whereby it would not be in default."See footnote 84 *84*

Southern claimed it understood the system and the problems presented by this finding. It offered an explanation of the school's actions. Rovetta Watson, Southern's financial aid director, recalled that at the 1989 program review exit interview the topic of premature Pell payments was discussed. She explained that a clock hour system school must submit payment requests every so many hours.See footnote 85 *85* Ms. Watson was asked: "Do you have any knowledge as to what was causing the premature payment of Pell Grants?" She explained:

We submitted on . . . projected hours that the student should complete within a particular time frame. Basically, at that particular time, our requests were taking a very long time to be processed, so in some instances, the student wants the money [which] had been received, [and the student] had actually met the hour requirements. We were not receiving funds in time enough to pay students in terms of college work-study, so we would . . . submit on projected hours . . . [based on an estimate of what the student would have completed by that time. ]See footnote 86 *86*

She explained that an overpayment results if the student does not meet his or her hours. She further said that she assumed that there would be no problem, as long as the student gained the required hours. She admitted being informed of the impermissibility of projecting hours, but she

indicated that the school has remedied the problem by ceasing the practice of projecting hours.See footnote 87 *87* Southern counsel concedes that the payments to the students identified were based on projected hours.See footnote 88 *88* Southern counsel further admitted that Ms. Mapes' computation set out in the chart above cannot be contradicted by any of the -Southern exhibits. She stated that stipulations 12 through 28 do not dispute that on a certain date they had completed a certain number of hours and that premature payments were made.See footnote 89 *89* She further stated in mitigation that all students completed their hours. She argued that it is not a violation of the regulations to request a payment based upon the assumption that by the time the money gets to the school, the student would have completed the hours.See footnote 90 *90*

Mr. Haygood tendered an explanation as to why the premature Pell payments were made.

He said:

What had occurred was that we were having difficulty in having our requests processed by the Office of Education in what we considered a timely fashion. . . . We ran into the problem with the -- particularly the regional office delaying, for some reason, those requests or not acting on them in a timely fashion which means that our students were being paid considerably late. . . . Students thought that we had the money and were holding it and not disbursing it to them. . . . The explanations that we attempted to give during the exit conference were very limited and were not - - - and I can't say were well received. They were limited in terms of giving us time to even discuss it, and if we discussed something, there was no response - - very little or no response given back regarding that.See footnote 91 *91*

Southern counsel argued that Education made inconsistent statements concerning the type of reimbursement system imposed upon Southern. Southern maintained that Southern exhibits V and W adequately satisfy Education's demands for corrective action found in Education's exhibit E. Southern's exhibit V is partially in response to the school's placement on a "reimbursement requested" basis. Exhibit V makes a general comment on the premature payment of Pell Grants. Southern made general statements of the school's policy and that the school has made significant progress to reduce the overexpenditure. No specific details are evidenced in the letter which shed light on the premature payments of Pell Grants.See footnote 92 *92*

Exhibit W is a final summary letter from Judith Brantley to the president of Southern. The letter states that Southern's exhibit V satisfactorily responded to the December 1987 program review. Brantley stated: "This review will be considered closed upon receipt by Mr. Pouncey of documentation evidencing payment of this liability. Your check for $565.35 should be made to the U.S. Department of Education . . . ."See footnote 93 *93* There is no testimony or other evidence to show the school failed to pay the $565.35 and close the 1987 program review.

B.

The notice claims that Southern's premature payment of Pell Grant payments is a violation of 34 C.F.R. § 690.75 (a)(6)(1985). This section, effective March 15, 1985, states:

For each payment period, an institution may pay a Pell Grant to an eligible student only after it has been determined that the financial aid transcript requirements of 34 C.F.R. Part 668 have been met, and the student ---

> Has completed [the] required clock hours for which be or she has been paid a Pell Grant.

The notice states that the College violated this regulation in "both the 1987 program review report and the 1989 program review report." In as much as the award years in question include the 1986-87, 1987-88, and 1988-89, it is necessary to look at the regulations to determine if the regulation quoted, above, was effective from 1986 through 1989.

On November 19, 1986, the regulation was changed. Section 690.75(a)(6) became 690.75(a)(5). The wording of the two subsections (6) and (5) are the same. After another amendment on November 28, 1986, however, 34 C.F.R. § 690.75 (a) eliminated subsection (5) and no identical subsection remained. Subsection (5) was changed to subsection (3) and restated: "Has completed required clock hours for which he or she has been paid a Pell Grant, if the student is enrolled in an eligible program that is measured in clock hours." The wording of subsection (3) continued through the 1989 award year.

In order to establish a violation of 34 C.F.R. § 690.75(a) (6), Education must show that a Pell Grant payment was made to a student for a future payment period prior to the student's completion of the current payment period. Education must show that the school had more than one payment period. Here, the payment periods are not contested. Southern operated as a clock hour system school. The first period covered the clock hours zero to 450. The second period covered 451 to 900 clock hours. Each succeeding period is calculated upon each additional 450 hours. To show that the payments were prematurely made, Education's program reviewer, Ms. Mapes, examined the institution's Pell Grants records. She specifically looked at the student payment date and compared it to the number of hours the student had completed during the current term. After Ms. Mapes sampled various student files and found problems in eleven files, she summarized her findings in a chart found in Education exhibit A-1 at 5. The chart identified the student, the amount of payment made, the payment period, the hours completed in the current payment period, and the required hours for entry into the next payment period. Nine of the students mentioned are named in award year 1987-88 records and two are named in the 1988-89 records.

Southern's financial aid director acknowledged that premature Pell payments were being made. She neither specifically admitted nor provided any defense to the details related to the students cited in the chart above. She explained why premature payments were made. She said that the requests for Pell funds were being made based upon the projected hours that the school believed the student should complete by a particular time frame. Southern's counsel admitted that the premature Pell payments resulted from projecting hours. In mitigation, she maintained that all students completed the hours for the prior pay period. Also in mitigation, Mr. Haygood testified that the school was having difficulty with Education making payments to them in a timely fashion.

One must look at the 1989 program review at finding three in conjunction with the stipulations in order to understand the premature payments.See footnote 94 *94* The summary, without some verification or other supporting data, is insufficient to establish proof of the truth of the violation concerning these three students.

As additional support for a violation of disbursing Pell Grant funds before a student completes his/her current payment period, Education offered information from the 1987 program review. Four students are identified on a 1987 program review chart - [student name], [student name], [student name] and [student name]. The 1987 program review excused two of the students charged with receiving premature Pell payment. Since the two students, [student name] and [student name], subsequently completed the hours necessary, Southern was required to take no action in these two students' cases. Stipulation 23 verified that [student name] received her second Pell payment prematurely. Stipulation 28 verifies that [student name] received a premature Pell payment. One student, [student name], is shown by stipulations 26 and 27 to have received premature payments of $1050 for her second and third payment periods. Stipulation number 25 verified that [student name] received $1050 as a premature Pell payment for her third payment period. There are minor differences-in the dates on the chart and the dates in the stipulations, but those differences are not relevant inasmuch as the stipulations admitted to the premature payments.

Finally, Southern exhibit W satisfactorily concludes the 1987 program review. Clearly, the exhibit is evidence that an Education official with authority represented that payment of $565.35 would close the 1987 program review. The school produced reliable evidence in its exhibit W at 4 of a canceled check for the sum requested. As Education counsel stated, the information contained in the prior program reviews is to be considered by the judge to determine if the current program review finding is a repeat finding.See footnote 95 *95* Here, there is sufficient evidence to support the 1989 program review finding that Southern disbursed premature Pell Grant payments to students. Furthermore, it is found that the 1987 program review information is proof that a repeat premature Pell Grant payment violation occurred.

Next, Education discussed at length its exhibits D and E to prove premature Pell Grant payments. These exhibits provide no evidence of premature Pell payments. These exhibits only provide proof that Southern was placed on a "reimbursement request" system of payment. Education also relied upon Carolyn Boykin and James Sturdivant to support this finding, but their testimony was only general in nature and did not provide any convincing evidence of the specifics of this finding.

In summary, it is found that premature Pell Grant payments were made on twelve occasions to eight students: [student name] for her second and fourth payments; [student name] for her second payment; [student name] for his second and fourth payments; [student name] for her second and third payments; [student name] for her second payment; [student name] for his second and third payment; [student name] for her second payment, and [student name] for her fourth payment. Education presented insufficient evidence to prove that any of the other students shown on the 1989 program review chart were paid premature Pell Grant payments. There is, however, sufficient evidence presented from the 1987 program review to support the 1989 premature Pell Grant payment as a repeat violation. In mitigation, there is sufficient information provided from

the stipulations to show that [student name] completed payment periods one and two; [student name] completed payment periods two and three; [student name] completed payment period one, and [student name] completed payment period one. Education in its 1987 program review acknowledged that in the cases of [student name] and [student name] no action was required by Southern after the students had completed the current pay period. By implication, Education treated these situations as if a mitigating circumstance occurred by the student actually completing the current payment period.

Charging students a fee for processing Pell Grants Finding Eight of the notice

A.

Finding eight of the notice is based on the 1989 program review report. The 1989 program reviewer found:

The institution credited student's accounts with a $7.00 "Pell Grant Processing Fee." Public Law 99-498 states that an institution may not charge students a fee for processing or handling any application, form or data required to determine the student's eligibility for assistance or the amount of such assistance. The following students are charged a processing fee: Students #1 - [student name], #5 - [student name], #8 [student name], and #19 - [student name].See footnote 96 *96*

A review of the student files by Ms. Mapes identified a line item of $7.00 on the student ledger cards. The notation marked CSS, she explained, represents the initials of College Scholarship Service, a company used as a "need analysis servicer." It appeared to her that Southern was charging a student for the processing of a Pell Grant fund application. Mapes, on direct examination said:

[T]hey were using Title IV monies to pay this seven dollar fee. And according to the public law, you can't use Title IV money . . . for this purpose. So what I asked them to do was [to] go back and review their files and either give me evidence that . . . the institution had paid this seven dollar fee to a third party or that the seven dollars had been credited back to the student's account. The student is the one who needs to pay for this or the institution can pay for it out of institutional monies but it can't be paid for out of Title IV monies.See footnote 97 *97*

Later on redirect examination, Ms. Mapes gave the following explanation of the charge:

[W]hen Title IV money came in and was shown as a credit on the ledger card, the amount of the charges and the amount of the Title IV monies, this fee was included in the reduction . . . So I had to assume that it was being paid with Title IV money . . . . It appeared that on the ledger card what Southern Vocational was doing was charging the student a fee for the CSS.See footnote 98 *98*

On cross examination, Ms. Mapes explained: "Title IV monies are given to the Student for educational expenses. And that is what they are to be used for." Later, referring to 20 U.S.C. § 1094 subsection A-2 as authority for her opinion, she said: "Title IV monies cannot be used to determine a student's . . . need."See footnote 99 *99* Further, she said:

[A]lthough the institution may have written out a cashier's check or a money order to CSS for this particular student, ultimately this seven dollar fee was still being paid with Title IV monies . . . [I]f the seven dollar fee had been paid with institutional monies, I would not have quoted it in the report. If it had been paid by the student to the school with his own money - - - money earned, not Title IV monies - - - I would have cited it as a finding in the report.See footnote 100 *100*

Stipulation number 50 states: "During the 1987-88 time period covered by the July 1989 review, College Scholarship Service (CSS) charged $7.00 for processing a financial aid need analysis."See footnote 101 *101* Seven dollar checks were written to CSS on September 2, 1987 in the following names: [student name], [student name], [student name] and [student name].See footnote 102 *102* Even if Mapes had seen the checks written to CSS, she claimed that she still would have issued finding eight "because the fee was still being paid with Title IV monies received by the student . . . as indicated by the ledger card."See footnote 103 *103* Mapes admitted: "Title IV monies are given to the student for educational expenses."See footnote 104 *104* She stated, however, that it is not an allowable educational expense to pay the $7.00 processing fee. Ms. Mapes admitted that there is no prohibition against CSS charging a fee, but based upon her observation it was her opinion that the school was charging the fee, not CSS.See footnote 105 *105*

To refute Education's claim, Southern relied on its exhibit J. That exhibit is an initial response to Mapes' November 28, 1989 program review report. ted. Ex. A - 1, finding 8] The school response dated February 8, 1990, states:

The institution did not charge the students a Pell Grant Processing Fee. The institution paid the fee to the College Scholarships Service [sic] for the student for the cost of processing the students' need analysis. The $7.00 was recorded on the student account card so that the institution could attempt to recover the amount advanced to the student.See footnote 106 *106*

Southern counsel Henderson asked Mr. Ronald Lipton, the highest ranking Education official in the decision making process to testify, the following question: "Assume that Southern's February '90 response to [this] finding indicated that the seven dollar fee was paid to the College Scholarship Service on behalf of the student . . . would you agree that this response would have been satisfactorily resolved [the] finding prior to the termination action?" Mr. Lipton answered: "It might have resolved that finding. And the way that you are describing it, it does sound like, yes, it would resolve the finding. . . . But I can't positively say, because I am not familiar enough with it, but it certainly sounds like it."See footnote 107 *107*

B.

This practice, Education maintained, violated 20 U.S.C. § 1094(a)(2) and 34 C.F.R. 668.12(b)(2)(iii). Education believed the authority "specifically condition[s] institutional eligibility to participate in Title IV programs on the institution's agreement not to charge a fee for processing or handling any application, form or data required to determine the student's eligibility for Title IV assistance.See footnote 108 *108* The code at 20 U.S.C. § 1094(a)(2) states:

The institution shall not charge any student a fee for processing or handling any application, form, or data required to determine the student's eligibility for assistance under this subchapter and part C of subchapter I of Chapter 34 of Title 42 or the amount of such assistance, as for handling the Federal Student Assistance Report provided for in Section 1090 (e) of this title.

Regulation 34 C.F.R. § 668.12(b)(2)(iii)(1988), effective December 1, 1987, states:

In the participation agreement, the institution agrees -- that it will not request from or charge any student a fee for the processing or handling -- any application, form, or data required to determine a student's eligibility for, and amount of, Title IV HEA program assistance; or the Federal Student Assistance Report required under section 483(f) of the HEA.

C.

The wording of the statute and the wording of the regulation covering this violation is almost identical. The Congressional comments do not provide any guidance on the legislation.See footnote 109 *109* Simply stated, the legislation prohibits an institution from charging an application fee for Pell Grant consideration. Proof of the violation must include evidence that the institution charged a student for processing the student eligibility determination and/or the computation of the amount of student assistance. All that Education must do is show that the charge was made to the student by the institution. Any explanation, arrangement, or understanding of the method of payment that the institution charged the student as a fee must be shown as payable to the institution.

Here, the facts are clear. Nancy Mapes identified in the 1989 program review report four students - [student name], [student name], [student name], and [student name] - who were charged a $7.00 Pell Grant processing fee. She testified that a line item on the student's ledger card identified the $7.00 fee to "CSS." She identified CSS as a need analysis servicer. Southern did not deny that a charge was made for the student's need analysis. The institution admitted that it paid $7.00 fees to the College Scholarship Service for the processing of the student's need analysis.See footnote 110 *110* The institution claimed, however, that it did not charge the fee for itself; it merely advanced the fee to the student and the record on the account card was made "to recover the amount advanced to the student." The evidence proved that the institution initially paid a fee for the needs analysis, but passed that expense to the student. In fact, the institution classified its payment to CSS as a student advance. Therefore, the student made the payment for the needs analysis to the institution who obtained its information from the third party. The eligibility determination information was contracted by the institution. The service was provided to the institution and the information became the property of the institution. The payment by the student to the institution was payment for the institution's processing of the determination of the student's eligibility and amount of assistance.

The institution provided no evidence to show that the student was obligated contractually to the servicer, such as language in the application. There is no evidence of any arrangement, explanation, or understanding that the student was obligated to CSS. There is no proof that the students were aware of any arrangement whereby the institution would collect for a service provided to the student. There is no evidence that the fee was assessed only to students who had

been determined eligible. There is no proof that any person who had not been determined eligible was not charged a fee. Unless the institution can provide some evidence to show that it was not directly charging a fee, its defense to this finding must fail. Here, the institution's attempt to show that it was acting as an agent for the student and/or servicer fails for a lack of convincing evidence. Therefore, it is concluded that Education has shown that the institution assessed a charge for its processing of the student's application to obtain a Pell Grant and the institution has failed to establish evidence otherwise.

Failure to adopt and apply an adequate satisfactory progress policy - Finding Nine of the notice

A.

The basis for the charge of an inadequate progress policy is found in finding nine of the notice at 7:

An institution is required to establish, publish, and apply reasonable requirements for determining whether students are making satisfactory progress in their course of study. A required element of such a policy is a maximum time frame in which the student must complete the course. The 1989 program review report found that the College's satisfactory progress policy does not contain a maximum time frame for course completion, in violation of 34 C.F.R. 668.14(e) (1987).

The College was previously cited for not having an adequate satisfactory progress policy in program review reports dated April 20, 1983, February 3, 1986, and November 21, 1986, in violation of 34 C.F.R. 668.169(e) (1983) and 668.43(c) (2) (1986), respectively.See footnote 111 *111*

The 1989 program review cited above states the following elements of Southern's violation:

Federal regulations require each participating institution to establish, publish, and apply reasonable standards for determining whether students are making satisfactory progress in their course of study. The institution's policy does not include a maximum time frame. For a clock hour school, the time frame shall be expressed as the number of months it takes to complete each 450 hour or 900 hour increment of the course.

The program reviewer demanded the following action to be taken by the school:

The institution must revise its policy in accordance with the cited regulations and forward a copy to this office for approval. Chapter 2 of the SFA Handbook contains a discussion which should prove helpful in revising the policy.

Once the revised policy has been developed and approved, the institution will be required to apply the policy retroactively to all Title IV recipients in the 1987-88 and 1988-89 award years. The institution must identify the names and the Title IV amounts by program and award years of any students who are determined not to have been eligible for the funds received. The institution will be held liable for any amounts paid to ineligible students, and must also repay any

administrative expense allowances claimed for such payments. Because this finding was cited in prior program reviews dated February 3, 1986, and November 21, 1986, we are proposing a fine of $1000. Repayment instructions will follow in a final program review determination letter once the amount of liabilities is calculated.See footnote 112 *112*

Education first raised the issue of "Satisfactory Progress Standards" in the April 20, 1983 program review conducted at Southern on October 18-22, 1982. The reviewer issued the following findings:

Satisfactory Progress Policy was not Clearly Stated

The on-site program review revealed that the institution has established and published standards for measuring satisfactory progress. However, the policy as stated in the school's catalogue does not consider the normal time frame in which the course should be completed (34 CFR 668.16(e), December 31, 1980).

Satisfactory Progress Standards Were Not Being Implemented By School Officials In Accordance With Institutional Policy

School officials did not submit the Title IV SFA recipients' selected attendance records, grade sheets and unofficial academic transcripts to the Financial Aid Office in a timely fashion. The institution was not able to demonstrate that it has a system for monitoring the Title IV SFA recipients' satisfactory progress (34 C.F.R. 668.12(c)(1)(iii), December 31, 1980) .

As required action, the program reviewer mandated that Southern establish standards for progress and retroactively implement these standards for all disbursements made on or after the date the General Provision regulations (dated September 28, 1979) became effective (November 8, 1979). All Title IV Federal funds paid to students who were not making satisfactory progress were ordered repaid to the Title IV accounts.See footnote 113 *113*

The next time Education raised the issue was in 1986. As a result of the September 1985 program review, William Pouncey, Regional Review Specialist, on February 1986, wrote a finding entitled "Satisfactory Progress Standard Insufficient." See Education exhibit A-4 at 5. A portion of that review letter states:

The satisfactory progress standard at the institution contains all the elements required by the Department of Education. However, the percentage completion rate for hours attempted does not total to the maximum time frame. For example, the 1872 clock hour program has a maximum time frame of 2340 hours attempted. The stated completion rate is 65% of the maximum time frame at the end of the first twelve months and 95% of the difference by the end of the second twelve months. These two sums will not total 1872 clock hours.

