

IN THE MATTER OF Southern Institute of Business and Technology  
Respondent.

Docket No. 90-62-ST  
Student Financial Assistance Proceeding

## DECISION

Appearances: Jack Norman Esq. of Dallas, Texas, for the Respondent

Russell B. Wolff, Esq. of Washington, D.C., Office of the General Counsel, United States  
Department of Education for the Office of Student Financial Assistance

Before: Judge Allan C. Lewis

This is an action initiated by the United States Department of Education (ED) to terminate the eligibility of the Southern Institute of Business and Technology (Southern) to participate in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, and to impose a fine of \$65,000. [See footnote 1 1/](#) This action was proposed following a program review conducted during May 1989 which alleges that Southern failed to make refunds of student loans, was late in paying refunds of student loans, and failed to submit one biennial non-Federal audit for the award years ending June 30, 1988 and 1989. Based upon the findings of fact and conclusions of law, *infra*, Southern's eligibility to participate in Title IV programs is terminated and a civil fine in the amount of \$30,000 is imposed or such lesser amount as may be due under certain circumstances.

### I. FINDINGS OF FACT

Southern is a postsecondary vocational institution with its offices located in Richardson, Texas, and campuses located in Plano and Richardson, Texas. [See footnote 2 2/](#) It was acquired by Mr. Wayne Paul in 1987 who became its president. Subsequently, Southern applied and became eligible to participate in the Title IV student financial assistance programs in 1987. During the award years ending June 30, 1988 and 1989, Southern had a total of approximately 300 students enrolled in its programs in these two campuses. [See footnote 3 3/](#)

In response to complaints received in late 1988 and early 1989 from some students alleging that Southern was not prompt in returning refunds, ED conducted a program review of Southern's activities on these two campuses relative to its participation in the student loan programs in May 1989. This program review encompassed the Pell Grant and the Guaranteed Student Loan (GSL) programs for the award years ending June 30, 1988 and 1989. [See footnote 4 4/](#)

A review of a sample of student files by ED indicated that Southern had not paid, in some instances, refunds of student loans or grants disbursed under the GSL and Pell Grant programs to their lenders or its Pell Grant account. In other instances, Southern had paid these refunds after the expiration of the 30 or 60 day grace period for refunds allowed by 34 C.F.R. § 682.607(c)

(1987), 34 C.F.R. § 682.607(c) (1989), and 34 C.F.R. § 668.23(e)(5) (1987). During the exit conference with the ED official, Southern indicated it was aware of the refund problem and that the refund liabilities would be satisfied when the program review findings were identified. At this time, however, Southern was not aware of the magnitude of the problem because Southern did not have a composite total of the refunds owed and, in some instances, the amount of the refund was not calculated.

As a result of the unpaid refund discovery, ED required Southern to review all student files for the award years 1988 and 1989 to determine which students were due refunds that were not paid or were paid in an untimely manner. This review encompassed approximately 300 students who were enrolled in the two campuses during the two year period.

In June 1989, ED sent two program review reports to Southern, one report for each of its two campuses. Southern was given 30 days to respond to each finding. In July 1989, Southern requested a 30 day extension to respond to the program reviews. This request was granted by ED. Thereafter, Southern submitted its responses to the program reviews in August 1989.

It is stipulated that, as of August 1989, Southern failed to pay student refunds due for the award years 1988 and 1989 in the total amount of \$148,457 as follows:[See footnote 5 5/](#)

No. of Students Refunds Due  
Pell Grant 6 \$ 5,468  
GSL 112 142,909  
Total 118 148,457

Based on information submitted for 107 students, Southern's refunds were outstanding beyond the grace period, as of August 1989, on average for 7.5 months and had a mean outstanding period of 7 months. Other than two refunds outstanding for 23 months, the remaining refunds were outstanding for periods less than 16 months. In addition, the amounts of the GSL refunds due may be categorized as follows:

Amount Approx. Percentage of  
Students Owed Refunds

Less than \$1,000 45  
Bet. \$1,000 and 1,500 20  
Bet. \$1,500 and 2,000 20  
Bet. \$2,000 and 2,500 10  
Bet. \$2,500 and 3,700 5

With respect to refunds, Southern knowingly did not pay these refunds and knowingly preferred other creditors over these student-creditors during the award years 1988 and 1989 and the years thereafter. In all likelihood, these actions were a conscious decision based on cash flow problems. The expansion into the prison program in 1988 and 1989 and its rapid growth created cash flow problems because, at least during the early stages, the cost of this program including equipment exceeded the monies flowing into the program from the Pell grants.[See footnote 6 6/](#)

Southern expended over \$72,000 to expand its curriculum into the printing area in 1988 or 1989 which did not work out. In addition, either Southern or Mr. Paul incurred a substantial expenditure of approximately \$200,000 to buy out an investor in early 1989.