Mr. Pouncey again required the institution to revise its satisfactory progress policy. The revision was to insure that the incremental completion rate allowed a student to complete the course within the maximum time frame. In addition, he said: "In revising the standard, school officials are encouraged to review the Appendix to the 1984-85 Federal Student Financial Aid

Handbook which discusses satisfactory progress and provides several examples of policies." Southern was also required to apply the revised policy retroactively to December 31, 1983, and any liabilities identified had to be repaid to Education.See footnote 114 *114*

Education's November 21, 1986, program review letter indicated that the institution made acceptable changes to established again a "Satisfactory Progress Standard" with the exception of the new time frame.See footnote 115 *115* 115 As required action, "[t]he institution must revise both the catalog and the handbook to include the time frame accepted by the Department of Education as part of its policy in May of 1986. "See footnote 116 *116*

In the 1989 program review, Nancy Mapes relied upon Education exhibit G for the 1987-88 award year analysis. It was Mapes' opinion that Education's exhibits G and H, the school's policy for 1987-88, contained inconsistent statements. She referred to Education exhibit F as her written analysis of the institution's satisfactory eligibility policy for 1987-88 award years.See footnote 117 *117* Mapes also relied upon Education exhibit G, a typed three page document which purports to be the school's "Satisfactory Eligibility Policy for 1987-88, as a source for her conclusions shown in Education's exhibit F.See footnote 118 *118* The academic year mentioned in Education exhibit G at page one is 900 clock hours. She said that the institution was giving the student 240 additional hours to complete a 1200 clock-hour program: "[I]f he was enrolled in a 1200 clock hour program, he could have actually taken up to 1440 to complete the course."See footnote 119 *119* On direct examination, she gave no further detailed explanation of how she rationalized the conclusions in exhibit F from the three pages of school policy contained in Education exhibit G. See footnote 120 *120* Specifically, she made the following analysis:

Using this definition of maximum timeframe for satisfactory progress the student is allowed 120% of the normal program length to complete the course.

| Clock Hours in program Timeframe | beyond normal length | Maximum |
|---|---|---|
| 1200 | 240 (1200 x 20%) | 1440 hrs. |
| 1800 | 360 (1800 x 20%) | 2160 hrs. |
| 2116 | 423 (2116 x 20%) | 2539 hrs. |
| 2400 | 480 (2400 x 20%) | 2880 hrs.See footnote 121 *121* |

Mapes explained that Education exhibit H is a second statement of the school's satisfactory progress policy. This exhibit contains, on the first page, her analysis of the information contained on the second page. The second page, Mapes said, contains a statement of Southern's policy on "length of programs/maximum time frame" to complete the program. The source of the information is not identified on the face of this document, but she said it was also given to her during her onsite investigation. The first paragraph of the document recites - the maximum time frame for 1200 clock hours. It states: "A student enrolled in a 1200 clock hour program on a full-time basis may be granted 600 clock hours beyond the normal length of the program to complete his/her course of study."See footnote 122 *122* She reasoned:

This document tells me that now if I am enrolled in a 1200 clock-hour program at Southern Vocational, I have 600 hours additional to complete the program, which would mean that I have 150 percent maximum time frame . . . . These policies are in conflict with each other. Ed exhibit F [her written analysis of the institution's eligibility policy for the award years 1987-88] tells me I have 1440 hours to complete a 1200 hour course . . . . The regulations state that the institution must develop a satisfactory progress policy for recipients that is as strict or stricter for students who receive Title IV funds than those who don't. The two satisfactory -- or maximum time frame policies that we were given during the on-site are in conflict with one another.See footnote 123 *123*

Mapes also identified Exhibit I as a basis for her opinion that the school has an inconsistent satisfactory progress policy. She referred to the heading on exhibit I "Length of Programs/Maximum Time Frame - 1200 Clock Hours" at page two: "A student enrolled in a 1200 clock hour program on a full-time basis may attempt a maximum of 1500 clock hours and is expected to complete 80% of the clock hours as scheduled."See footnote 124 *124* Mapes explained: "The institution is now saying that their maximum time-frame for completing a 1200 hour program . . . is only 300 hours beyond the normal length. So now [the student] is given 125 percent of the time frame to complete a 1200 hour program. "See footnote 125 *125* She emphasized the last paragraph on page four of Education exhibit I which asserts:

A student's completion rate is measured at the end of each quarter. If the student has not completed 80% of the cumulative clock hours attempted to date, he/she will be placed on probation. If at the end of the next quarter, the student has not raised the completion rate to 80% of the cumulative hours attempted, the student will be dismissed.

Ms. Mapes admitted that Education exhibit I corrected Southern's problem of conflicting policy created by exhibits G and H.See footnote 126 *126* Later, after reflection and on re-direct examination, she referred to Education exhibit I as not resolving the matter. She said: "[T]here is still conflicting information in this document if it is used as a whole. . . . [I]f you are using this definition of maximum time frame, . . . the institution is allowing the student 120 percent or 1440 hours to-complete a 1200 hour course. "See footnote 127 *127* In one part of exhibit I, Mapes maintained, the student is given 120 percent of the normal program lengthSee footnote 128 *128* and, in another part of the document, the student is given 125 percent of the normal program length to complete the course.See footnote 129 *129* She said:

[T]here is conflicting percentages of maximum time frame that the institution is using. It would have to be corrected one way or the other. You are going to give the student 120 percent of the time, or you give them 125 percent of the time. . . . But it needs to be consistent and . . . the additional required action completed before the finding could be closed.See footnote 130 *130*

Education counsel Bengle argued that "the regulation really requires . . . a workable policy and you . . . apply it . . . ."See footnote 131 *131* She argues that the regulations require a maximum time for completion as part of the school policy. The policy must be clear and unambiguous as to the time frame, however, she said, Southern's policy was inconsistently stated.

Southern counsel Henderson asserts that Mapes' opinion could not have been based on the school's Student Handbook. Counsel points to Southern exhibits R, X, Y and Z to illustrate that the Education exhibits which-Mapes' relied upon were not from the Student Handbook. Southern produced its exhibit Y, a copy of its 1987-88 Student Handbook. The handbook sections from 1988-89, exhibit R, concerning clock hours and completion time are identical to the 1987-88 handbook exhibits. The handbook reads: "For determining satisfactory progress [for completion of a program of study], a program is broken down into quarters. A quarter equals 10 weeks or 300 clock hours.See footnote 132 *132* The handbook, at page 10, also requires the student to be progressing towards completion of the program of study:

A student's completion rate is measured at the end of each quarter. If the student has not completed 80% of the cumulative clock hours attempted to date, he/she will be placed on probation. If at the end of the next quarter, the student has not raised the completion rate to 80% of the cumulative hours attempted, the student will be dismissed. . . In order to receive financial aid funds, the student must also be attending regularly. Before making the next disbursement, the attendance for previous period will be reviewed. If the student has not attended 80% of the hours for which he/she is registered, his/her award will be delayed until at least 100% of the hours for which the student has been paid have been completed.See footnote 133 *133* The maximum time-frame is set out as follows:

LENGTH OF PROGRAMS/MAXIMUM TIME FRAME MAXIMUM TIME FRAME HOURS - A student enrolled in a 1200 clock hour program on a full-time basis may attempt a maximum of 1500 clock hours and is expected to complete 80% of the clock hours as scheduled. . . "See footnote 134 *134*

Southern counsel Henderson, in her arguments in November 1991, referred to Education's brief on satisfactory academic progress performance. She argued that "the first sentence says the evidence demonstrates that Southern Vocational has no functioning satisfactory academic progress policy and that the school dismisses no students for failure to make satisfactory academic progress . . . . That's totally unsupported . . . ."See footnote 135 *135*

The notice reflects violations of this finding as early as the April 20, 1983 program review.See footnote 136 *136* That review covered the period of July 1, 1980, to June 30, 1982.See footnote 137 *137* The February 3, 1986 review examined the period July 1, 1983, to June 30, 1985.See footnote 138 *138* The November 21, 1986 review does not give a specific time period covered by its review. It states, at finding three of the 1986 report, that: -"The institution submitted a revised satisfactory progress standard on May 12, 1986.See footnote 139 *139* Next, the 1989 program review covered the 1987-88 and 1988-89 award years.See footnote 140 *140*

Finding number 9 at 2 refers to a violation of 34 C.F.R. § 668.16(e)(1984), effective October 6, 1983.See footnote 141 *141*

§ 668.16 Standards of administrative capability.

(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 measurable 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 incomplete, withdrawals, repetitions, and non-credit 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;

Next, Education listed 34 C.F.R. § 668.43(c)(2)(1987) as authority for an inadequate satisfactory progress policy:

The institution shall describe the rights and responsibilities of students receiving financial assistance and, specifically, assistance under the title IV HEA programs. This description must include specific information regarding-- (2)(i) Standards which the student must maintain in order to be considered to be making satisfactory progress in his or her course of study for the purpose of receiving financial assistance; and (ii) Criteria by which the student who has failed to maintain satisfactory progress may reestablish his or her eligibility for financial assistance. . .

On page 2 of the notice in the general statement of the violations, Education cited Southern with a violation of 34 C.F.R. § 668.14 (e)(1988). Section 34 C.F.R. § 668.14(e)(1988) states:

To begin and to continue participation in any Title IV, HEA program, an institution shall demonstrate to the Secretary that it is capable of adequately administering that program under the standards established in this section. Except as provided in § 668.15, the Secretary considers an institution to have the administrative capability if it establishes and maintains student and

financial records required under § 668.23 and the individual Title IV, HEA program regulations and if it

(e) Establishes, publishes, and applies reasonable standards for measuring whether a student, who is otherwise eligible for aid under any Title IV, HEA 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 agency, and if the agency has those standards;

(2) For a student enrolled in an eligible program who is to receive assistance under a Title IV, HEA 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, HEA program; and

(3) Include the following elements:

(I) Grades, work projects completed, or comparable factors that are measurable 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 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.

(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.

(iv) A determination at the end of each increment by the institution whether the student has successfully completed the appropriate percentage or amount of work according to the established schedule.

(v) Consistent application of standards to all students, e.g., full-time, part-time, undergraduate, and graduate students, and programs established by the institution.

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

(vii) Specific procedures under which a student may appeal a determination that the student is not making satisfactory progress.

(viii) Specific procedures for reinstatement of aid; and

(4) Meet or exceed the requirements of § 668.7(c); See footnote 142 *142*

C.

The adequacy of Southern's satisfactory progress policy was first raised in the 1983 program review. Mr. Pouncey raised the issue again in the 1986 program review. The regulation effective October 6, 1983, requires a satisfactory progress policy which includes: grades measured against a norm, course completion within a maximum time frame, and consistent standards for all categories of students.See footnote 143 *143* The regulation in effect during the 1986 program review [34 C.F.R. § 668.16(e)] was written in the same text and form as the regulation in effect

at the time of the 1983 program review.See footnote 144 *144* Section 34 C.F.R. § 668.14(e) requires an institution to establish and maintain a standard to determine whether a student is progressing in the chosen course of study. The Secretary provided a standard which includes: grades measured against a norm, a maximum time frame for completion of the student's goal, a determination based upon percentage to be completed at the end of each course increment, consistent application to all categories of students, policy on non completion, student appeal procedures for satisfactory progress determination and reinstatement aid.

The Secretary stated that the maximum time frame, the central issue in this case, must be determined by the institution, based upon the student's enrollment status and divided into increments, not to exceed one academic year. Specifically, the notice states: "A required element of such a satisfactory progress policy is a maximum time frame in which the student must complete the course. The 1989 program review report found that the College's satisfactory progress policy does not contain a maximum time frame for course completion, in violation of 34 C.F.R. § 668.14(e)."See footnote 145 *145* The 1989 program reviewer based her opinion on Education exhibits G and H. The exhibits, the reviewer believed, were given to her during the review. The documents, three pages each, do not have cover sheets nor does the content of the pages identify the source of the information. The program reviewer testified that Southern had inconsistent policies reflected in the two "maximum time frames" identified in Education exhibits G and H. The reviewer admitted that Education exhibit I corrected the conflict created by G and H. On re direct examination, however, she again changed her opinion and testified that exhibit I did not resolve the problem. The testimony of the program reviewer is unclear, contradictory, and unconvincing.

More convincing evidence is found in Southern exhibits R and Y. Exhibit R is a copy of Southern's 1988-89 Student Handbook. Exhibit Y is a copy of Southern's 1987-88 Student Handbook. The 1987-88 and the 1988-89 Student Handbooks are the same. The length of the programs and maximum time frame is clearly stated to be 1200 hours. The student must successfully complete 80% of the cumulative hours attempted. The policy provides a workable policy. The only conflict and confusion is the testimony of the program reviewer and the conclusion that the program reviewer presented in Education exhibit F. In summary, Education's evidence is insufficient to prove that the 1989 program review allegation of a violation of the requirement for Southern to have a satisfactory progress policy. Southern presented sufficient evidence that it has a workable published policy which sets forth an adequate satisfactory progress policy complete with a maximum time frame for course completion.

Failure to properly identify Federal funds accounts - Finding Ten of the notice

The notice restates comments from the 1989 program review as its basis for finding ten:

Institutions are required to identify accounts containing Federal funds, either by noting in the account name that the account contains Federal funds or by letter to the bank. . . . Accounts containing Pell Grant funds must be identified by the former method, whereas either method of identifying a Federal funds account is acceptable for accounts containing Federal funds obtained through other Title IV programs. . .See footnote 146 *146*

The 1989 program review directed the following action to be taken:

The institution's response must show it has taken corrective action to properly identify each bank account containing Federal funds. . . .Campus-based regulations require that all bank accounts containing Federal funds must be clearly identified by either the use of the word "Federal" in the account name or by a letter to the bank. The March 15, 1985 Pell Grant regulations require the word "Federal" to be included in the name of the account; e.g., Pell Grant Federal Fund Account. It is recommended that the institution identify its Campus-based Federal accounts [in] the same [manner].See footnote 147 *147*

Philip Knight, the program reviewer, conducted the investigation of this finding by looking at the bank statements of the school. He said: "The word federal was not identified in the account as federal, F-E-D-E-R-A-L." He believed that none of the account names specifically included the word "federal." Even though stipulation number 48 states that Southern made available all bank statements for the relevant time period, Mr. Knight submitted no documents to support his testimony. Referring to page 149 of The Blue Book, a Department of Education technical handbook, as his source of authority, he testified that the word federal cannot be abbreviated in the Pell Grant account.See footnote 148 *148* Education admitted into evidence its exhibit Y, a three page document. The first page of the document shows the cover of The Blue Book. The second and third pages refer to sections 5.3.2. and 5.4 of the book. At the section entitled "Requirements for Naming Bank Accounts," the following is found:

Pell Grant regulations require the word federal to appear in the name of any bank account which contains Pell Grant funds. The word federal should not be abbreviated.

For accounts in which other Title IV program funds are deposited, either the account must have the word federal in its name or the institution must send written notification to the bank specifying which accounts contain federal funds. This enables auditors and the bank itself to recognize accounts that hold federal funds.

If a single bank account is used for Pell Grant, SEOG, and CWS funds, its name must include the word federal. (Perkins funds should always be kept in a separate account.)

On cross examination, Southern counsel and Mr. Knight had the following exchange:

Henderson: [W]as there anything deficien[t] in your opinion. . .with the accounts other than the Pell account?See footnote 149 *149*

Knight: Well, based on the bank statements, they weren't clearly identified as federal funds.

Henderson: Okay. If it says federal funds, what is unclear about that to you?

Knight: F-E-D period.

Henderson: [W]hat is unclear about that?

Knight: FED period is fed . . . It is not the federal. It is fed.See footnote 150 *150*

Knight admitted that he did not know if all institutions receive a copy of The Blue Book or if Southern had a copy of The Blue Book.See footnote 151 *151* After failing to state on direct examination that the word "federal" was abbreviated in the Pell account name, he explained, on cross examination, that the word "federal" was abbreviated on the Pell account name.See footnote 152 *152* He admitted that he did not ask the school if it had written a notification letter to the bank.See footnote 153 *153* He also admitted, on cross-examination, that the regulations do not state that the word federal cannot be abbreviated.See footnote 154 *154* Later, Knight stated that should he review the school in the future, he would do two things. He would first check the bank statements to see if the word "federal" was included in the account name and, second, he would determine if the school had evidence that it notified the bank of federal funds accounts. Mr. Knight expressed his belief that the regulation was issued out of fear that an uninformed person would cause the account to be garnisheed.

On November 25, 1987, Southern wrote a letter to Mr. Robert Davis, President of the bank. The letter stated that, according to Education policy, an institution handling Title IV Student Financial Aid Funds must designate such accounts by marking the separate accounts with the words "Federal Funds." Southern specifically indicated three accounts which it used for federal funds.See footnote 155 *155* The letter said:

The U.S. Office of Education establishes policies which require that institutions handling Title IV Student Financial Aid Funds to designate such accounts with the additional classification as "Federal Funds". We are hereby giving notification to the bank that the accounts listed below contain federal funds. Further, we are requesting that the words Federal Funds be added to the title of the accounts, on the bank statements, and on the checks of those accounts.

On March 1, 1991, a similar letter was written to the bank.See footnote 156 *156* Lawrence Haygood testified that the reason that the school sent letters to the bank was to clarify a misunderstanding concerning the identification of the accounts. He explained to the bank officials:

[T]hey must be identified as containing federal funds, and make sure that it is on the account card and on the account. When we did that, the titles were abbreviated. When I went to the bank to ask them to put 'federal funds' on the account, they told me that we can't take but so many letters, and the bookkeeping counted out spaces and told me: This is all I can get on there. They recommended to me to put it this way, and that is why in the previous letter, they had abbreviated 'fed. funds'.See footnote 157 *157*

Southern's counsel, on cross examination of Ronald Lipton, Education's Compliance Officer, asked whether bank notification by letter was a satisfactory method of complying with this finding. Mr. Lipton explained that a different rule applies for Pell &rant funds versus other types of Title IV funds. He said: "The difference is for Pell Grant funds, the account must be labeled as such, federal account; whereas, for other funds, it can be labeled a federal account or there can be a letter sent to the bank explaining to the bank that federal funds are contained in [the] account."See footnote 158 *158* Southern counsel also referred to Southern exhibit O, the school's

first bank notification letter. She asked: "Would your opinion concerning the satisfactory compliance with that regulation [690.81(b)] also apply to the Pell Grant account?" Lipton agreed that exhibit O would satisfy the part of the regulation which permits bank notification by letter.See footnote 159 *159* He said: "I am glad that you use the word opinion. Yes, my opinion would be that that satisfies the requirement. "See footnote 160 *160*

B.

The notice references violations of 34 C.F.R. §§ 690.81(b) (1985), 674.19(1981) (updated 1988), 675.19(1981)(updated 1988) and 676.19(1981)(updated 1988). The notice cites the 1989 program review report as the only source for a violation of the sections shown above.See footnote 161 *161* The programs are found in the following: Pell Grant - 34 C.F.R. § 690.8(b), Perkins Loan - 34 C.F.R. § 674.19, College Work Study (CWS) - 34 C.F.R. § 675.19 and Supplemental Educational Opportunity Grant (SEOG)- 34 C.F.R. § 676.19.

Fiscal control and fund accounting procedures for Pell Grant funds is found in section 690.81(b):

A separate bank account for Pell Grant funds is not required. However, the institution shall notify any bank in which it deposits Pell Grant funds of all accounts in that bank in which it deposits Federal funds. This notice-must be given by including in the name of each such account that Federal funds are deposited therein.

Fiscal procedures and record keeping requirements for the Perkins Loan program is found in section 674.19:

(2) (i) A separate bank account for Federal funds is not required, except as provided in paragraph (b) of this section. . .(ii) An institution shall notify any bank in which it deposits federal funds of the accounts into which those funds are deposited by --(A) Ensuring that the name of the account clearly discloses the fact Federal funds are deposited in the account; or (B) Notifying the bank, in writing, of the names of the accounts in which it deposits Federal funds. The institution shall retain a copy of this notice in its files.

Fiscal procedures and record keeping requirements for the College Work Study program is found in section 675.19:

(3)(i) Except as provided in paragraph (a)(3)(ii) of this section, a separate bank account for CWS funds is not required. However, an institution shall notify any bank in which it deposit. Federal funds of the account in which those funds are deposited by-- (A) Including in the name of the account the fact that Federal funds are deposited; or (B) Notifying the bank in writing of the accounts in which it deposits Federal funds. The institution shall retain a copy of this notice in its files. (ii) If the Secretary determines that adequate accounting records are not maintained, the institution shall keep CWS funds in a separate bank account.

The fiscal procedures and record keeping requirements for the SEOG program is found in section 676.19:

(2)(i) Except as provided in paragraph (a)(2)(ii) of this section, a separate bank account for SEOG funds is not required. However, an institution shall notify any bank in which it deposits Federal funds of the accounts in which those funds are deposited by-- (A) Including in the name of the account the fact that Federal funds are deposited; or (B) Notifying the bank in writing of the accounts in which it deposits Federal funds. The institution shall retain a copy of this notice in its files. (ii) If the Secretary determines that adequate accounting records are not maintained, the institution shall keep SEOG funds in a separate bank account.

C.

Education cited Southern for violation of certain fiscal control and fund accounting procedures. Education claimed that Southern failed to properly notify the institutional bank depository of the accounts containing federal funds. It also claimed that the accounts contain federal funds which do not contain the words "federal funds" in the account title. Reference was made to violations under the following programs: Pell Grant - 34 C.F.R. § 690.8(b), Perkins Loan - 34 C.F.R. § 674.19, College Work Study (CWS) - 34 C.F.R. § 675.19 and Supplemental Educational Opportunity Grant (SEOG)- 34 C.F.R. § 676.19. The regulations for Perkins, CWS, and SEOG programs are written almost identically. Each insist that the school notify the federal fund depository bank it uses that it, in fact, deposited federal funds into specific accounts of the banking institution. The method of notification, according to the regulations, is to either mention in the name of the account the fact that federal funds are deposited in the bank or to provide notice to the bank in writing of the accounts in which federal funds are deposited. The Pell Grant regulation is not written in the same language as those applicable to the Perkins, CWS, and SEOG programs.

According to the clear wording of § 690.81(b), Pell Grant fiscal control and fund accounting requires a school to notify the bank that it uses as a fund depository of each of its accounts that contain federal funds. Furthermore, the notification to the bank must name "each such account that Federal funds are deposited therein." This provision differs from Perkins, CWS, and SEOG in that only notification by name of "each such account" is required; whereas the regulations appertaining to the Perkins, CWS, and SEOG offers two methods of notification, either in the name of the account or by a written notification of the account names.

In this case, Southern notified its bank, the Alabama Exchange Bank, of the accounts containing federal funds. The first letter of notification, Southern's exhibit O, is dated November 25, 1987; The second letter of notification is Southern's exhibit AA. Both letters identified, in writing, the accounts. In addition, Southern notified the bank that all accounts containing federal funds should be identified with the title "Federal funds." This written notification satisfies the requirements of 34 C.F.R. §§ 690.81(b), 674.19, 675.19 and 676.19.

Next, the program review report stated in the notice for finding ten that Southern violated the sections above because the Pell Grant accounts do not identify the accounts by noting in the account name that the account contains federal funds. Other than Knight's testimony that-he does not recall any of the bank statements of the accounts containing the word "federal", the program reviewer provided no documentation to support his statements that the accounts did not contain the word "federal."

To support the requirement that Pell Grant accounts must spell out the word "federal" in the account name, Mr. Knight, the program reviewer, relied upon his source of authority as page 149 of The Blue Book. Knight admits that he does not know if all schools get The Blue Book or if Southern received a copy of it. The Blue Book is a pamphlet of technical information based on laws, regulations, policies and procedures related to accounting, recordkeeping, and reporting by postsecondary educational institutions for federally-funded student financial aid programs. The Blue Book states: "Pell Grant regulations require the word federal to appear in the name of any bank account which contains Pell Grant funds.

Nevertheless, the institution was directed by the program review report to include in all federal fund accounts the word "federal." Furthermore, the action directed Southern as follows: "The March 15, 1985 Pell Grant regulations require the word 'federal' to be included in the name of the account; e.g. Pell Grant Federal Fund Account." The direction is not accurate. The Blue Book, used by Mr. Knight as authority for his position, is not a replacement for the regulations. The statement in The Blue Book cannot be said to be an interpretation of an ambiguous regulation. Section 34 C.F.R. § 690.81(b) is neither ambiguous, nor does it require an interpretation. The purpose of having regulations is to prevent the use of informal, unwritten rules to govern agency actions. Section 690.81(b) is not ambiguous; it is clear. The regulation does not state a requirement that "federal" be written in the account name. The regulation states:

A separate bank account for Pell Grant funds is not required. However, the institution shall notify any bank in which it deposits Pell Grant funds of all accounts in that bank in which it deposits Federal funds. This notice must be given by including in the name of each such account that Federal funds are deposited therein.

The words, "this notice", in the third sentence of the regulation refers to the word "notify" contained in the second sentence of the regulation.

In summary, Southern did what it was required to do. Even though the regulation does not require the institution to do so, it asked the bank to include in the account name "federal." Lastly, when asked on cross examination if Southern's exhibit O satisfied compliance with § 690.81(b), Education Compliance Officer Lipton responded: "Yes, my opinion would be that . . . (sic) [it] satisfies the-requirement." Therefore, Southern did not violate 34 C.F.R.§§ 690.81(b), 674.19, 675.19, 676.19. It notified the bank of all accounts which contained federal funds.

Permitting bank service fees to be paid from a Federal control account - Finding Eleven of the notice

A.

Finding eleven of the notice states: "An institution is not permitted to pay bank service fees from its Federal funds account. . . . In the 1989 program review, the reviewers found that bank service fees had been deducted from the College's Federal control account." The program review neither provides any specific facts nor alleges when the charges were made.See footnote 162 *162*

The program review report directed Southern to comply with the following:

The institution must review its Federal depository accounts for the 1987-88 and 1988-89 award years to identify any unauthorized charges and provide documentation to show that any charges have been reimbursed. . . .If the institution has not made the required reimbursements to the Federal depository accounts, the accounts must be repaid and appropriate documentation submitted to this office. . . .This is a repeat finding cited in the program review report dated November 21, 1986; therefore, a $1000 fine is being proposed. Repayment instructions will follow in the final program review determination letter.

Mr. Knight testified that as a result of looking at the bank statements, he found that bank service charges were incurred on the control account.See footnote 163 *163* Knight explained that Education exhibit O is a copy of his work notes made after looking at the Education control account. A comparison of the amounts in exhibit O to stipulation 57 indicate that some of the numbers match and some of the numbers do not match. Exhibit O records the following sums:

July 1987 $.93; August 1987, $2.24; December 1987, $2.43; March 1988, $1.44; April 1988 $2.63; June 1988, $1.69; July 1988, $2.90.

Stipulation 57 corresponds to the inspection of the problems found in the Education control account. It states:

Bank charges were assessed against SVC's Federal funds control account on or about the following dates in the following amounts: June 30, 1987, $.93; July 31, 1987, $2.24; November 30, 1987, $2.43; February 29, 1988, $1.44; April 29, 1988, $2.63; May 31, 1988, $1.69; June 30, 1988, $2.90; July 29, 1988, $2.68; August 31, 1988, $2.68; September 30, 1988, $2.68; October 31, 1988, $1.60; November 30, 1988, $.95; December 22, 1988, $3.00; February 8, 1989, $3.22; March 31, 1989, $3.33; and April 14, 1989, $10.00.

The exhibit also shows that $150 was deposited into the general fund account. The amounts are the same in all cases, but the dates vary in most entries. No other dates or entries are listed on exhibit O and only the April 29, 1988 date exactly matches the stipulation and Knight's notes.See footnote 164 *164*

According to Haygood, all of the charges set forth in stipulation 57 were reimbursed to the Education control account from the institutional operating account.See footnote 165 *165* Even though the amount of charges shown in stipulation 57 amounts to only $44.40, the school decided to refund more money than required. A check numbered 2846, dated April 14, 1989, shown in Southern's exhibit J for $135, represents full payment of the charges.See footnote 166 *166* Haygood explained that the school made the overpayment to cover any additional charges that were not declared. See footnote 167 *167* The date of the check is April 14, 1989, and, according to Mr. Haygood was available to the program reviewers in July, 1989.See footnote 168 *168*

Southern points to its exhibits AA and BB for factual support. Exhibit AA is a letter written March 1, 1991, from Lawrence Haygood, Jr., to the President of the Alabama Exchange Bank. In the letter, Haygood informs the bank that federal program guidelines do not permit bank service charges to be made against the federal program accounts. He specifically requested that any bank

service "charges against these accounts be made against the institution's operating account, 60-4390-9." Southern exhibit BB is a letter from the bank in response to exhibit AA. The bank letter stated in part: "We are not authorized to grant your request but would suggest that you handle the respective service charges on a reimbursement basis at the time you receive your periodic statement on each account."See footnote 169 *169*

The parties stipulated that Southern was cited by Education in the November 21, 1986 program review for having bank charges deducted from its federal funds account in the amount of $15.00 in July 1986.See footnote 170 *170* Mr. Haygood testified that the $15.00 charge in July 1986 was the only charge that had been cited by Education in the 1986 program review. He said:

After it was mentioned to us by the program reviewer, either in the exit conference or by the report, I went to the bank and requested that the bank not charge us any type charges-- or any charges he made against our operating account, not that this is a requirement that is made of the institution.See footnote 171 *171*

B.

The notice cites the 1989 program review report as the source of a violation of 34 C.F.R. § 668.16 (1988)See footnote 172 *172* Education's notice states: "This was a repeat finding, the College having been cited for the same substantive violation in the program review report dated November 21, 1986."See footnote 173 *173*

Section 668.16, effective November 19, 1986, serves as the basis of the charge of permitting bank service fees to be paid from a federal control account:

Funds received under the Pell Grant SEOG, CWS, JCL, and Perkins Loan programs, except those funds received for the administrative cost allowance, are held in trust for the intended student beneficiaries and the Secretary. The institution, as a trustee of Federal funds, may not use or hypothecate (i.e. use as collateral) Title IV, HEA program funds for any other purpose.

While Education failed to provide the regulatory reference for the prior violation, a review of the 1987 Code of Federal Regulations lists a regulation substantially similar to 5 668.16(1988). Section 668.22, effective, as amended, November 28, 1986, states:

§ 668.22 Federal interest in title IV student assistance program funds.
(a) Except for funds received for the administrative cost allowance, funds received by an institution under
(1) The Pell Grant Program,
(2) The Supplemental Educational Opportunity Grant Program,
(3) The College Work-Study Program, and
(4) The National Direct Student Loan Program, are held in trust for the intended student beneficiaries. The institution, as a trustee of Federal funds, may not use or hypothecate (i.e., use as collateral) title IV funds for any other purpose.
(b) An institution's administrative cost allowance is established for the Pell Grant Program, the

Supplemental Education Opportunity Grant Program, the College Work-Study Program, and the National Direct Student Loan Program by section 489 of the Higher Education Act of 1965.

C.

Southern is changed, as stated in the notice, with permitting bank service fees to be paid "from the College's Federal control account." Such actions, Education maintained, violated 34 C.F.R. § 668.16. The regulation, in part, states: "The institution, as a trustee of Federal funds, may not use or hypothecate . . . Title IV, HEA program funds for any other purpose" than the education of the student beneficiaries and the Secretary. Education considered it a use of the federal depository account for a bank to assess a service charge.

Education's evidence was the testimony of the program reviewer. He made notes, but provides no supportive data to his testimony. Education's exhibit O are only conclusionary comments made by the program reviewer which alone do not support the allegations. The parties stipulated in number 57 to a list of charges totaling $44.40 which was assessed by the bank to the federal funds control account from June 1987 to April 1989. The amounts stipulated, however, were admissions by the school that charges were assessed by the bank on the account. The fact that the reviewer's numbers and dates vary from the stipulated amounts is not material. Haygood's testimony concerning Southern's exhibit J being a payment to the Southern Vocational College - Ed. Control Account for $135, however, is an admission that a reimbursement was made for the bank charges.

Haygood not only admitted to the reimbursement for bank charges, but he also explained that the payment was made in April 1989 prior to the July 1989 program review. He properly argued that the repayment was made prior to the program review and the verification of payment was available to the program reviewer. Even though the repayment is evidence of bank charges to the federal account, Southern submitted its exhibits AA and BB to show that it did not intentionally permit or direct the use of the federal fund control account. Exhibit AA is a letter from Southern to its bank, Alabama Exchange Bank, directing any bank service fees to be made against the institution's operating account. The bank responded to Southern's request by stating: "We are not authorized to grant your request but would suggest that you handle the respective service charges on a reimbursement basis at the time you receive your periodic statement on each account." Southern exhibit BB.

The institution is charged with permitting bank service fees from being paid from the federal control account. One cannot conclude that Southern intentionally directed the bank to charge a bank service fee. It cannot be found that Southern permitted the fee to be charged. In fact, Southern directed the bank that no fee is permitted by the federal program guidelines. The bank's response in exhibit BB clearly indicates that the bank is not authorized to comply with the institution's request to charge service fees to the school's operating account.

In summary, it can, however, be found that $44.40 had been assessed by the bank against the federal control account, that Southern reimbursed the federal control account prior to the July 1989 program review, that Southern attempted to direct the bank not to charge the federal control account, and that the bank would not change its policy of assessing the bank service charge to the

account. Therefore, it cannot be found that Southern intentionally or negligently permitted bank service fees to be paid from a Federal fund control account, in violation of 34 C.F.R. 668.16.

Failure to obtain and keep current adequate fidelity bond coverage - Finding Twelve of the notice

A.

The notice claims a failure to obtain and keep current adequate fidelity bond coverage by stating:

Institutions are required to maintain and keep current adequate fidelity bond coverage to protect Federal funds from loss due to institutional employee or 75 officer theft or misappropriation. 34 C.F.R. 668.13(g) (1987), 668.15(f) (1980). During the 1989 program review, the College could not provide proof that it had the required fidelity bond coverage in place.

Education relied upon its exhibit X, a letter from Lawrence Haygood, Jr., to Nancy Mapes, dated August 29, 1989. Southern admitted in the letter that they were "currently making arrangements to renew coverage for the Business Manager, Financial Aid Officer, and President at a minimum of $100,000." The letter does not specifically admit or deny fidelity bond coverage. The letter was described by Education counsel: "It's a letter in which there's an admission that the bond that they thought they had wasn't the bond they were supposed to have."See footnote 174 *174* The parties's have stipulated, however, that "SVC did not have fidelity bond coverage from a date prior to July 17, 1989 until January 15, 1990.See footnote 175 *175*

Mr. Earnest Davis, Southern's business manager was asked how it happened that Southern had no fidelity bond coverage. He said: "That came about accidentally. The local agent who had actually had our bonding or actually was responsible for our bonding went out of business and they did not notify us of going out of business or cancellation or whatever. They did not notify us.See footnote 176 *176* As a result, the school was canceled without its knowledge.

B.

The notice states that during the 1989 program review the College was unable to show proof of fidelity bond coverage. The regulation alleged, on page 8 of the notice, to be violated is 34 C.F.R. § 668.13(g)(1987). In as much as the 1987 Code of Federal Regulation's has no subsection (g), this review turns to the 1988 edition. The 1988 edition of the C.F.R. incorporated section 668 13(g), effective December 1, 1987:

(g)(1) An otherwise eligible institution shall obtain and keep current adequate fidelity bond coverage in order to protect the Government's interest in the Title IV, HEA program funds the institution received as a trustee. A fidelity bond indemnifies the holder against losses resulting from fraud or lack of integrity, honesty or fidelity of its employees or officers.
(2) A public institution that is bonded by the State against the type of losses described in

paragraph (g)(1) of this section does not have to obtain additional fidelity bond coverage.
(3) Any bond required under this paragraph must be obtained from companies holding certificates of authority as acceptable sureties (31 C.F.R. Part 223). A list of these companies is published annually by the Department of the Treasury in its Circular 570.

The notice also cites 34 C.F.R. 668.15(f)(1981), effective December 31, 1980. It is essentially the same regulation:

(f)(l)(i) An otherwise eligible institution shall obtain and keep current adequate fidelity bond coverage in order to protect the Government's interest in the title IV funds it receives as a trustee. (ii) However, a public institution that is bonded by the State against the type of losses described in paragraph (f)(2) of this section does not have to obtain additional fidelity bond coverage. (2) A fidelity bond indemnifies the holder against losses resulting from fraud of lack of integrity, honesty, or fidelity of one or more of its employees or officers. (3) Any bond required under this paragraph shall be obtained from companies holding certificates of authority as acceptable sureties (31 C.F.R. Part 223). A list of these companies is published annually by the Department of the Treasury in its Circular 570.

C.

The regulation, 34 C.F.R. § 668.13(g), requires an institution to have fidelity bond coverage to indemnify against losses from employee fraud or lack of integrity, honesty, or fidelity. Stipulation number 55 admits that Southern did not have fidelity bond coverage from a date prior to July 17, 1989, to January 15, 1990. Southern's business manager, Earnest Davis, explained that the insurance carrier went out of business and did not notify the school. Consequently, the school's insurance coverage was canceled. While the circumstances may cause one to be sympathetic toward the institution, the institution must maintain internal assurances to guard against such events. There was a failure to keep bond coverage. Therefore, Southern violated 34 C.F.R. § 668.13.

General Violations

Earlier in this discussion, it was stressed that the direction of this decision is to first provide the facts to nine findings which are based on specific events. With that complete, the discussion now turns to the general violations found in findings one, two, and three. They deal with more abstract concepts: administrative capability, proper accounting, and fiduciary responsibility. Education counsel refers to these findings as being-a more "global violation."See footnote 177 *177* She also refers to these violations as being systemic. Each of the more general concepts develops from specific events or a series of specific events. Each of the findings accuse the school of failing to take certain action or acting in a certain manner so as to cause the adverse finding.

Failure to demonstrate administrative capability - Finding One of the notice

A.

The first of the general findings is the failure to demonstrate administrative capability. The notice specifies in the following order the violations to support finding one: premature payment of Pell Grants; holding credit balances without student authorization; failure to retain Stafford Loan proceeds; untimely payment of refunds; recording inconsistent financial information in its Fiscal Application (FISAP); allowing unauthorized charges to be assessed against its Federal Depository Account; failure to resolve prior audit and program review exceptions, and failure to maintain records that provide a clear audit trail of the 80% federal/20% institutional match of funds.

Some of the specific violations shown above relate to other findings previously discussed as part of the first nine specific findings. Premature payment of Pell Grants is the same as finding seven of the notice. Holding credit balances without student authorization is the same as finding five. Untimely payment of refunds is the same as finding four. Allowing unauthorized charges to be assessed against its Federal Depository Account is the same as finding eleven. Education maintained that proof of the separate specific findings shown in the earlier discussion provided sufficient proof of the elements necessary to find a violation of finding one.

In addition to the facts supporting the four separate violations above, there are four other fact patterns cited in the notice to support a violation under finding one: 1) failure to maintain a clear audit trail; 2) failure to credit retained Stafford Loan proceeds; 3) failure to resolve prior audit and program review exceptions, and 4) failure to record consistent financial information on the FISAP. The facts of the four previously discussed findings are not repeated here. Moreover, the facts for the inconsistent financial information found on the FISAP will be discussed under finding two. The discussion of the facts contained in this finding will be limited to: 1) failure to maintain a clear audit trail; 2) failure to credit Stafford Loan proceeds, and 3) failure to resolve prior audit and program reviews.

Education counsel stated that Nancy Mapes' testimony "addresses how [the facts] played into her determination of a lack of administrative capability.See footnote 178 *178* Because Mr. Pouncey had placed the school on a reimbursement account, Mapes claimed an awareness of the systemic nature of Southern's problems.See footnote 179 *179* According to Ms. Mapes, in evaluating a school's ability to administer Title II funds, a program reviewer looks to see if the school has a staff of sufficient numbers and capabilities to assure compliance with the regulations. More importantly, she said, they look to see if the school has the necessary paperwork to track the money spent.See footnote 180 *180* She said that an infraction is a "global violation" if "[i]t is a systematic problem that the institution has not corrected or not taken the appropriate steps to correc.See footnote 181 *181* She looked at the following three allegations to determine if the school had sufficient capable staff and the necessary paper trail to track the money.

1. Failure to provide a clear audit trail

Mr. Knight testified as to the reasons he believed Southern failed to display administrative capability and failed in its systematic administration regarding cash management.See footnote 182 *182* Specifically, he referred to finding fourteen of the 1989 program review:

Finding: CWS Accounting/Recordkeeping Needs Improvement

The institution's CWS bank statements did not always provide a clear audit trail indicating the 80% Federal and 20% institution matching of funds. During most of the 1987-88 award year, the institution provided 100% of the CWS payroll from the institution's general fund. In addition,-there were ten CWS checks in amounts ranging from-$110 to $2121.34 made out to the institution's general fund for the two year period ending June 30, 1989. Only three of the checks appear to be for reimbursement of the institution's 20% match.

As required action, the institution had to list the amounts of the 10 checks followed by an explanation as to why these funds were transferred to the general fund. The institution was required to provide a clear audit trail.See footnote 183 *183* No further significance was placed on the ten checks mentioned above.

Knight said, "Based on institutions' bank statements and deposit slips, I was unable to determine the 80/20 percent matching for CWS."See footnote 184 *184* He referred to Education exhibit V and W. Exhibit V is a copy of the institution's monthly request for college work study program funds for 1987-1988; Education exhibit W is a copy of the institution's 1988-89 college work study funds request. The documents, according to Knight, were prepared by Southern.See footnote 185 *185* He explained that the 20% column shows the institutional share and the column labeled 80% is the federal share for the monthly payroll. He claimed that the monthly deposits from the bank records did not match the sums on exhibits V and W.

Mr. Knight said that he looked at the numbers shown in exhibits V and W to see if the numbers coincided with the 80 percent federal share.See footnote 186 *186* He said, "I was unable to verify the amounts.See footnote 187 *187* He stated that Southern failed to provide a clear audit trail because:

To have adequate documentation in order to follow the flow of the funds from the accounts, the Ed control account which would-be federal funds and the institutional account which would be the 20 percent matching. . . .The purpose of that would be to determine whether or not the institution had properly matched its 20 percent share with the 80 percent federal share. . . .They are supposed to match the 80 percent federal share with the 20 percent matching share when they deposit the money in the college work study account.See footnote 188 *188*

He based his opinion on Education exhibits V and W, the bank deposits, and checks written on the Title IV account to the institution's general fund. He claimed that he tried to compare the amounts, but that he was unable to determine where one or two of those reimbursements matched the 80 percent. Mr. Knight did not explain how or what documents he found which verified the one or two cases mentioned here to match any of the numbers in Education exhibits V and W. He concluded the following : "My bottom line is that there is no adequate audit trail to trace the 20/80 percent matching that is required by the federal regulations.See footnote 189 *189*

Southern counsel Henderson asked Mr. Knight if he looked for the 80 percent reimbursement share or the 20 percent figure. Knight said, "I looked for both of them. I tried to follow the flow of funds."See footnote 190 *190* Counsel asked Mr. Knight what he meant by the last sentence in

the finding entitled CWS Accounting. "Only three of the checks appear to be for reimbursement of the institution's 20% match." Knight further explained, "The institution was putting a hundred percent in, and I was trying to follow the 80/20 percent that they say they were reimbursing themselves for."See footnote 191 *191* Knight agreed that during most of the 198788 award year the institution was providing 100 percent of the college work study payroll from the institution's general fund.See footnote 192 *192* Later, he said: "They stated that they were advancing funds into the account for both the federal and the institutional share. And one of the things they stated was that they were reimbursing themselves for the 80 percent that they kicked in up front."See footnote 193 *193* He referred to stipulation number 53 which states:

"On 7/29/88, SVC withdrew $762.13 from SVC's General Fund Account and deposited it into SVC's CWS account to pay for 100% of the CWS payroll wages for the then-current payroll period."See footnote 194 *194* Knight explained that since the institution was using its funds first and then requesting from the Government for the 80 percent share advanced, he looked for checks in amounts similar to the amount advanced.See footnote 195 *195* Knight said:

In order to provide an audit trail, they would have to, or at least have some kind of documentation to show what those two combined or whatever how many amount of months that they were going to reimburse themselves for, yes, they would. There is no way of -- from the amounts that they were reimbursing themselves, with the exception of I think one or two months, they never matched up to the 80 percent federal share.See footnote 196 *196*

Lawrence Haygood, Jr., provided Southern's explanation: "[t]he transfers were for reimbursement of college work-study expenses or payrolls that the institution made out of its operating account for the college work-study program." His explanation as to why the school was paying almost all of the work-study out of its own funds follows:

Two things were occurring that could cause that and were causing that at that time. One, in cases where we received our resources extremely late because of processing. The students who had worked and were scheduled to be paid, if it were generally over a week -- several days to a week late, we would go ahead and pay it out of the general operating account, provided we had money available at that time.

The other major reason was that we were not receiving enough money after the offset to pay college work-study at that time. College work-study is due to the students. It is not something we can hold on account or we can charge the student for; we have to pay them in check for college work-study that they have earned. So we, therefore, had to pay them from our own operating account because we had not received the resources back from the Department of Education to pay them.See footnote 197 *197*

Haygood had the following exchange with his attorney:

Q And so for a substantial portion of the 87-88 award year, you were not receiving adequate federal funds to cover the 80 percent share of the Government. Is that what you are saying?

A Yes, that is correct.

Q Now, you are saying it was because of the offsets?

A Yes, that is right.

Q What do you mean?

A The amount of money that is offset by the Department of Education to be paid for the note which had been negotiated. They offset against whatever resources are there without regard to which programs there is; however, certain programs have to be paid at that given time.

Q When you say offset, they deduct this from the top?

A Right. They deduct this from the top.

Q And there were numerous instances in which what was left was not enough to pay college work-study?

A There were numerous instances in which [it was] not sufficient to pay the entire payroll at that time; therefore, the institution paid the payroll and acquired reimbursement at a later date.

Q Now, how was the reimbursement handled? Was it a lump-sum reimbursement or how was the school reimbursing itself?

A The school generally reimbursed itself 80 percent which was the federal share which was to have been paid by the federal government if it were available. If not, the school reimbursed itself based on what was available at the given time after we received the resources from the federal government. If part of that reimbursement was available, then we reimbursed part of what was available. The entire amount never was reimbursed for that year.

Q So you were reimbursing yourself in increments as the money became available?

A Yes. If we had the entire payroll, we would reimburse the entire payroll and identify that payroll that we reimbursed. If not, we would reimburse part of a payroll based on what was left after the other proper accounts had been paid as required.

Or also, based on the fact that we may get in, say, so much from work-study that was due for the work-study account, and we may pay a current payroll and if anything was left that had come down, we could then also reimburse ourselves a portion of what was left.

Q So the fact that the non-matching was because the reimbursements were not in full at any -- very seldom was the reimbursement in full at a given time.

A That is correct.

Q Did Mr. [Knight], or either of the reviewers ask you to provide any documentation as to the 20/80 percent match -- well, what we are calling the audit trail?

A . . . No, he did not; and no, she did not.See footnote 198 *198*

Mr. Haygood explained that he kept a written document to track the increments paid against each payroll. Mr. Haygood claimed that if Mr. Knight would have asked to track the reimbursements to a specific payroll, he would have been able to trace them by taking "the payrolls which had been paid by the general fund, taken the reimbursement and matched them to payrolls that had been made. Some would match exactly; most were done incrementally, so we would have had to show the increments - to which payroll that increment applied that had been paid by the general fund -- which payroll was being reimbursed."See footnote 199 *199*

The following supportive data was provided by the school to explain the testimony of Mr. Haygood. Southern exhibit J is a February 8, 1990, letter from Lawrence Haygood, Jr., to Nancy Mapes in response to Education's 1989 program review report. Southern counsel explained that Southern exhibit J, at page 20 and 21, shown below, provided its response to the program review report. Southern listed the transfers from the school's institutional account to the college work study account. The first chart reports the amounts the school transferred to the CWS account. The second chart records reimbursements transferred to the general fund.

Finding 14: Institutional Operating Account Transfers to CWS

| | Program |
|---|---|
| 06/24/87 | 1,587.91 |
| 07/17/87 | 276.38 |
| 08/24/87 | 1,225.00 |
| 10/21/87 | 1,675.00 |
| 11/25/87 | 3,356.71 |
| 12/22/87 | 2,646.52 |
| 01/28/88 | 1,723.53 |
| 02/18/88 | 3,170.80 |
| 03/18/88 | 3,021.72 |
| 04/22/88 | 1,897.78 |
| 06/01/88 | 2,130.00 |
| 07/15/88 | 1,505.85 |
| 07/29/88 | 762.13 |
| 12/01/89 | 1,044.05 |
| 03/03/89 | 1,166.00 |

This is a total of $27,189.38. Eighty percent of this amount is $21,751.50.

Finding 14: CWS Checks Transferred to G.F.

| Ck # | Date | Amount | Explanation |
|---|---|---|---|
| 0281 | 09/11/87 | $1,500.00 | Reimbursement for institutional advance on CWSP payroll. |
| 0282 | 10/30/87 | 2,121.23 | " |
| 0283 | 04/08/88 | 800.00 | " |
| 0284 | 06/30/88 | 305.00 | " |

0285 08/01/88 1,814.38 "
0292 08/19/88 325.00 "
0286 12/09/88 350.00 "
0287 03/21/89 1,200.00 "
0288 05/18/89 225.00 "
0289 06/08/89 110.00 "

This is a total of $8750.61.

Southern counsel stated: "At the time for different reasons, they were paying almost all of it and as the Federal money became available later, they would reimburse themselves in increments simply because there was never enough to do one lump sum increment . . . that doesn't violate the regulations."See footnote 200 *200*

2. Failure to credit retained Stafford money

Education claims that finding one is also based on a failure to credit retained Stafford money which Southern denies. The basis of the complaint is found in finding five of the 1989 program review:

Finding: Failure to Credit Retained Stafford Loan Proceeds

Student #9 had a balance on his ledger card of $250 as of 06/26/89. The institution failed to give him credit for $125 withheld from his Stafford Loan check on the receipt dated 01/09/89. The student's account should show a balance of $125.See footnote 201 *201*

Required Action:

In responding to this finding, the institution must provide evidence that the student's account has been credited for $125. In addition, since this is a repeat finding from the prior program review, a $1000 fine is being proposed. The institution must develop a system to ensure that future Stafford Loan proceeds will be credited to the student's account in a timely manner. The title of the person responsible for this action should be included in the response.See footnote 202 *202*

In a special November 1991 hearing held to identify the specific testimony or exhibits relied upon by the respective parties, Education counsel was asked what evidence it presented to prove the failure to credit retained Stafford proceeds. Counsel responded, "[T]hat's just addressed by the transcript, it's not a separate finding. . . .[I]t's only addressed in this administrative capability finding so it will be covered by our transcript and document cites." Counsel did not, however, identify any documents or specific testimony on the issue of the failure to credit-retained Stafford proceeds. Southern presented the only evidence and testimony.

Rovetta Watson testified that the allegation, "basically stated that we failed to credit a student $125 that was withheld from a guaranteed student loan check. The student's tuition card was not credited -- account balance."See footnote 203 *203*

Ms. Mapes asked Watson about it because it was found in her files. Watson explained: "The way the question was put to me . . . was: What does this mean right here? And I said, basically, that we deducted $125 on this student. That is what the student paid for his guaranteed student loan for his tuition."See footnote 204 *204*

Ms. Watson referred to Southern's exhibit X, a one page document entitled Southern Vocational College, Financial Aid Office, Guaranteed Student Loan Documentation. She explained: "[T]his document is one that we have each time a student gets a loan disbursement, he has to sign for the amount -- that he recognizes the total amount of the disbursement and what charges are being deducted from that check.See footnote 205 *205*

The exhibit, which was in her financial aid file, is a form signed by Clarence Wilson which shows payment entries dated 12/29/88, 1/9/89, and 4/9/89. The January 9, 1989, entry indicates a payment of $125 for tuition. Ms. Watson told Ms. Mapes that the student had a deduction of $125 for his tuition. She later rationalized, even though the student loan documentation card was properly marked, that the students' tuition card was not credited as a $125 student payment. The error, she said, was that it was not posted to the student's ledger card.See footnote 206 *206* According to Watson, the credit was subsequently posted to the student's ledger card later.

3. Failure to resolve prior audit and program reviews

At the November 1991 special hearing, Education failed to provide any specific reference in the evidence for the tribunal's consideration on this issue. Education, in its post hearing brief, made the following statement concerning the significance of the letters that finalize an audit or a program review:

OSFA's acceptance of corrective action or its closure of a review should not be confused with excusing the violations that occurred. The closure of a review simply means that all findings have been addressed and that any financial liabilities resulting from the liabilities have been identified. OSFA has the authority to and does frequently initiate limitation, suspension, or termination proceedings under 20 U.S.C. § 1094(c)(1)(d) and/or civil penalty (fine) proceedings under 20 U.S.C. § 1094(c)(2)(B)(i) before the program review process has run its course. (Emphasis added). In addition, OSFA has authority to and frequently does base these enforcement actions upon program review findings that have been closed.See footnote 207 *207*

Education counsel was asked: "Is a program review ever final? Is there any finality to the process?" Her response was: "I think at some point it would be within the judge's discretion to say that's an unreasonable action on the part of the Department. . . "See footnote 208 *208*

Education exhibit A-3 is the November 21, 1986 program review letter which provided some evidence on this point. The letter acknowledges: "It should be noted that the institution was destroyed by fire in January of 1986. All records were destroyed in that fire. Since that time the institution has been reconstructing its records." Later in the letter, Education stated:" "Any prior program review findings still not satisfied will be considered a requirement of this review.See footnote 209 *209* The 1986 program review acknowledged that any prior year reviews would be incorporated into the 1986 review.

In response to Education's assertion that Southern failed to resolve prior audit and program reviews, Southern has submitted its exhibits V and W. Southern exhibit V is a Final summary letter from William Pouncey dated December 11, 1986. The letter relates to the November 1986 program review (Ed. Ex. A-3). The letter states that $904 must be repaid to Education. It also states: "This constitutes this office final summary letter with respect to the liabilities identified from the program review." Page three of that exhibit is a copy of a check for $904 payable to the U.S. Department of Education. There is no evidence submitted which questions the validity of the payment.

Southern exhibit W is a Final summary letter of the December 1987 program review from Education's Judith Brantley. Upon the payment of $565.35, she explained, "[t]his review will be considered closed." Page four of the exhibit is a copy of a check for $565.35 payable to the U.S. Department of Education. There is no evidence which questions the validity of Southern's payment.

As stated earlier, stipulation 58 points to Education's failure to answer the institution's responses: "Prior to Ed's termination action of July 17, 1990, Ed had not written to SVC acknowledging receipt of, or otherwise correspond[ed] with SVC concerning, SVC's February 1990See footnote 210 *210* and April 1990See footnote 211 *211* responses to the 1989 program review."

B.

The notice refers to the institution violating 34 C.F.R. 668.14 and 668.15 (1988). Education alleged that the premature payment of Pell Grants; holding credit balances without student authorization; failure to credit Stafford loan proceeds; untimely payment of refunds, and recording of inconsistent financial information in its FISAP and its account ledgers are repeat violations.

Section 668.14 is a lengthy regulation which is summarized, herein, in order to highlight the salient parts. The institution must demonstrate "that it is capable of adequately administrating" a program. The Secretary established standards in the regulation which use the words adequate, capable, and reasonable to measure the standards.

The Secretary considers the following as adequate or reasonable standards: (1) The institution must establish and maintain student and financial records required under § 668.23 and for individual programs. (2) The Secretary considers an institution capable if the school designates a capable individual to administer and coordinate the programs. (3) The institution must communicate information that bears on student eligibility. (4) The school must use an adequate number of qualified persons to administer the programs. In this regard, the Secretary considers the number of students aided, the number and types of participating programs, the number of applicants administered, and the financial aid delivery system used by the institution. (5) The school must use adequate checks and balances in its system of internal control. (6) It must divide the functions of authorizing payments and disbursing funds. (7) The institution must establish, publish, and apply reasonable standards for measuring a student's satisfactory progress in his or her course of study. (8) It-must develop and apply an adequate system to identify and resolve

discrepancies in information received from different sources with respect to the student's application for financial aid. (10) The institution must refer for investigation any application which indicates fraud, or other criminal conduct in connection with the application for assistance. (11) The school must provide adequate financial aid counseling. (12) The institution must not otherwise appear to lack the ability to administer the federal programs competently.

Section 668.15 provides additional factors for evaluating administrative capability. The Secretary considers it an indication of an institution's impaired capability if default rates on loans exceed 20 percent, or if more than 33 percent of the students withdraw during an academic year or an eight month period depending upon year classification. No facts were presented to show a violation on 34 C.F.R. § 668.15.

C.

The regulation which addresses administrative capability is lengthy and difficult to set forth in a manageable form.See footnote 212 *212* Education counsel correctly describes the violations as systemic or global concepts. The regulation in the first paragraph of § 668.14 states that "an institution must demonstrate to the Secretary that it is capable of adequately administering that program under the standards established in this section." The regulation is general in nature and abstract. The violations are based upon acts or omissions which must lead one to conclude that the institution lacks organization/structure and ability to manage the federal funds entrusted to it. The regulation requires capable staffing, adequate systems, able communications, satisfactory investigation and problem solving, financial aid counselling, or high default rates on loans. In order to show that an institution had violated §§ 668.14, Education must establish proof of the specific act alleged and show that the institution failed to meet the Secretarial standard set forth under § 668.14. The Secretary makes use of the words adequate and reasonable as a yardstick for measuring the standard.

Therefore, Education must show that the circumstances surrounding the specific acts are unreasonable or inadequate in order to establish a violation of finding one of the notice.

The program review report provides eight examples which Education offers as proof of a violation of the administrative capability regulation. Four of the examples were previously discussed: (1) finding seven - premature payment of Pell Grants; (2) finding five - holding credit balances; (3) finding four untimely refunds;-(4) finding eleven - unauthorized charges.

One of the examples, recording inconsistent financial information on the FISAP, will be fully discussed under finding two. The examples discussed herein are (1) failure to provide a clear audit trail, (2) failure to credit Stafford loan proceeds, and (3) failure to resolve prior audit and program reviewers.

1. Clear Audit Trail

The "clear audit trail" allegation is based upon the 1989 program review finding that the CWS bank statements did not provide a clear audit trail indicating the 80% federal and 20% institutional matching for CWS funds. This part of the program review investigation was done by

Mr. Knight. After observing the bank deposits and statements, he summarized his conclusions in Education exhibits V and W. His explanation of exhibits V and W was vague; he did not document his conclusions found in the two exhibits. He said that he looked for similar amounts in the two columns which represented sums into and out of the CWS program funds. He said: "They are supposed to match the 80 percent federal share with the 20 percent matching share when they deposit the money in the College Work Study account." Since he was unable to match the columns, he concluded that no clear audit trail was provided. His conclusions lack weight and credibility.

The facts indicate that the federal-government was not making payments in a timely fashion to pay its 80% of the CWS funds in advance of the time that the CWS payments were due to the students. Haygood's testimony, Knight's testimony, and stipulation 53 all support the fact that Southern was paying 100% of the CWS payments to the students during the period under review. Since Southern was, as Mr. Knight described, "kicking in up front" the entire 100% of the CWS payroll, the audit trail did not create a clean "check and match the columns" method of audit. In addition to Southern paying the entire CWS fund first, Southern was having all of its receipts from Education offset by prior commitments to Education. Haygood testified that its exhibit J was available for review at the time of the program review, but Knight failed to request it. Southern's exhibit J shows that Southern, during the period of 6/24/87 through 3/13/89, provided $27,189.38 for payments to the CWS account. The federal share was $21,751.50 or 80% of the total amount paid out Education owed this amount to Southern. Haygood explained that from the receipts, "the school generally reimbursed itself 80 percent . . . if it were available. If not, the school reimbursed itself based on what was available . . . from the federal government. . . . The entire amount never was reimbursed for that year. "See footnote 213 *213*

The CWS checks transferred back to Southern's general account amounted to only $8750.61. The numbers support the fact that Southern was not reimbursed for the 80% federal share which Southern "kicked in up front." Southern's proof supports its explanation of the trail of funds. In summary Southern did provide a clear and adequate audit trail of the 80% federal and 20% institutional matching of funds.

2. Failure to credit retained Stafford money

Education claimed that Southern failed in its administrative capabilities because the school failed to credit $125 withheld from student [student name]'s Stafford loan check. Education provided no evidence to support this claim. The only evidence submitted is Southern's exhibit X. It is a Southern guaranteed student loan documentation form. The form shows that on January 9, 1989, [student name] was paid $304.64. Southern's financial aid officer explained the form to the program reviewer at the time of the review and to the tribunal at the time of the hearing. Each time a student received a loan disbursement the student is required to sign the document to verify a disbursement. The form, in addition to showing a payment to the student of $304.64, also showed a deduction for $125.00 for tuition. Ms. Watson admitted that the student ledger card was not posted at the time of the review, but was later posted to the student's record.

Education claimed that Southern failed to credit retained Stafford money. The only credible evidence presented shows that a student's ledger card was not posted. There is no information to

support an untimely posting to the ledger card. There is no proof that Southern is required to post the ledger card as a credit for retained Stafford money. There is no proof that the institution retained any Stafford money. There is credible evidence that Southern gave guaranteed student loan money to the student named in Education's finding five of the 1989 program review. The financial aid office record documents the fact that the $125 deduction was made to cover the students tuition. The money was neither retained by Southern, nor surreptitiously hidden from the student. The record indicates that it was deducted against [student name]'s tuition. At the time of the review, Southern provided evidence that the ledger card was not posted. According to Southern, the student's ledger card was, however, subsequently posted. Southern's admission of the failed posting of the ledger card is insufficient proof that Southern failed to credit retained Stafford money.

3. Failure to resolve prior audit and program reviews

Education presented no evidence to support the claim that Southern failed to resolve prior audit and program reviews. Southern, however, presented various documents to show that all prior audits and program reviews were satisfactorily closed. The 1986 program review stated that any prior unresolved program review findings were incorporated into the 1986 program review. Southern submitted its exhibit V as evidence that the 1986 program review was closed. The exhibit showed that Southern provided Education with all closure requirements. Southern complied with those requirements by paying $904. Southern's exhibit W provides evidence of Southern's payment of $565.35 to close the 1987 program review. Education's Judith Brantley said that the 1987 program review would be closed. Therefore, the evidence submitted does not support Education's claim that Southern has failed to resolve prior audit and program reviews. All evidence is to the contrary. It is clear that Southern did cooperate with Education and did resolve all prior audit and program reviews.

In conclusion, Education failed to show that Southern lacks proper administrative capability, by way of its alleged failure to provide a clear audit trail, failure to credit retained Stafford money, or failure to resolve prior audit and program reviews. Of the eight examples that Education provided as proof that Southern lacks administrative capability, Education proved that some elements of finding four - untimely payment of refunds, and some elements of finding seven - premature payment of Pell Grants were shown. Education, however, proved neither the elements of finding five and eleven, discussed earlier, nor the facts raised in finding one.

While Education has shown proof on some of the elements in findings four and seven, there is insufficient evidence that Southern suffers from such a systemic problem that the recordkeeping, staffing, or administration of the institution is below the Secretary's standard for a reasonable, capable, or adequate administrative operation of the institution. Moreover, Education failed to show that the institution neglected to act in accordance with good business practice and, as such, it has flaws which pervade its organization. To the contrary, Southern showed that it has taken reasonable measures to assure a sound administration of the funds entrusted to it. Therefore, Education failed to prove that Southern was unable to maintain an organizational structure to meet the Secretary's standard for administrative capability.

Failure to properly account for Federal funds received Finding Two of the notice

A.

The presentation of the facts is divided into four parts. It begins with the notice and is followed by the program reviewer's analysis. Next, the institution provides its explanation of the facts or action taken to rebut Education's allegations. Last, Education makes a short rebuttal.

1.

The notice states that the institution must substantiate on the program account ledger the receipt and disbursement of Title IV fundsSee footnote 214 *214* and must record the flow of funds on a FISAP annually.See footnote 215 *215* Also, the institution is required to submit quarterly to Education form PM 272 - a report of Title IV expenditures.See footnote 216 *216* This finding identified in Southern's submissions of the CWS and Pell program reports discrepancies between the FISAP, the College's program account ledgers, and the form PM 272. The notice alone, however, is not sufficient to ascertain the specifics of the violation. For the details of the discrepancies, the notice refers to the 1989 program review report. The 1989 program review report provides the following facts:

Finding Eleven: Discrepancies Between Program Expenditure Reports and Institution's Records

An examination of the institution's Title IV fiscal reports and accounting records revealed discrepancies in expenditures for the College Work Study and Pell Grant Programs for the award period ended June 30, 1988 as follows:

| | FISAP | ED/PMS 272 | Ledger |
|---|---|---|---|
| CWS | $ 26,487 | $ 19,978.19 | $ 26,487 |
| Pell Grant | 268,401 | 281,773.00 | 234.780 |

Education stated in its 1989 program review that the school was cited two times previously for similar conduct (See the November 1986 and the 1983 program review report for the previous citations). In the required action section of the report, Education commented on the school's past performance: "The institution has not made significant improvement in reconciling its records as similar findings have appeared in the December 14, 1987 program review and the last two audit reports. . . .See footnote 217 *217* " It should be noted that the last two audit reports were not presented as exhibits. Finding twelve of the 1989 program review referred to a general allegation stating that finding eleven is a repeat citation:

Finding: Repeat Prior Audit Exceptions Not Resolved

The program review revealed findings that have been noted in prior audits. The institution's last two audits dating back to October of 1982 have contained recurring findings. Specifically, the following findings have occurred in two or more audits:

(a) Fiscal Operations Report and ED Form 272 Not in Agreement,
(b) Fiscal Operations Report and Financial Records Not in Agreement, and
(c) Bank Charges Assessed Against Federal Accounts.

The two previous program reviews reports are dated December 14, 1987 and November 21, 1986. The December 14, 1987 program review at finding six states:

The audit report for the year ended 6/30/87 is in preparation and not available for review. However, the Fiscal Operations Report for the year ended 6/30/87 is not in total agreement with the program ledgers. The differences primarily involve administrative expenses, the programs to which they were charged, and the amount of the charges.See footnote 218 *218*

The November 21, 1986 report states in part II Program Review Exceptions at finding four:

The institution's Fiscal Operations Report for the period ending 6/30/86 shows that SEOG CY account was overspent.

Total funds spent in IY and CY combined do not exceed the combined authorization of $24,674 for both accounts. However, because IY money was spent on CY students the institution reported an over-expenditure in the CY account. The institution should refer to the SEOG Instructions on page 27 of the 1986 application.

An administrative cost allowance of $613.00 was charged against the IY account and $620.00 against the CY account. The non-Federal auditors must review the allowance claimed and make any necessary adjustments. These corrections may be made through the edit check procedure.See footnote 219 *219*

Finally, in addition to the November 1986 report, the 1989 program review report makes reference to the 1983 program review report as a source for similar conduct. Finding ten of that report states that the Fiscal Operations Report and the institution's ledgers did not agree as to the CWS or Pell Grant funds expended.See footnote 220 *220* No additional relevant evidence or testimony is provided on the 1983 program review facts.

2.

Philip Knight prepared and drafted finding eleven of the 1989 report.See footnote 221 *221* His analysis and testimony is divided between a discussion of the CWS and the Pell Grant programs. He explained that the amounts reported in the FISAP, Form PM 272, and the school ledgers should be equal. If the amounts did not match, he claims that a reconciliation should have been made to show why they do not balance.See footnote 222 *222*

First, he attempted to explain the discrepancies in the CWS program. He referred to Education exhibit Q, R, S, and T. Education counsel describes exhibit Q as ten selected pages of the FISAP for July 1, 1987 through June 30, 1988.See footnote 223 *223* Education counsel asked Knight to explain which FISAP figures should be equal. He indicated that the discrepancies for the College Work Study is indicated in exhibit Q, page 37 and 39 at numbers 3, 5, 6, 9, 12, 13, and 14.See footnote 224 *224* To figure the amount of funds spent by Southern in the College Work Study program, he explained that by taking the totals of line 3, 13, and 14 you get expenditures of the 80% federal share of the CWS program money. "Line 13a is the 80 percent federal share. Line 14 would be 100 percent federal funds claimed for administrative cost allowance. And line 3

would be 100 percent federal funds transferred from the [C]ollege [W]ork [S]tudy fund to the SEOG account to pay SEOG awards.See footnote 225 *225* Specifically, Mr. Knight referred to the following expenditures on page 37 of the FISAP (Education exhibit Q):

Line 3. CWS Funds transferred to and Spent in SEOG -$3,219
Line 5. 1986-87 Funds carried forward and spent in 1986-87 +3,219
Line 6. 1987-88 Funds carried forward to be Spent in 1988-89 -$3,219
Line 9. Total Earned Compensation for Regular CWS jobs $26,487
Line 12. Total Institutional Share of Earned Compensation $5,297
Line 13. Total Federal Share of CWS disbursements to students (Both Regular and Community Service Learning Program) $21,190
Line 14. Administrative Cost Allowance Claimed for Regular CWS Program + 1,323

He claimed that the total of these lines is $25,732. The arithmetic is: + $21,190 from line 13, + $1323 from line 14, $3219 from line 3 = $19,294. Therefore, a discrepancy in the amount is at issue.

Mr. Knight compared the balances reported on Education exhibit Q (FISAP) to Education exhibit R. Exhibit R is entitled "Federal Cash Transaction Report - Status of Federal Cash" for July 1, 1988 through September 30, 1988.See footnote 226 *226* The form is marked "MS 272."See footnote 227 *227* Education counsel stated, however, that exhibit R did not give detailed information without looking to other exhibits.See footnote 228 *228* Counsel directed Knight to Education exhibit S for similar information. Exhibit S is page 2 of Education exhibit R. It shows the authorized amount to be $25,732 for the account number E-P008810070. He said that similar information on exhibit Q is found "on the line identified at the very right hand side as $19,978.19." He maintains that this entry represents just the federal share of the CWS expenditures. This figure is different, however, than the calculation in exhibit Q discussed above.

Knight also referred to the sum of $7,121.00 on line four Education exhibit S.See footnote 229 *229* He said that this number is probably for a grant started in 7-1-88 for the award period June 30, 1989.See footnote 230 *230* He explained that the time period an institution may incur expenditures against a particular grant is for that award period and for "almost another 18 months."See footnote 231 *231*

Knight further explained that he compared Education exhibit T to the entries on Q, R and S. Exhibit T is entitled "TCS ledger, Trial balance 6/30/88." He said: "[O]n exhibit T, there is an account at the very top that says Unexpended Grant, CWS . . . There is one showing, $19,903."See footnote 232 *232* Knight said that he believed the $19,903 is the 80% federal share.See footnote 233 *233* He reasoned that the calculation on exhibit Q should amount to the $19,903 shown on Education exhibit T.See footnote 234 *234* To determine whether the amount was the total expenditure or only the 80% federal share of CWS funds, he said:

I think what I did was attempt to calculate what the 20 percent share would be on the total expenditure which would be approximately 20 percent of the total off the FISAP. . . . report taking the total earned compensation of $26,487 which is on line 9 . . . [of Education] exhibit

number Q. . . page 37 . . . and use the calculation of 20 percent of that amount.See footnote 235 *235*

On cross examination, Knight admitted that the 1989 program review report shows no discrepancy between the CWS FISAP and ledger amount of $26,487. The only discrepancy that exists is found on the PMS 272 form (Education exhibit S). It shows the $19,978.19 figure.See footnote 236 *236*

Second, Knight found error with the Pell Grant accounting. He based his opinion on exhibits Q, R, S, T, and U. In drafting the 1989 report for Pell grant funds, he used the sum of $281,773 to represent the total Pell Grant expenditures shown on the PMS 272. He believed he obtained the information from the Education payment report form 272 for the period 9-30-88. On cross examination, Knight again testified that the $281,773 figure came from an Education payment report form 272. He said that he copied the number to his work papers when he did his review, but he did not have specific evidence either in his notes, the institution's 272 payment form, or other documentation to identify the source of his information.See footnote 237 *237*

Education's PMS 272 information for the period of 7/1/88 to 9/30/88 is shown on exhibits R and S. Neither R nor S show a figure of $281,773. .In fact, there is no reference to any sum which shows the Pell Grant expenditure on exhibits R or S. Neither the FISAP (Education exhibit Q), nor Education exhibit R and S(PMS 272) show the amount given in the 1989 program review at finding eleven of $268,401.See footnote 238 *238* He admitted that the actual figure from the FISAP was $278,147. He said: "The Physical Operations Report was $278,147. This figure must have been -this $268,401 must have been put under the wrong heading." Later, he changed his reference and said the $268,401 came from the student payment summary and not the FISAP.See footnote 239 *239* Documentary exhibits of the student payment summary are not available to confirm the source information. He claims that he showed the work sheet to Mr. Ernest Davis, Southern's Business Manager. According to Knight, Davis merely shrugged and made no response.See footnote 240 *240* Knight later admitted: "In this case, apparently, I didn't have a copy of the [E]d[ucation] payment 272 report for that particular period."See footnote 241 *241* Ernest Davis testified that he believes that the discrepancies were discussed in the exit conference, but he does not recall being questioned in detail about the discrepancies.

Also, he neither recalled any discussion on Knight's source for the figures, nor recalled seeing any worksheet or documents.See footnote 242 *242*

To determine the Pell expenditures, Mr. Knight also looked at Education exhibit U in account 4305. Account 4305 is entitled "Transfer FR NIH, Pell," also known as the Education Control Account.See footnote 243 *243* The ledger shows the trial balance on 8/30/88. He said: "It shows $234,780 . . . was transferred to the Pell Grant account."See footnote 244 *244* He compared the $234,780 to the $45,467 amount on Education exhibit T under item 4205 entitled - Unexpended Grant, Pell. Exhibit T was completed on the same date as exhibit U. He further explained that it is significant that the school's cash monitoring reimbursement:

indicates the institution has expended $239,780 in Pell grant funds, and they are reporting they have drawn $281,773. So there is a difference . . . of $45,000 or $46,000. . . .The ed payment 272

account, as I explained earlier, came off that page we don't have a copy of . . . which is $281,773. The ledger amount in the far right side of the report indicates $234,780 expended in Pell grants. . . .[I]t indicates that the institution expended or drew down from the Government $281,773, and they are only reporting expenditures in their records of $234,780.See footnote 245 *245*

He then stated that he was unable to tell the exact amount the institution actually spent in Pell grants. On cross examination, Southern counsel Henderson asked Mr. Knight why he relied upon a report dated 8/30/88 when the close out date for Pell Grants is December 31. Knight admitted that December 31 is the annual close out date for Pell Grants.

Q Why would that not be included if that is the official final Pell document.

A I believe it was in my work papers. Based on the discrepancies in the other three figures, I didn't think it was relevant to include it.See footnote 246 *246*

The $281,773 alleged by Knight in the 1989 program review at finding eleven exceeds the amounts on Education's exhibit T (the 6/30/88 TCS ledger T shows a hand written calculation for the Funding Award for 87-88 of $280,247.) and it does not appear on Education exhibits R and S. He admitted that the amount on the FISAP, Education exhibit Q, is $248,147. He could not tell from Education exhibit U what the total Pell Grant expenditure was.

Knight later admitted that the FISAP is the official reporting document for CWS and other campus based programs, but not the final official document for Pell grants.See footnote 247 *247* He admitted that it was an oversight on his part to not provide the student payment summary for Pell from the official final figure. He admits that the number from the student payment summary would have been more accurate than even the correct FISAP amount. He, nevertheless, maintained that a difference of over $30,000 existed.See footnote 248 *248*

3.

Mr. Haygood explained that during the course of the on-site review he does not recall the issue of discrepancies between the program expenditure reports and other institution records being discussed. He did recall it being mentioned at the exit interview. Mr. Knight did not show Mr. Haygood which documents he relied on to formulate his opinion.See footnote 249 *249* He said that the exit interview was "not in detail nor lengthy."See footnote 250 *250*

Haygood claimed that his responses to the program review gave figures that did reconcile all of the numbers. The parties stipulated that Education did not answer Southern's responses to the 1989 program review. Stipulation 58 states: "Prior to Ed's termination action of July 17, 1990, Ed had not written to SVC acknowledging receipt of, or otherwise correspond with SVC concerning, SVC's February 1990See footnote 251 *251* , and April 1990See footnote 252 *252* responses to the 1989 program review." Mr. Ronald Lipton admitted that he had not seen either of the two responses prior to his recommendation to Molly Hockman to sign the termination letter which initiated this review.See footnote 253 *253*

Mr. Haygood submitted Southern exhibit L, the second response to Education's 1989 program review report. Haygood explained that exhibit L can be identified as covering the period of the alleged discrepancies by first stating on page one of the Pell payment summary that it is for 1987-88. He further stated that the document number identifies the grant year within it; in this case, the document number EOP8810070. EOP88 represents 1988 expenditures and the 10070 identifies the program as College Work Study.See footnote 254 *254* The response provided the following information concerning finding 11 (Finding Two of the notice):

As you will note by the date of the attached documents, the institutions' reports had been previously reconciled last year through the FISAP edit check process and the adjusted Ed Form 272. Reconciled expenditures for Pell Grant as of 6/30/88, and CWSP were:

| FISAP | ED/PMS 272 | SVC Ledger |
|---|---|---|
| $268,375.00 | $268,375.00 | $268,375.00 |
| 26,487.00 | 25,732.00 | 26,487.00 |

The differences shown in CWSP were due to the recording of CWSP expenditures at 100% on the FISAP and SVC Ledger, while at 80%, the federal share, is reported on the ED/PMS 272 Form.

We request reconsideration of the proposed fine based on the fact that the reconciliation had been completed last year on the required respective documents.See footnote 255 *255*

Mr. Haygood began his discussion of exhibit L by referring to page 5:

The first document is the Pell Grant Program Student Payment Summary. The document shows on about the fifth line, total payment amount, the amount of $268,375. . . This is the document which reports your final report;

the type of report is the final report for the Pell Grant Program for the award year.See footnote 256 *256*

The caption at the top of exhibit L, page 6 states "Statement of Cash Accountability" for the period covered by this report 10-1-88 to 3-31-89. On a prior page, it indicates that it is a final report for the 1987_88 award year. Haygood testified:

This is part of the 272 document report of expenditures -- Pell expenditures which shows the document activity, the last document listed is closed -- or next to the last which is E-008804674 is closed at $268,375 which is the amount of Pell Grant. This figure matches the figure on the Pell payment summary.See footnote 257 *257*

Haygood stated: "In the Pell documents, the figures were the same for the Pell payment summary, ED payments 272, and the SVC ledger."See footnote 258 *258*

Next, the testimony turned to an explanation of the College Work Study(CWS) program.

Haygood said:

On the College Work Study . . ., I showed again that the FISAP figure and the SVC ledger figure was the same as they had cited that the Ed payments 272 figure was higher because it was a final figure which had included administrative costs and other allowable costs that can be added to the work study expenditures.See footnote 259 *259*

On exhibit L, page 7, the amount $25,732 is listed under "Resolution of previously reported award problems."See footnote 260 *260* Haygood explained the CWS program information:

The significance of this document is that it shows . . ., as of 3-31-90, reported expenditures for . . . [C]ollege [w]ork [S]tudy on the 272-were $25,732 . . . This document accounts for federal resources or federal money received by an entity . . . what programs received and what expenditures have been made and reported. [T]his is a quarterly report and it shows what has been reported to date, and to date expenditures reported for CWS were $25,732.See footnote 261 *261*

The "Report of Cash Accountability shown on Southern exhibit L at 8 indicates the $25,732 as a "closed" item.See footnote 262 *262* Haygood rationalized:

[T]he significance is that it shows that $25,732 was spent in the [C]ollege [W]ork [S]tudy account, and that account was closed at $25,732 of [C]ollege [W]ork [S]tudy money -- federal money . . . The amount of money we received and expended on [C]ollege [W]ork [S]tudy -- federal money -- was $25,732. That amount earlier had shown -- the figure that was shown to us was $19,000 from which Mr. Knight had mentioned; but the final figures are $25,732."See footnote 263 *263*

Mr. Haygood further stated that if Mr. Knight would have added the correct figures, it would have equalled the figure mentioned here. According to Haygood, Knight erred in not using the correct figures, he used the 9/30/88 report figures and should have used the figures from Southern's exhibit L. He added:

To further clarify it, . . . the reason that you will see a difference there is because when a FISAP is prepared, that is the point at which you can take administrative costs and do what is called carry forwards and backwards. So that the figures that are reported -- the federal expenditures, for instance, of [C]ollege [W]ork [S]tudy up through 6/30/88, you may report only what has been expended in terms of expenditures to the students directly. It would not necessarily include your administrative costs.See footnote 264 *264*

Mr. Haygood admitted being charged in the past by Education for failing to account for federal funds, but offered that on one occasion the error was not Southern's but Education's error. He referred to Southern exhibits P-1 through P-4. First, he pointed to P-1, a report of cash advances to Southern for the period 101-85 through 1-31-86. On the third line, under amount requested, is the sum $153,496.30. Southern claims that the amount was questioned by them and it took over a year to get the amount justifiably removed from their records.

4.

Mr. Knight offered the following comments to rebut Mr. Haygood's testimony: "This $268,375 . . . on their student payment summary -- I believe in my finding I think I quoted under the FISAP the 268,401, so I was within approximately $26 of this figure . . . At the time of my review, I don't think I was -- I was not furnished this document."See footnote 265 *265* He went on to say that even if he would have had the information:

[I]t wouldn't have totally resolved the finding, no, The ledger at that time indicated, I think, $234,000 in expenditures and this report is indicating $268,000 in disbursements requested . . . It is part of the ledger finding, yes, but there is still a discrepancy between what is on this report and what is reported on the institution ledger.

Haygood maintained that the mistake is on the ledger and Southern exhibit L does not include the ledger.See footnote 266 *266* Furthermore, he said that exhibit 2 at EOP00884674 indicates closed but beneath the closing is a notation that an over-disbursement of $9772 to the Pell Grant people.See footnote 267 *267* He said: "In essence, in the prior ED payment report, they reported $9772 in disbursements in excess of the authorization that this had."See footnote 268 *268*

B.

The notice states at page two that Southern violated 34 C.F.R. § 675.19(1988) and 690.81 (1985). On page 4, the notice states additional violations under 34 C.F.R. §§ 674.19 and 676.19. The notice states that Southern was also cited for this violation in "program reviews conducted in 1987, November 1986, and 1983 "See footnote 269 *269*

Section 675.19, effective December 1, 1987, refers to the College Work Study program. Section 674.19 refers to the Perkins program and section 676.19 refers to the SEOG program. Each section is essentially the same but for the reference to the separate program. Each section requires an institution to establish and maintain an internal control system to insure that no office can both authorize payments and disbursement of funds to students. It states that fiscal officers may preform only ministerial acts. The institution must make a proper identification of federal fund accounts. The notice states: "The 1989 program review identified discrepancies between figures reported by Southern Vocational College in its FISAP and the figures contained in the College's program account ledgers with respect to the CWS and Pell Grant programs."See footnote 270 *270* The significant regulations are §§ 675.19 for CWS regulations and 690.81 for the Pell Grant regulations.

Section 675.19 states: (l) An institution must establish and maintain financial records which reflect all program transactions. The institution must establish and maintain a general account ledger identifying each program transaction and separate those transactions from all other school financial activity. (2) The institution shall establish and maintain program and fiscal records to show certification of the student's work and income earned, to show a payroll voucher to support all payroll disbursements, to show noncash contributions, to be reconciled monthly, to identify each student's account and status, to show the student's eligibility, to show how the need was met. (3) Each year an institution shall submit timely a Fiscal Operations Report. (4) The

institution must maintain all CWS applications for the students it reports on the Fiscal Operations Report and Application to participate in the Perkins Loan, SEOG, and the CWS programs (FISAP). (5) The institution shall maintain all records supporting its application for funds.

Section 690.81 governing the Pell Grant funds is not as detailed as the CWS regulation. The Pell Grant regulation merely states: An institution shall establish and maintain on a current basis financial records that reflect all program transactions. The institution shall establish and maintain general ledger accounts and related subsidiary accounts to identify each program transaction and separate those transactions from all other institutional financial activity. The institution shall account for the receipt and expenditure of Pell Grant funds in accordance with generally accepted accounting principles.

The notice also refers to the recalculation of a Pell Grant award due to corrections from a change in family contribution or enrollment status. The regulation cited as 1981 authority in the notice varies slightly from the subsequent regulation.

C.

The notice charges that Southern is unable to maintain adequate records to account for federal funds. Specifically, it states that Southern's records provide an inaccurate record to track the flow of Pell Grant and CWS funds on form PMS 272, the FISAP, and the program ledger accounts. As such Southern violated 34 C.F.R. §§ 675.19 for its inadequate recordkeeping in the CWS program, and 690.81 for its inadequate recordkeeping the Pell Grant program. The most relevant part of the notice compares sums from the FISAP, PMS 272, and the ledger account. None of the Pell Grant amounts shown in the notice and 1989 program review match. Additionally, the CWS PMS 272 sum does not match the FISAP and ledger amounts. The program reviewer, Mr. Knight correctly stated that the regulations require proper identification of each program transaction and timely reports. A comparison of the three record systems is a accurate method of reviewing the financial records to determine if an institution fails to maintain adequate records and to properly account for the federal funds received.

Mr. Knight's explanation of the records reviewed is, however, faulty. He was unable to provide the source of his documentation which he used to form the basis of his opinion. He was unsure of how he arrived at the figures used on the 1989 program review. Furthermore, his testimony fails to support a thorough study of the facts. On cross-examination, he admitted that he used the wrong information when he failed to use the close out date as the proper number to track the CWS program. He and Mr. Lipton admit that they did not take the time or make the effort to consider Southern's responses before recommending to the deciding official on the course of action that was taken in this matter.

Mr. Haygood reconciled all but one of the figures which Mr. Knight questioned. The difference between exhibit L and the program review figure exists due to three reasons. 1) Exhibit L is a final figure, 2) the administrative and other allowable costs are included in exhibit L, and 3) the PMS 272 records are 80% of the federal share. Southern exhibit L provides reliable documentation to support Southern's position that the final Pell Grant figure on the FISAP, PMS 272, and the account ledger all indicated the sum of $268,375. In addition, the CWS

expenditures on the FISAP and the account ledger matched at $26,487. This sum also matched the amount Mr. Knight used on the 1989 program review for the FISAP and the account ledger number.

The only difference remaining is the difference in the sum which appears on the form PMS 272 of $25,732. Haygood explained that the $25,732 was for all expenditures as of 3-31-90. Mr. Haygood stated several times that the $25,732 is a final program amount. He said that it is the amount of money that was "received and expended" on CWS. Certainly the sum of $25,732 is much closer to the $26,487 than the $19,000 figure to which Mr. Knight testified. Nevertheless, the difference between the two figures ($26,487 and $25,732) of $755 is not totally explained. Therefore, while the Pell Grant figures are reconciled, the CWS figure amount is not totally reconciled by Southern.

Southern demonstrated a total reconciliation of the Pell Grant program. While Southern failed to make an adequate explanation as to-why there is a difference in the two totals in the CWS program, one cannot find that Southern's failure to explain the $755 difference is a systemic problem in its recordkeeping requirements. Southern met the requirements of 34 C.F.R. § 675.19 and 690.81. The school established financial records to reflect all transactions. It submitted timely Fiscal Operations Reports and Fiscal Operations Report and Application to participate in the Perkins Loan, SEOG, and the CWS programs. It did establish and maintain general ledger accounts for the Pell and CWS programs. In conclusion, Education failed to show by sufficient convincing evidence that Southern has a systemic problem in its recordkeeping requirements and has violated 34 C.F.R. §§ 675.19 or 690.81.

Failure to act as a fiduciary - Finding Three of the notice

Finding three of the notice charges the school with failing to act as a fiduciary. The notice states:

The violations cited in this notice cumulatively demonstrates that the College has failed to act as a fiduciary; specifically failing to account for Federal funds "finding 2l, disbursing Pell Grants to students not eligible for the disbursements "finding 7], failing to make timely refunds "finding 4], retaining student funds in violation of applicable regulation "finding 6], permitting bank service fees to be paid from Federal funds accounts "finding 11], failing to properly identify Federal funds accounts t finding 10], and failing to obtain and keep current adequate fidelity bond coverage "finding 12]. . . . See footnote 271 *271*

Education maintained that if it can prove the findings highlighted in the above quotation, they will have shown that the school, in addition to the specific violation, also violated the fiduciary responsibility regulation. Finding three also asserts: "[T]he College has violated its fiduciary responsibilities by repeatedly submitting cash requests for amounts in excess of the amounts it earned. . . ."See footnote 272 *272* Education counsel Bengle provided a historical beginning for the fiduciary violation. She claimed that the fiduciary violation began with Southern's placement on cash reimbursement method of payment: "[W]hat they were doing was submitting documentation to the Department to claim the funds and saying they were entitled to that reimbursement because they had either paid or credited the kids accounts when in fact they

hadn't done so."See footnote 273 *273* The notice states that Southern had either been on a cash monitoring method of payment or the reimbursement method of payment-since February 1986. Education explained that the school, while on some form of cash reimbursement control, repeatedly submitted cash requests for Pell Grant payments which have not been earned. It said in the notice at 6:

More funds were claimed than were earned by the institution in cash requests submitted during 1986, 1987 and 1988. The excessive cash requests were based on the institution's representation of students as eligible for Pell Grant disbursements prior to their completion of the hours for which a previous disbursement has been made, an independent regulatory violation also cited herein.See footnote 274 *274*

Education stated that the program review substantiates the overclaim occurring repeatedly from December 1987 through October 1988. The basis of the excessive cash requests is found in the facts previously stated and discussed in finding seven premature Pell Grants.

B.

The notice lists "failure to act as a fiduciary" as a violation of 34 C.F.R. § 668.82 (1987), effective December 1, 1986:

§ 668.82 Standard of conduct.

(a) A participating institution acts in the nature of a fiduciary in its administration of the Title IV, HEA programs.
(b) In the capacity of a fiduciary, the institution is subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs.
(c) An institution's-failure to administer the Title IV, HEA programs, or to account for the funds it receives under those programs, in accordance with the highest standard of care and diligence required of a fiduciary, constitutes grounds for a fine, or the suspension, limitation or termination of the eligibility of the institution to participate in those programs.

C.

The notice uses as a basis for this finding the elements of certain findings previously discussed. Education maintained that proof of the facts of the specific regulations in the certain findings already discussed also establishes a violation under this regulation. Education relied on: 1) failing to account for federal funds "finding 2], 2) disbursing Pell Grants to students not eligible for disbursement - premature payment of Pell Grant payments [finding 7], 3) failing to make timely refunds "finding 4], 4) retaining Pell Grant funds of students no longer enrolled "finding 6], 5) permitting bank service fees to be paid from federal funds accounts "finding 11], 6) failing to properly identify federal funds accounts "finding 10], and 7) failing to obtain and keep an adequate fidelity bond coverage "finding 12]. The notice also sets out a statement of the school repeatedly submitting cash requests for amounts in excess of the amounts that the school had earned. The facts to support this claim are the same facts as Education relied upon to prove

finding 7 premature payment of Pell Grants. Other than repeating the findings shown above, no new facts were alleged by Education to support this finding. Southern did not dispute the Education's proposition that the school can be held in violation of two separate violations based upon the same set of facts.

The earlier discussions of the findings of fact hold that Education was not able to prove findings 2, 5, 6, 9, 10, and 11. Education showed sufficient evidence to prove elements of findings 4, 7, 8, and 12. The findings adverse to Southern are summarized below. Education was able to prove some elements of finding 4 - the charge of failure to make timely refunds under the Guaranteed Student Loan program. First, it is found that stipulations 29 and 30 admit that Southern made untimely GSL refunds to [student name] and [student name], even though both parties acknowledge that the two student files had been corrected before the 1989 program review. Second, it is found that stipulation 34 admits Southern's GSL refund to [student name] in September 1989 was untimely, even though the basis for the 1989 program review demand was flawed by recharging the [student name] and [student name] situations. Third, it is found that stipulations 31-33 and 35-38 contain admissions by Southern of untimely GSL refunds to [student name], [student name], and [student name]. In mitigation, with the exception of the [student name] admission, all of the untimely GSL refunds were reported in program reviews prior to the current 1989 program review and had become final "closed" reports.

In finding 7, Education was able to show 12 cases of premature Pell Grant payments in the 1989 program review and 4 cases in the 1987 program review. Education has, in the past, treated the completion of the previous term as a circumstance which it considered satisfactory required action to close a program review. Education considers this action a mitigating circumstance. In several of the incidents of premature payments, the students have completed the term which served as the basis for the premature payment. It was previously found, in finding seven above, that completion of the term is a mitigating circumstance. The testimony established that Education was not prompt in making its payments to the school. Southern showed mitigation of some of the instances of early payment. Even though Southern was not permitted to make premature Pell payments, it provided a reasonable explanation for taking the course of action it did to insure that the students would have the funds available when needed to meet tuition and school expense requirements. In finding 8, the institution's attempt to show that it was acting as an agent for the student and/or servicer failed for a lack of convincing evidence. Education proved that the institution assessed a charge for its processing of the student's application to obtain a Pell Grant and the institution has failed to establish evidence otherwise. In finding 12, Education proved that Southern was without fidelity bond coverage for a period of time. Education did not show, however, that the failure of coverage was an intentional act or negligence on the part of the institution.

The regulation states that the institution must act as a fiduciary. The regulation uses the word as a noun, ie., "in the nature of a fiduciary" or "in the capacity of a fiduciary." The regulation also states that the fiduciary must administer the federal funds "in accordance with the highest standard of care." Black's Law Dictionary, 563 (5th ed. 1979) defines "fiduciary" in this way:

The term . . . means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the

scrupulous good faith and candor which it requires. . . A trustee possesses a fiduciary responsibility to the beneficiaries of the trust to follow the terms of the trust and the requirements of the applicable state law. A breach of the fiduciary responsibility would make the trustee liable to the beneficiaries for any damage caused by such breach.

Black's Law Dictionary further defines a trustee as: "The person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to use of another. . . ."See footnote 275 *275* The highest degree of care requires:

the care and skill exacted of persons engaged in the same or similar business. It means the highest degree required by law where human safety is at stake, and the highest degree known to the usage and practice of very careful, skillful, and diligent persons engaged in the same business by similar means or agencies.See footnote 276 *276*

To apply the definitions found in Black's Law Dictionary, one must look to the areas of trust and corporate law. In 90 C.J.S., Trusts, § 247 (d)(1955), it is stated that a fiduciary must:

exercise care, or common skill, common prudence, and common caution, and that he refrain from negligent acts of commission or omission, or willful defaults. In other words, a trustee must exercise sound judgment and prudence, and in the discharge of his duties he must exercise due diligence, or that care and diligence which an ordinarily prudent man would exercise in the management of his own affairs. . . .A trustee is a fiduciary of the highest order who is held to a high standard of conduct with respect to the administration of the trust, and he must act fairly, justly, honestly, in the utmost good faith, and with sound judgment and prudence, but he is not an insurer of the trust property or of results, and will not be held responsible for mere mistakes or errors of judgment, or for losses not attributable to lack of fidelity. (emphasis added)

In Bulla v. Valley National Bank of Phoenix, 308 P.2d. 932 (1957), the principle was set forth that a "trustee must in good faith protect the interest of all beneficiaries and exercise care and diligence which the ordinary prudent person would exercise under the circumstances in the management of his own affairs." In the case of Byrne v. First National Bank of Chicago, 216 N.E. 485 (1966), which involved an action against a trust beneficiary to recover damages for the breach of fiduciary duty in the delay and withholding distribution of trust property, no breach of duty was found. The duty was described as: "Trustees are bound in management of all matters of trust to act in good faith and employ such vigilance, diligence and prudence as ordinary men would exercise under like circumstances in dealing with their own affairs." The court, In re Cook's Trust Estate, 171 A. 730, (1934) outlined the trustee's duty "to exercise the care and skill a man of ordinary prudence would exercise in dealing with his own property in light of the situation existing at the time. The conduct of the Trustee is not to be judged by hindsight knowledge of subsequently developed facts and circumstances." The "prudent person rule" is the standard or measure of care, diligence, and skill required of a trustee.See footnote 277 *277*

Like a trustee, a corporate officer serves in a fiduciary capacity. Robert Hamilton, in his hornbook on Corporations (1979), asserts that corporate directors are trustees. He writes that the director is bound by the rules of conscientious fairness, morality, and honesty in purpose which

the law imposes as the guides for those who are under the fiduciary obligations and responsibilities. Further, he states, that a director is required to conduct the business of the corporation with the same degree of care as an ordinary and prudent man would exercise in the management of his own affairs of like magnitude and importance. In Basic Corporate Law, a casebook by Detlev F. Vagts, it is stated that it is unusual for directors to be liable for negligence in the absence of fraud or personal interest.

Southern was entrusted with federal funds which were to be used by eligible students in attendance at the institution. Southern had a duty to use the highest degree of care in the administration and handling of the federal funds. Southern was not required to be absolutely liable for all actions which result in some failure to comply with the regulations. It is not, as a fiduciary, an insurer for all damages to federal funds. Southern was only liable for the breach of its fiduciary responsibility if it fails to use the highest standard of care. While it is true that Education proved four of the findings, there is insufficient proof that the management and operation of Southern was carried out without exercising caution and due diligence. Education did not show that Southern's actions were lacking based upon a highest standard of care by a similar institution in the same business of education. In a review of the four findings adverse to Southern, it is further found that Southern exercised the highest degree of reasonable care expected of a trustee or a corporate director. Southern acted as an ordinary and prudent "person" in light of the circumstances surrounding the facts presented. Therefore, it cannot be found that Southern either breached its fiduciary responsibility or violated 34 C.F.R. § 668.82.

A summary of the findings

Southern was earlier found to have violated four of the twelve findings cited in the notice - findings 4, 7, 8, and 12. Finding four is based upon four separate fact situations. The first situation is based upon [student name] and [student name]'s untimely refunds discovered during the 1987 program review. The second is the admission of the untimely refund to [student name] which was realized during the follow up response done in the 1989 program review. The third situation concerns the admissions of untimely refunds to [student name], [student name], and [student name]. There is no clear discovery source of the third fact situation, but it is an admission by Southern that it made untimely refunds to the three students named. While Education offered some allegations of other untimely refunds to students, the evidence to prove the allegations fell short of the threshold required. Of the six untimely refunds shown, only the [student name] case was newly discovered during the 1989 program review. The five other cases are examples which Education resurrected from prior program reviews which had been previously closed by Education.

Finding seven, premature Pell Grant payments, was discovered during the 1989 program review. Premature Pell Grant payments were made on twelve occasions to eight students: [student name] for her second and fourth payments; [student name] for her second payment; [student name] for his second and fourth payments; [student name] for her second and third payments; [student name] for her second payment; [student name] for his second and third payment; [student name] for her second payment, and [student name] for her fourth payment. In addition, Education has shown evidence that this violation is a repeat violation in that sufficient proof has been provided of premature Pell Grant payments to [student name] and [student name]

in the 1987 program review. In mitigation, there is sufficient evidence from the past actions of Education that no program review action would be taken against the school in certain circumstances. The occasion of such circumstances occurred if the student who was the recipient of the untimely payment later completed the past payment period and proceeded into the next and proper payment period. In this case, there is proof that, on six of the twelve premature payments reported in the 1989 program review, the students later moved into the next and proper payment period. Therefore, in half of the proven cases, mitigating circumstances were shown.

In finding Eight, Education has shown that a charge was made to four students for processing applications for Pell Grant consideration. Southern failed to provide any evidence that the students had an awareness of an obligation to the needs analysis servicer, College Scholarship Service, for the processing of the application. Southern admitted to the violation cited in finding twelve. Stipulation 55 admits that it did not have fidelity bond coverage for a period of time. The circumstances which caused the lapse in coverage may have been beyond the control of the school, but the institution is required to maintain a level of business awareness to protect itself against a lapse in coverage.

Some form of penalty is appropriate in as much as the school is found to have violated certain regulations.

Consideration of Penalties

The first consideration in assessing an appropriate penalty is the examination of the notice. The notice informed Southern of Education's intent to terminate its eligibility to participate in programs authorized under Title IV of the Higher Education Act. Such programs include: Pell Grant - 20 U.S.C. § 1070a; Perkins Loan - 20 U.S.C. § 1087aa; College Work Study - 42 U.S.C. § 2751; Supplemental Educational Opportunity Grant - 20 U.S.C. § 1070b, and the Guaranteed Student Loan Programs - 20 U.S.C. § 1071, 20 U.S.C. § 1078-2, and 20 U.S.C. § 1078-1. Education relied upon 34 C.F.R. § 668.86 for the termination action. Additionally, the notice, based upon 34 C.F.R. § 668.84, informed Southern of Education's intent to fine it $500,000.

Second, consideration must be made in accordance with the six levels of the decision making process. This proceeding began with the program reviewers - Nancy Mapes and Philip Knight. They made their recommendations to their superior, Judith Brantley, the Institutional Review Branch Chief in Atlanta. In an initial letter from Mapes to Brantley, Mapes stated that she did not believe that termination of Southern was a "viable solution."[See footnote 278 *278*] After discussing the matter with Ms. Brantley, Mapes changed her recommendation to one of termination and fine. Brantley discussed the recommendation with Ronald Lipton telephonically before she sent the written report to Washington. After the recommendation was forwarded in writing to Lipton at the Compliance Branch in Washington, it was assigned to Max Sampson for his review and comment.

After Sampson's review and recommendation, Lipton again reviewed and approved the recommendation to terminate and fine Southern. Lipton testified that the recommendation was then transferred to the Office of General Counsel:

The Office of General Counsel approves some of our action letters or notices. In this case, I certainly believe that they did approve this notice, but they don't make decisions. . . .They would recommend -- I guess, if they thought there was not proper supporting documentation, if there was not a good cause of action, they would certainly tell us that this is not a good case to pursue and we recommend that you drop it, but they make recommendations to us. They do not make the decisions .See footnote 279 *279*

Ultimately, Mr. Lipton recommended the final course of action to the signator of the notice, Molly Hockman, Director of the Division of Audit and Program Review.

The third consideration is the testimony of Ronald Lipton, Chief of the Compliance Branch. His testimony provided the highest level of insight into the decision making process. His testimony was divided into two parts - a discussion of both the decision to terminate the school and the decision to fine the school. Lipton explained that he made the decision to terminate and fine Southern because he concluded from conversations with Judith Brantley and from a review of the program review report that: "this school should not participate in the programs."See footnote 280 *280* He admitted that he did not consider the responses Southern made to the 1989 program review reports.See footnote 281 *281* Mr. Lipton stated that Molly Hockman is the actual decision maker who issues a notice to terminate and/or fine. He said, however, that "the vast majority -- almost all of my recommendations are adopted by her, so I certainly made the decision to go ahead and send out this letter."See footnote 282 *282*

In reference to the Lipton rationale for his recommendation to terminate the school, he stated: "We take termination actions for a variety of reasons against schools and lenders, but generally it is a serious action to end a school's eligibility to participate in our programs."See footnote 283 *283* Moreover, Lipton stated: "[W]henever there is fraud and abuse, it is necessary for my branch to become involved in these cases."See footnote 284 *284* Lipton further explained that the earlier program review reports were attached to the termination and fine notice "[t]o show that there is a continuing problem at this school and that the time has come for the Department to satisfy its obligations in trying to eliminate fraud and abuse in the programs by terminating the school's eligibility to participate."See footnote 285 *285* Lipton explained his thinking in giving his support to the termination and fine notice in this matter:

My recollection was that the program review report . . . noted that there were many violations, some more serious than others, . . .a history of unwillingness or inability on Southern Vocational's part to properly administer the programs. . . .I know that the people in the regional office were visiting the school quite often. The Department has limited resources, namely personnel and money, to continue visiting schools. The school is supposed to have expertise to administer these programs, and Southern Vocational appeared unwilling to do so, or unable to do so, or both. I am not sure what the case was or is, but in any event, there were a number of violations, again, some more serious than others. . . .[T]he the conclusion that I drew, from reading the report and talking to Judy Brantley, was that this school should not participate in the programs where a high degree of trust, expertise, willingness to abide by the rules and regulations is necessary to successfully administer the programs. . . .I will give you the specifics that I know. I do believe in this case that there was a problem with Southern Vocational adequately responding to past program review reports. Specifically, I believe, that even though

the school gave the regional office in Atlanta assurances that problems have been corrected , upon subsequent review, the Department would find out that the problems had not been corrected. Secondly, I believe that there was a problem with reports submitted to Washington. Every school has an obligation to submit quarterly and annual reports, and I believe that Southern Vocational had problems in submitting reports to the Department. . .See footnote 286 *286*

Lipton was asked by his counsel with respect to finding one - failure to demonstrate administrative capability: "[I]s it relevant to consider whether a violation that is going to be listed as a basis for an administrative capability finding is an isolated instance or whether it indicates anything about a system in place at the university in question?" Lipton explained: "My feeling is that it is designed to discuss the total picture -the institution's ability to administer the programs, not just one isolated incident, but the overall bottom line, how are they doing."See footnote 287 *287* He also explained that in this case the fine is requested in addition to the termination to act as punishment to the school and to act as a deterrent to other schools and lenders.See footnote 288 *288*

Before turning to Mr. Lipton's comments concerning the imposition of the fine, it is helpful to review that portion of the notice which discussed the fine. The notice provided the following comments:

In assessing this fine, OSFA [Office of Student Financial Assistance] has considered both the gravity of the violation and the size of the institution. As part of its assessment of the gravity of each violation, OSFA considered, where applicable, the actual harm caused by the violation. The size of the institution was considered in setting the fine, and resulted in the assessment of a smaller fine for each violation than OSFA would otherwise impose on the quantity of violations, their gravity, and, in most cases, their repetitive nature. . . .Southern Vocational College receives about half a million dollars per year in Federal Title IV funding. Thus the College is not a large institution. However, the violations of the regulations by the College have been numerous and repeated since 1982, in spite of the several program reviews evidencing extensive efforts by ED[ucation] to influence the College to obey ED[ucation] regulations. Moreover, many of the violations by the College have been serious instances of faulty cash management. Accordingly, $500,000 is a reasonable fine amount considering size of the College and the seriousness of the violations by the College.See footnote 289 *289*

Mr. Lipton was asked how the Office of Student Financial Assistance arrived at the $500,000 fine amount. He began by stating:

[S]etting an amount that we are seeking to impose as a fine is an extremely inexact science. There are a lot of factors that go into it. . .[I]n approving this dollar amount for the fine, I did take into account that there were repeat violations, so there were more than the 12 violations cited in this letter. It was the . . . other program review reports that are incorporated by reference to this action. . . .[S]ome of the violations are more serious than others. . . .So I don't have a good answer for you. We realize that if we seek to impose a $50,000 fine, for instance, . . .we cannot get you to impose a $400,000 fine. So there is a little --, or, a lot, possibly, of setting this amount at higher than we can actually receive as far as a fine, but the dollar amounts equate -- and I don't

have any documentation in front of me, but they do equate somewhat to the violations.See footnote 290 *290*

Lipton further explained that the standard or criteria in imposing fines that his branch uses is based on the maximum fine. He said: "[T]here is a regulatory provision that provides that a maximum fine of $25,000 per violation [may be imposed], and that in seeking to assess fines we are obligated to take into account the size of the institution and the gravity of the offense. . . "See footnote 291 *291*

Lipton gave a general statement on the gravity of the offense and the size of the institution:

The gravity of the violation would be how serious the violation is. . . .[W]e take into account the risk of loss of federal funds for that type of violation, the number of occurrences, and, . . .the dollar amount involved in the federal aid. So certain violations are more serious than others. . . .[T]he Department takes into account the size of the institution which we translate to mean how much in federal funds the school receives per year or the school's enrollment, which is general related.See footnote 292 *292*

Ronald Lipton believed that because Southern had received an average of $500,000 for the award years 1987, 88, and 89, Southern was a medium-sized school.See footnote 293 *293* He admitted that the size of the school is not spelled out in the regulations. He further admitted: "I rely upon recommendations from people that refer cases to me also.See footnote 294 *294* He admitted that his review of the report was not a fine line by line consideration of the points of the report.See footnote 295 *295* Finally, he admitted: "The program reviewers could probably give you a better understanding of these program regulations." See footnote 296 *296*

Nevertheless, Ronald Lipton represented the highest level of authority to testify in the decision making process, but his testimony provided little insight into the specifics of the decision why Education chose to both terminate and fine Southern. His recollection of the facts was shallow. Mr. Lipton had much difficulty trying-to explain what he remembered in the program review, the Brantley memorandum, or the Mapes memorandum.See footnote 297 *297* He had trouble articulating the rationale of his decision. He was unable to provide much detail of the facts of the charges. Therefore, Education's explanation of its decision to terminate the institution's eligibility and to fine the school in the sum of $500,000 lacked persuasion.

While the statements of Education provide little guidance as to a fitting penalty, some penalty is in order. Education requested that the school be both terminated and fined. Education believes that not only should Southern be terminated because it allegedly committed fraud and abuse of the worst kind, but also that Southern deserves to be fined $500,000 because the fine would serve as a deterrent to other schools.

The fourth factor to consider is the regulations. The regulations provide no guidance as to the amount of culpability necessary to terminate a school's eligibility. The regulations at 34 C.F.R. § 668.90(2) state:

The administrative law judge's decision must state whether the imposition of the fine, limitation, suspension, or termination sought by the designated department official is warranted, in whole or in part. If the designated department official brought a termination action against the institution, the administrative law judge may, if appropriate, issue a decision to fine the institution or impose one or more limitations on the institution rather than terminating its eligibility to participate.

The more onerous penalty of termination, suspension, or limitation should be imposed if a violation is serious. The violation(s) is serious, if the entire system is infected with mismanagement, dishonesty, fraud, or wanton negligence. Mismanagement, dishonesty, fraud, or wanton neglect indicate strong evidence that a systemic problem exists at a school.

In this case, the program review findings one, two, and three - failure to demonstrate administrative capability, failure to properly account for federal funds, and failure to act as a fiduciary - were described as "global" or "*systemic" violations. An adverse finding based upon the systemic concept could justify the imposition of a more serious penalty of termination, suspension, or limitation. Education, however, provided insufficient convincing evidence to prove any of the systemic violations. Additionally, the combined seriousness of the four findings, based as they are on specific situations, does not amount to a global violation meriting a termination of the school. Therefore, termination of Southern is not warranted.

If the violation is not as serious as the situation described above, then a fine may be appropriate.See footnote 298 *298* A fine is an appropriate method of enforcement of the regulations. A fine serves as a deterrent to future violations at the school charged with the violation and as an expression of public statement to other schools.

Unlike the termination penalty, the regulations provide some guidance in 34 C. F.R. § 668.92 for the administrative law judge:

(a) In determining the amount of a fine, the designated department official, administrative law judge, and the Secretary shall take into account---
(1) (i) The gravity of the institution's violation or failure to carry out the relevant statute, regulation, or agreement; or
(ii) The gravity of the misrepresentation; and
(2) The size of the institution.

The last consideration is the independent examination of each of the four adverse findings. It cannot be found that a grave or serious consequence occurred when one considers, either separately or jointly, the adverse findings against Southern. The facts of finding four support an untimely refund to [student name] as a result of the 1989 program review. There is evidence that five other untimely refunds occurred in earlier program reviews. Therefore, the 1989 [student name] violation is a repeat violation. The pattern does not, however, reflect evidence of fraud, abuse, or gross mismanagement. It cannot be found to be intentional, nor can it be found that the negligence is gross or wanton. The failure to make the payment in timely fashion is an act of simple negligence.

Finding seven is supported by sufficient 1989 program review evidence of 12 premature Pell Grant payments. There is also evidence that premature Pell Grant payments were made in two cases reported in the 1987 program review. Southern was put on notice by the 1987 program review that the intentional act of prematurely applying for the Pell Grants was not permissible. Therefore, even though Education excused the students who later advanced into the proper payment period by acquiring the necessary hours of study, Southern clearly had notice not to continue such actions. The requests for the Pell Grant payments were intentionally done in anticipation of the slow processing of the payments from Education. Southern took the action to avoid a short fall caused by the delay in receipts from Education. According to Southern, all of the students who were prematurely paid Pell Grant payments subsequently completed the necessary hours of the previous period to justify the payment. Southern only provided, however, proof in 6 of the 12 cases that the students accumulated the necessary hour to justify payment for the subsequent period. Therefore, it was found above that Southern had shown a mitigation of circumstances. Nevertheless, an intentional act of the premature applications is more serious than an act of simple negligence, shown above, in the case of the untimely refund.

In finding eight, Southern argued unsuccessfully that it was merely acting as a third party agent for the student and the servicer in processing the Pell Grant application. It is true that a servicer is entitled to be paid for work done. It is also true that the processing of the application is an educational expense. The only evidence presented, however, indicates that Southern requested the information for its use. There is no evidence that the student was aware of an obligation to the servicer. Southern's attempt to show that it was acting as an agent for the student and/or the servicer fails for lack of evidence. The violation is a intentional act.

The fourth violation, finding twelve, is serious, but it does not appear to be an intentional act. Southern presented sufficient evidence to establish that it was not aware of the fact that the insurance carrier had gone out of business. Not maintaining a level of awareness to protect itself against a lapse of coverage is, however, an act of negligence. In light of the fact no injury occurred as a result of the lapse of coverage makes the violation one of simple negligence.

The second factor for consideration is the size of the school. In light of the fact that Southern received an average sum of Educational funds of approximately $500,000, it is not unreasonable to conclude that Southern be characterized as a small institution.

Therefore, it is found that Southern is a small institution that committed four violations ranging in gravity. The seriousness of the violations ranges from simple negligence to a more serious intentional act. The total fine is based upon the sum of the four findings: The imposition of $2,500 for the untimely refund found in finding four is appropriate. A-fine of $10,000 is not an unreasonable sum for the violation shown in finding seven for the twelve premature Pell Grants payments; the mitigation of circumstances and the repeat nature of the violation were considered in assessing the amount of the fine. Finding eight, assessing a fee for a Pell Grant application, is an intentional act for which a $5,000 fine is appropriate. Finally, finding twelve, failure to maintain fidelity insurance, is an act of simple negligence for which a fine of $2,500 is reasonable.

Therefore, it is found that a fine of S20,000 is not an unwarranted sum to be levied upon the Southern Vocational College for the four adverse findings.

SUMMARY OF THE CASE

Education issued a notice of intent to terminate Southern from participation in financial assistance programs under Title IV of the Higher Education Act. Education argued that Southern should be terminated from the program and fined $500,000 based on the 12 violations found in the 1989 program review. Southern disputed some of the findings and offered evidence in mitigation of others.

Education provided sufficient evidence to prove violations in four of the 12 violations alleged in the notice. Finding 4 demonstrated Southern's failure to make timely refunds under the Guaranteed Student Loan program. Education proved, and Southern stipulated, that Southern failed to make refunds of GSL funds within 30 days of the student's withdrawal from school or last day of school in violation of 34 C.F.R. § 682.607 (1987). In mitigation, it has been found that, with one exception, the untimely refunds has been reported in prior program reviews that were now final "closed" reports. Finding 7 showed that Southern prematurely disbursed Pell Grant payments to students who had not completed the academic period for which they had received Pell Grant funds in violation of 34 C.F.R. § 690 75(a)(6)(iii) (1985). Premature disbursements were made 12 times to eight students. In mitigation, it was shown the several of the students subsequently completed the term and, therefore, became eligible for the funds prematurely received. In finding 8, Education proved that Southern charged some students a fee for processing their applications for financial assistance in violation of 20 U.S.C. 1094(a)(2) and 34 C.F.R. 668.12(b)(2)(iii). Southern failed to prove that it was merely acting as an agent for the student and /or the processor of the applications. In finding 12, as stipulated by the parties, Southern was shown to have operated without a fidelity bond for a period of time in violation of 34 C.F.R. 668.13(g). Southern showed, however, that the failure of coverage was unintentional and not a negligent act. The remaining allegations failed for lack of proof by Education.

Therefore, it is the conclusion of this tribunal that Southern Vocation College should be fined, but not terminated from participation in the Title IV programs. The tribunal listed five considerations for the determination of an appropriate penalty. Consideration was given to the termination notice, the decision making process within Education, the testimony of the highest Education official to testify, the applicable regulations, and an independent examination of the four adverse findings. In light of these factors, and in the absence of systemic violations, termination from participation in the Title IV programs is deemed inappropriate and a fine of $20,000 is imposed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that Southern Vocational College be fined the sum of $20,000 for the findings of the repeat violation of issuing an untimely refund, the repeat violation of making premature Pell Grant payments, the assessment of an application fee for Pell Grant processing, and the failure to maintain fidelity insurance coverage.

Daniel R. Shell
Issued NOV 19 1992 Administrative Law Judge
Washington, D.C.

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Footnote: 1 *1 The notice or letter of intent to terminate and fine is referred to in the decision as the "notice."*

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Footnote: 2 *2 See Ed. Ex. A, at 1.*

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Footnote: 3 *3 Id. at 1-2.*

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Footnote: 4 *4 Ed. Ex. A-1.*

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Footnote: 5 *5 Ed. Ex. A-2.*

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Footnote: 6 *6 Ed. Ex. A-3.*

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Footnote: 7 *7 Ed. Ex. A-4.*

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Footnote: 8 *8 Ed. Ex. A-5.*

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Footnote: 9 *9 Ed. Ex. A at 2-3.*

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Footnote: 10 *10 Tr. November 1991 at 77-82.*

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Footnote: 11 *11 Id. at 82.*

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Footnote: 12 *12 The Office of Student Financial Assistance posthearing brief at 2-3, n - 1.*

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Footnote: 13 *13 SVC Ex. J.*

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Footnote: 14 *14 SVC Ex. L.*

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Footnote: 15 *15 Tr. #1 at 61.*

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Footnote: 16 *16 Tr. #1 at 26. Mr. Lipton, as Chief of the Program Compliance Division, represents the highest level Education official in the decision making process to testify. In the notice, he is listed as the contact person and his immediate superior, Molly Hockman, is the decision maker.*

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Footnote: 17 *17 Ed. Ex. A, R. 2 at 1-2.*

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Footnote: 18 *18 Id. at 6.*

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*Footnote: 19* *19 Ed. Ex. A-1 at 6.*

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*Footnote: 20* *20 Tr. #1 at 121-26.*

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*Footnote: 21* *21 Id. at 241-42.*

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*Footnote: 22* *22 The stipulations were submitted in two parts. Counsel for Education submitted stipulations Numbers 1 through 51 on January 2, 1991, which were unsigned by both attorneys. The stipulations included a representation by Education that counsel for Southern authorized the submission. Southern did not contest Education counsel's representation regarding the stipulations, therefore, the tribunal concludes that the submission of the stipulations 1 through 51 are joint admissions of the facts as stated. The stipulations numbered 51 through 58 were submitted March 11, 1991, and were signed by both attorneys.*

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*Footnote: 23* *23 Stipulation 31 - 7/20/88 GSL refund to [student name], last date of attendance 11/5/87 - $1050; stipulation 32 - 7/20/88 GSL refund to [student name], last date of attendance 12/1/87 - $500; stipulation 33 - 7/20/88 GSL refund to [student name], last date of attendance 7/30/87 - $2500; stipulation 34 - 9/5/89 GSL refund to [student name], last date of attendance 1/12/89 - $1750; stipulation 35 - 7/20/88 refund to [student name], last date of attendance 8/4/87 - $350; stipulation 36 - 7/20/88 refund to [student name], last date of attendance 1/1/87 - $350; stipulation 37 - 7/20/88 refund to [student name], last date of attendance 11/5/87 - $326 and stipulation 38 - 7/20/88 refund to [student name], last date of attendance 9/1/87 $350.*

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*Footnote: 24* *24 SVC Ex. M at 3 lists the same information, except the name [student name] does not appear. A [student name] does appear, however, in the exhibit as [student name].*

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*Footnote: 25* *25 SVC Ex. M, at 1.*

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*Footnote: 26* *26 Ed. Ex. A at 6.*

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*Footnote: 27* *27 Ed. Ex. A-2, at 4.*

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*Footnote: 28* *28 See n.32.*

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*Footnote: 29* *29 SVC Ex. W at 1.*

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*Footnote: 30* *30 Id. at 3-4.*

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*Footnote: 31* *31 See Ed. Ex. A at 6. Also see Tr. #1 at 226. According to the program reviewer, the term "currently due" means - what would have been due per quarter. At the time of the review, Southern was charging by the quarter.*

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*Footnote: 32* *32 Ed. Ex. A at 6.*

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*Footnote: 33* *33 Tr. #1 at 223-24.*

Footnote: 34 *34 Id. at 183-84.*

Footnote: 35 *35 Id. at 184*

Footnote: 36 *36 Tr. #3 at 627-29.*

Footnote: 37 *37 Southern Ex. J at 16.*

Footnote: 38 *38 Tr. #3 at 630.*

Footnote: 39 *39 Id. at 749.*

Footnote: 40 *40 There is confusion in the testimony as to how many and what type of documents Education requested in the February surprise follow-up review. Other than Knight's testimony, there is no clear evidence that the authorization forms were requested by Education or volunteered by Southern. Mr. Knight testified that he was not responsible for writing the November 28, 1989 program review finding nine on credit balances, but was responsible for writing 10, 11, 12, 13, 14 and 17. Tr. #2 at 384. He acknowledged that Nancy Mapes was the lead person and responsible for getting the report issued. Tr. #2 at 449.*

Footnote: 41 *41 34 C.F.R. § 690.71 "Scope."*

Footnote: 42 *42 See heading on page 6 of the notice. Ed. Ex. A*

Footnote: 43 *43 See Ed. Ex. A-1 at 10.*

Footnote: 44 *44 Tr. November 1991 at 32.*

Footnote: 45 *45 Id. at 26.*

Footnote: 46 *46 Ed. Ex. A at 6-7.*

Footnote: 47 *47 Ed. Ex. A-1 at 11.*

Footnote: 48 *48 Tr. November 1991 at 33.*

Footnote: 49 *49 Ed. Ex. A at 6.*

Footnote: 50 *50 SVC Ex. L at 1-2.*

Footnote: 51 *51 Tr. November 1991 at 34. SVC counsel also relies on SVC at M to support its claim of mitigating circumstances, but that exhibit merely states that the school has responded to all findings of the November 28, 1989 program review (Ed. Ex. A-1), except finding four.*

Footnote: 52 *52 Tr #3 at 632-33.*

Footnote: 53 *53 Id. at 632.*

Footnote: 54 *54 Tr. #2 at 333.*

Footnote: 55 *55 See n.52.*

Footnote: 56 *56 See n.51.*

Footnote: 57 *57 The evidence of students [student name] and [student name] failed for this reason in addition to the reason given in the preceding paragraph.*

Footnote: 58 *58 See n.41.*

Footnote: 59 *59 See n.45.*

Footnote: 60 *60 See n.40 & 41.*

Footnote: 61 *61 Tr. #1 at 223-24.*

Footnote: 62 *62 Ed. Ex. A at 7*

Footnote: 63 *63 Ed. Ex. A-1 at 5.*

Footnote: 64 *64 Tr. #1 at 238.*

Footnote: 65 *65 Id. at 221-22.*

Footnote: 66 *66 Id. at 234-39*

Footnote: 67 *67 Id. at 239.*

Footnote: 68 *68 Tr. November 1991 at 25.*

Footnote: 69 *69 Ed. Ex. A-1 at 6.*

Footnote: 70 *70 Ed. Ex. A-1 at 2-3.*

Footnote: 71 *71 November 1991 at 46.*

Footnote: 72 *72 Tr. November 1991 at 49.*

Footnote: 73 *73 Ed. Ex. D at 1.*

Footnote: 74 *74 See Ed. Ex. D.*

Footnote: 75 *75 The testimony of Mapes and Knight.*

Footnote: 76 *76 Ed. Ex. E.*

Footnote: 77 *77 Tr. November 1991 at 90. Counsel created confusion by referring to the letter being written on December 9, 1988, but the exhibit actually is dated September 9, 1988.*

Footnote: 78 *78 78Education brief, June 11, 1991, at 32-33.*

Footnote: 79 *79 Id. at 47.*

Footnote: 80 *80 Tr. #2 at 475-80.*

Footnote: 81 *81 Id. at 492.*

Footnote: 82 *82 Tr. #2 at 495-99*

Footnote: 83 *83 Id. at 496.*

Footnote: 84 *84 Id. at 499.*

Footnote: 85 *85 Tr. #3 at 555.*

Footnote: 86 *86 Id. at 556-57.*

Footnote: 87 *87 Id. at 557-59.*

Footnote: 88 *88 SVC Ex. J at 3.*

Footnote: 89 *89 Tr. November 1991 at 28-29.*

Footnote: 90 *90 Id. at 30.*

Footnote: 91 *91 Tr. #3 at 621-23.*

Footnote: 92 *92 SVC Ex. V is a letter from Lawrence Haygood, Jr., to William Pouncey, dated September 28, 1988.*

Footnote: 93 *93 SVC Ex. W at 1.*

Footnote: 94 *94 Student number one, [student name], received two premature payments. Stipulation number 12 verifies that she was not entitled to her second payment of $1050 when she only had 350.25 hours completed. Stipulation number 13 verifies that she completed the payment periods ending at 450 and 900 hours, but was paid $1100 for her third payment period when she had only 1299.25 completed hours. In order to receive her fourth payment, she needed to complete 1351 hours. The evidence from the chart and stipulation number 14 shows that*

*student number 2, [student name], received a second payment of $1050 when she had completed only 360 hours of the first payment period. Stipulation number 15 verifies that student number 3, [student name], received payment number two of $1050 after completing 396.25 hours; stipulation number 16 verifies that he received $1100 on 11/4/88. The figures on the chart reflect a third premature payment on 7/1/88 and a fourth payment on 10/26/88. The third payment was made for $1100 as well as the fourth payment. The third payment was made upon completion of 896.25 hours and the fourth payment was made after completion of 1173.75 hours. It is not possible to clearly determine which $1100 payment stipulation 16 attempts to verify. It is reasonable to assume that stipulation number 16 refers to payment number four inasmuch as the date is relatively close to the chart payment date. Stipulation 16 only admits one of the payments to be prematurely paid to [student name]. Therefore, the information is not sufficiently complete to verify that the third payment check was premature. Verification of a premature payment for the fourth period admits that payment periods two and three were completed by the student. Evidence submitted by stipulation number 17 verifies that student number four, [student name], received a second payment of $1050 after completing only 355 hours of the first period. Stipulation 18 verifies both that she received a third payment of $1100 after completing only 845.5 hours of the second period. In turn, the stipulation verifies that she completed the first payment period. Stipulation number 19 verifies that [student name], student number 5, received a premature payment for the second period when she had completed 358.75 hours. Other than the information on the chart, Education has presented no additional evidence to support the allegation concerning student number six. Stipulation number 20 verifies that student number 7, [student name], prematurely received his second period payment of $1100 and stipulation number 21 verifies that he received his third period payment of $1100 prematurely. It verifies that he completed the first payment period. According to stipulation 22, student number 8, [student name] only had 427.5 hours completed in the first payment period when she received $1050 for a second Pell payment. Stipulation number 24 verifies that student number 10, [student name] received a fourth pell payment when she only had 1234.5 hours completed in the third payment period. The chart indicates that she also received a second payment prematurely but there is insufficient evidence to establish the information shown on the chart. The information of stipulation 24 does, however, verify that [student name] completed the second pay period for which she is alleged to have received a premature payment. Other than Ms. Mapes' summarized information shown on the chart, Education has presented no additional evidence of premature payments for remaining students: number 6 - [student name], 9 - [student name], and 11 - [student name].*

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*Footnote: 95* *95 See n.9 and 11.*

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*Footnote: 96* *96 Ed. Ex. A-1 at 9. The names of the students are found in an Appendix A of the same exhibit.*

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*Footnote: 97* *97 Tr. #1 at 255-56.*

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*Footnote: 98* *98 Tr. #2 at 320-24.*

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*Footnote: 99* *99 Tr. #2 at 322-323.*

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Footnote: 100 *100 Id. at 329.*

Footnote: 101 *101 Stipulation 50, filed January 2, 1991, without counsels signatures.*

Footnote: 102 *102 SVC Ex. J at 14.*

Footnote: 103 *103 Tr. #2 at 320.*

Footnote: 104 *104 Id. at 322.*

Footnote: 105 *105 Tr. #2 at 328.*

Footnote: 106 *106 SVC Ex. J at 5.*

Footnote: 107 *107 Tr. #1 at 74-75. Mr. Lipton earlier testified that he did not review either on the two responses that Southern had submitted after receipt of the 1989 program review report. See n. 15 infra. and stipulation number 58.*

Footnote: 108 *108 Ed. Ex. A at 7.*

Footnote: 109 *109 The legislative history of P.L. 99-498, at 419, briefly discussed the matter of the application fee:*

*The House amendment, but not the Senate bill, clarifies the provision requiring that students and parents not be charged a fee for applying for Federal student financial assistance. The Senate recedes with an amendment requiring the development of separate, identifiable loan application documents for Part B of Title IV that applicants shall submit directly to eligible lenders.*

Footnote: 110 *110 See stipulation No. 102.*

Footnote: 111 *111 Ed. Ex. A at 7.*

Footnote: 112 *112 Ed. Ex. A-1 at 8.*

Footnote: 113 *113 Ed. Ex. A-5 at 5-6.*

Footnote: 114 *114 Ed. Ex. A-4 at 3-4.*

Footnote: 115 *115 Ed. Ex. A-3 at 5.*

Footnote: 116 *116 Id .*

Footnote: 117 *117 Tr. #1 at 242.*

Footnote: 118 *118 She believes that she received the exhibit from the institution's financial aid office when she was conducting her on site program review research. Tr. #1 at 243.*

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Footnote: 119 *119 Id. at 243.*

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Footnote: 120 *120 Tr. #1 at 243.*

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Footnote: 121 *121 Ed. Ex. F.*

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Footnote: 122 *122 Ed. Ex. H at 2.*

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Footnote: 123 *123 Tr. #1 at 244-45.*

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Footnote: 124 *124 Ed. Ex. I at 2. Ms. Mapes stated that Education exhibit I was provided by the school in response to the program review.*

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Footnote: 125 *125 Tr. #1 at 245.*

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Footnote: 126 *126 Tr. #1 at 251-2.*

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Footnote: 127 *127 Tr. #2 at 262.*

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Footnote: 128 *128 Ed. Ex. I at 4*

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Footnote: 129 *129 Ed. Ex. I at 2.*

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Footnote: 130 *130 Tr. #2 at 263.*

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Footnote: 131 *131 Tr. November 1991 at 17.*

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Footnote: 132 *132 SVC Ex. R at 9.*

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Footnote: 133 *133 Id. at 10.*

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Footnote: 134 *134 Id. at 15.*

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Footnote: 135 *135 Tr. November 1991 at 91.*

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Footnote: 136 *136 The 1983 program review report notes that the inadequate satisfactory progress standard policy is a violation of 34 C.F.R. § 668.12(e)(1)(iii), December 31, 1980. Ed. Ex. A-5 at 6. The 1980 publication of the Code of Federal Regulation for the 34 series has only parts 0 to 199. There is no § 668. The July 1, 1981, edition of the Code of Federal Regulations shows § 668.12 (C) (1):*

*With respect to each student recipient of Title IV financial aid an institution shall establish and maintain on a current basis records regarding - (iii) whether according to the written*

*standards and practices of the institution - the student is making satisfactory progress toward completion of his or her course of study.*
*(Effective December 31, 1980.)*

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*Footnote: 137* *137 Ed. Ex. A-5 at 1.*

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*Footnote: 138* *138 Ed. Ex. A-4 at 3.*

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*Footnote: 139* *139 Ed. Ex. A-3 at 3.*

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*Footnote: 140* *140 Ed. Ex. A-1 at 2.*

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*Footnote: 141* *141 The first regulation cited by Education is 34 C.F.R. § 668.169(e) (1983) (See Education exhibit A finding 9 at 7). No such regulation exists under that number in the Code of Federal Regulations for 1983.*

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*Footnote: 142* *142 Education reports at page 7 of the notice a violation of 34 C.F.R. § 668.14 (e)(1987), effective as amended November 28, 1986, in the 1989 program review. This section stated below does not relate to the school's satisfactory progress policy:*

*(e) Information included in a student's financial aid transcript. A student's financial aid transcript shall include, with respect to any year for which the institution is required to keep that student's financial aid records, at least the following information-*
*(1) The student's name and social security number;*
*(2) Whether the student received a Supplemental Grant in any award year;*
*(3) For the award period in which the request for the transcript is made,*
*(I) The student's Scheduled Pell Grants disbursed to the student.*
*(ii) The amount of supplemental Grants disbursed to the student;*
*(4) The amount of National Direct Student Loans advanced to the student during each award year;*
*(5) Whether the student is in default on--*
*(I) A National Direct Student Loan made by the institution; or*
*(ii) A guaranteed Student Loan or a PLUS Loan that the student received for attendance at the institution if the institution is aware of the default status; and*
*(6) Whether the student owes a refund on-11(1) A Pell or Supplemental Grant for attendance at the institution; or*
*(ii) A State Student Incentive Grant received for attendance at the institution, if the institution is aware that the student owes the refund.*

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*Footnote: 143* *143 See 34 C.F.R. § 668.16(e)(1984).*

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*Footnote: 144* *144 If the 1989 program reviewer's allegations stand, a penalty for a repeat violation for the failure to maintain a satisfactory progress policy could be imposed.*

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Footnote: 145 *145 Ed. Ex. A at 7.*

Footnote: 146 *146 Ed. Ex. A at 7-8.*

Footnote: 147 *147 Ed. Ex. A-1 at 16.*

Footnote: 148 *148 The Blue Book is also known as Accounting Recordkeeping and Reporting by Post-Secondary Educational Institutions for Federally Funded Student Financial Aid Programs.*

Footnote: 149 *149 See Tr. #2 at 420. Knight explained that three accounts (Pell, College Work Studies and SEOG) are the accounts in question.]*

Footnote: 150 *150 Id. at 418-19.*

Footnote: 151 *151 Tr. #2 at 422.*

Footnote: 152 *152 Tr. #2 413-418.*

Footnote: 153 *153 Id. at 417.*

Footnote: 154 *154 Id. at 421.*

Footnote: 155 *155 SVC Ex. O.*

Footnote: 156 *156 SVC. Ex. AA.*

Footnote: 157 *157 Tr. #3 at 657.*

Footnote: 158 *158 Tr. #1 at 155.*

Footnote: 159 *159 Tr. #1 at 83.*

Footnote: 160 *160 Id. at 84.*

Footnote: 161 *161 Ed. Ex. A at 8.*

Footnote: 162 *162 Id.*

Footnote: 163 *163 Tr. #2 at 384.*

Footnote: 164 *164 Compare Ed. Ex. O to Stipulation 57.*

Footnote: 165 *165 SVC Ex. J at 17-18. A check was written April 14, 1989.*

Footnote: 166 *166 SVC Ex. J at 18.*

Footnote: 167 *167 Tr. #3 at 654*

Footnote: 168 *168 Id. at 654.*

Footnote: 169 *169 SVC BB at 1, paragraph 2.*

Footnote: 170 *170 Stipulation 56, received March 11, 1991. Stipulations numbered 52 through 58 are signed by both parties. Stipulation 56 is based upon ED. Ex. A-3 Finding 6 at 5.*

Footnote: 171 *171 Tr. #3 at 651-52.*

Footnote: 172 *172 Ed. Ex. A at 2 and 8.*

Footnote: 173 *173 Id*

Footnote: 174 *174 Tr. November 1991 at 5.*

Footnote: 175 *175 Stipulation number 55, reviewed March 1, 1991.*

Footnote: 176 *176 Tr. #3 at 739.*

Footnote: 177 *177 Tr. #1 at 229.*

Footnote: 178 *178 Transcript November 1991 at 66. Mapes' testimony is found at Tr. #1 at 219-35.*

Footnote: 179 *179 Ed. Ex. E. and C.*

Footnote: 180 *180 Tr. #1 at 219-20.*

Footnote: 181 *181 Tr #1 at 230.*

Footnote: 182 *182 Tr. #2 at 409-13*

Footnote: 183 *183 Ed. Ex. A-1 at 14.*

Footnote: 184 *184 Tr. #2 at 409-10.*

Footnote: 185 *185 Id. at 410*

Footnote: 186 *186 Id. at 439.*

Footnote: 187 *187 Id. at 411.*

Footnote: 188 *188 Id. at 4ll-4l2*

Footnote: 189 *189 Id. at 442.*

Footnote: 190 *190 Id. at 437.*

Footnote: 191 *191 Id. at 439.*

Footnote: 192 *192 Id. at 441.*

Footnote: 193 *193 Id. at 438.*

Footnote: 194 *194 Stipulations submitted March 11, 1991. Mr. Knight's testimony is found in Tr. #2 at 413.*

Footnote: 195 *195 Id. at 440.*

Footnote: 196 *196 Id. at 441.*

Footnote: 197 *197 Tr. # 3 at 677-78.*

Footnote: 198 *198 Tr. #3 at 678-80.*

Footnote: 199 *199 Id. at 682.*

Footnote: 200 *200 Tr. November 1991 at 75-76.*

Footnote: 201 *201 [student name] is identified in Finding 5 as student #9. See appendix at 17.*

Footnote: 202 *202 Ed. Ex. A-1 at 7-8.*

Footnote: 203 *203 Tr. #3 at 547-48*

Footnote: 204 *204 Id. at 548.*

Footnote: 205 *205 Tr. #3 at 549.*

Footnote: 206 *206 Id. at 550.*

Footnote: 207 *207 Id., at 2-3, n.1.*

Footnote: 208 *208 Id. at 82.*

Footnote: 209 *209 Ed. Ex. A-3 at 1-3.*

Footnote: 210 *210 SVC Ex. J.*

Footnote: 211 *211 SVC Ex. L.*

Footnote: 212 *212 34 C.F.R. § 668.15 is cited in the notice, but none of the facts relate to the subject matter of this regulation.*

Footnote: 213 *213 See n.191.*

Footnote: 214 *214 Ed. Ex. A at 4, ¶ 1.*

Footnote: 215 *215 Id., ¶ 2.*

Footnote: 216 *216 Id., ¶ 2.*

Footnote: 217 *217 Ed. Ex. A-1 at 12-13.*

Footnote: 218 *218 Ed. Ex. A-2 finding 6, at 5.*

Footnote: 219 *219 Ed. Ex. A-3 finding 4, at 4.*

Footnote: 220 *220 See Ed. Ex. A-5 at 9-10.*

Footnote: 221 *221 Tr. #2 at 284.*

Footnote: 222 *222 Id. at 390.*

Footnote: 223 *223 Id. at 390.*

Footnote: 224 *224 Id. at 393-94*

Footnote: 225 *225 Id. at 394-95. Also See Ed. Ex. Q at 7, line 13a.*

Footnote: 226 *226 Ed. Ex. R at 1*

Footnote: 227 *227 The exhibit copy only shows the form as MS 272. The testimony, however, refers to this form as PMS 272.*

Footnote: 228 *228 Tr. #2 at 395*

Footnote: 229 *229 Also identified as EPO 42A 80100. See Tr. #1 at 401.*

Footnote: 230 *230 Id.*

Footnote: 231 *231 Id.*

Footnote: 232 *232 Tr. #2 at 396.*

Footnote: 233 *233 Id. at 397.*

Footnote: 234 *234 I presume he believes that the figure to be equal is the sum he calculated $25,732.*

Footnote: 235 *235 Id. at 398-99.*

Footnote: 236 *236 Compare finding figures of the 1989 program review report above and Tr. #2 at 423.*

Footnote: 237 *237 Id. at 434.*

Footnote: 238 *238 See notice information on page 71 of this decision; also see Ed. Ex. Q at 2, line 23 for the "Total Pell expenditures for 198788 Pell Grant award year - $278,147. Also Ed. Ex. Q provides no Pell Grant information.*

Footnote: 239 *239 Tr. #2 at 432.*

Footnote: 240 *240 Id. at 436.*

Footnote: 241 *241 Id. at 454.*

Footnote: 242 *242 Tr. #3 at 736-38*

Footnote: 243 *243 Id. at 403. See Ed. Ex. U.*

Footnote: 244 *244 Id. at 404.*

Footnote: 245 *245 Id. at 405-6*

Footnote: 246 *246 Tr. #2 at 429.*

Footnote: 247 *247 Id. at 430.*

Footnote: 248 *248 Id. at 455-56.*

Footnote: 249 *249 Tr. #3 at 659-60.*

Footnote: 250 *250 Id. at 661.*

Footnote: 251 *251 SVC Ex. J.*

Footnote: 252 *252 SVC Ex. L.*

Footnote: 253 *253 Tr. #1 at 61.*

Footnote: 254 *254 Tr. #3 at 731-32.*

Footnote: 255 *255 SVC Ex. L at 2.*

Footnote: 256 *256 Id. at 663.*

Footnote: 257 *257 Id. at 665.*

Footnote: 258 *258 Id. at 661.*

Footnote: 259 *259 Id. at 662.*

Footnote: 260 *260 SVC Ex. L at 7.*

Footnote: 261 *261 Id. at 666-67.*

Footnote: 262 *262 SVC Ex. L at 8.*

Footnote: 263 *263 Id. at 668.*

Footnote: 264 *264 Id. at 669-70.*

Footnote: 265 *265 Tr. #3 at 746.*

Footnote: 266 *266 Id. at 746-47.*

Footnote: 267 *267 Id. at 747.*

Footnote: 268 *268 Id.*

Footnote: 269 *269 Ed. Ex. A at 4*

Footnote: 270 *270 Ed. Ex. A at 4*

Footnote: 271 *271 Ed. Ex. A at 5.*

Footnote: 272 *272 Id.*

Footnote: 273 *273 Tr. November 1991 at 44-45.*

Footnote: 274 *274 Id. at 6.*

Footnote: 275 *275 Id. at 1357. 276Id. at 193.*

Footnote: 276 *276 Id. at 193*

Footnote: 277 277 6 Am. Jur. 2d Trusts, § Standards at 391 (1992).

Footnote: 278 278 SVC Ex. E.

Footnote: 279 279 Id. at 62.

Footnote: 280 280 Tr. #1 at 28.

Footnote: 281 281 Id. at 63.

Footnote: 282 282 Tr. #1 at 102

Footnote: 283 283 Id. at 18.

Footnote: 284 284 Id. at 21.

Footnote: 285 285 Id. at 32.

Footnote: 286 286 Id. at 28-32

Footnote: 287 287 Id. at 194-95

Footnote: 288 288 Id. at 23.

Footnote: 289 289 Ed Ex. A at 9.

Footnote: 290 290 Id. at 186-87

Footnote: 291 291 Id. at 23.

Footnote: 292 292 Id. at 41.

Footnote: 293 293 Tr. #1 at 188

Footnote: 294 294 Id. at 113.

Footnote: 295 295 Id. at 109.

Footnote: 296 296 Id. at 115.

Footnote: 297 297 Tr. #1 at 42-48.

Footnote: 298 298 34 C.F.R. § 668.90(2).