In its August 8, 1989 submissions to ED, Southern acknowledged its responsibility to determine and pay refunds in a timely manner and further indicated in its follow-up submissions on September 28, 1989, that it would make the appropriate refunds. In subsequent conversations with ED officials, Southern indicated that the refunds would be paid by November 1, 1989.

On October 30, 1989, ED notified Southern that its corrective actions relating to the two program review determinations were sufficient to close out all of the adverse findings except the finding dealing with the nonpayment of student loan refunds. The excessive interest and special allowances paid by ED by virtue of the untimely refunds was determined to be \$5,068.

In November 1989, Southern informed ED that it had not paid the refunds and that it was still trying to raise cash to satisfy the liabilities. During the following week, regional officials of ED recommended that Southern be placed on the reimbursement payment system. On November 27, 1989, Southern was placed on this system for the Pell Grant program. This action was taken, according to ED, because Southern failed to take action to refund monies previously due lenders or ED for Pell grants and GSL loans after giving assurances that refunds would be made. Shortly thereafter, Southern expressed its dismay to ED that things had not worked out as anticipated, and represented that all refund liabilities would be satisfied by January 1990.

Under the reimbursement system, the institution presents a request for reimbursement to the regional office of ED where it is reviewed for completeness and accuracy. Thereafter, it is forwarded to the program compliance branch and later to financial management service for payment.

From November 1989 to January 1990, ED processed and disbursed approximately \$1.4 million to Southern under this system. With the exception of the Mineral Wells request discussed below, ED processed and approved each request for reimbursement. Southern submitted requests for reimbursement on the following dates and its requests were processed and paid by ED as follows:

#### Date Action

1/9/90 2 requests totalling \$88,000, paid within 5 weeks  
1/24/90 2 requests totalling \$15,000, paid within 3 weeks  
2/1/90 1 request totalling \$123,000, paid within 4 weeks  
2/8/90 1 request totalling \$41,000, paid within 3 weeks  
3/6/90 4 requests totalling \$206,000, paid within 5 weeks 4/18/90 6 requests totalling \$196,000, all paid within 5 weeks, except one which took 7 weeks  
6/11/90 3 requests totalling \$60,000, paid within 5 weeks  
6/13/90 1 request totalling \$83,000, paid within 3 weeks  
7/17/90 10 requests totalling \$246,000, all paid within 4 weeks, except one which took 7 weeks  
9/25/90 9 requests totalling \$184,000, paid within 3 weeks, one request was paid within 7 weeks

11/19/90 2 requests totalling \$85,000, paid within 5 weeks 12/27/90 2 requests totalling \$77,000, paid within 4 weeks

On January 11, 1990, Southern advised a regional official of ED once again that Southern intended to repay all liabilities assessed in the program reviews.

On February 21, 1990, ED received a document from Southern which indicated that checks in the approximate amount of \$47,600 representing refunds due 38 students were presented to the University Savings Bank for payment of the refunds. These checks were drawn on the Cornerstone Bank and were returned subsequently due to insufficient funds in Southern's account. This insufficiency was the result of a levy by the Internal Revenue Service on this account due to Southern's failure to pay over the withholding and social security employment taxes withheld from its employees' compensation. Though Southern had represented previously on February 21, 1990, that these refunds had been paid, Southern did not notify ED that these checks had been rejected for payment.

On April 19, 1990, the Institutional Review Branch of ED recommended to the Program Compliance Branch of ED that Southern be terminated from participation in the Title IV student loan programs. Its recommendation was based upon Southern's failure to make full restitution of the refunds due despite repeated assurances that restitution would be made.

There were reminders after January 1990 by ED that Southern should still pay the refunds, including a notice of July 11, 1990.

By August 23, 1990, Southern provided evidence to ED that it had paid approximately \$48,000 of refunds due student lenders for the award years 1988 and 1989. Of this amount, approximately \$15,800 was paid during or before March 1990. The remaining amount of approximately \$31,500 was paid on or about August 10, 1990. As of August 23, 1990, \$90,185.60 of GSL refunds and \$4092 of Pell grant refunds remained unpaid. In addition, Southern had not paid ED \$5,068 of additional interest and special allowances incurred by ED.

In October 1990, following the release of \$180,000 in Federal funds to Southern under the reimbursement payment system, a regional ED official requested that the remaining refund liabilities be satisfied. Southern indicated that, in light of the termination proceeding, funds would be placed in an escrow account for future payment of these refunds. However, no monies were placed in an escrow account.

As a matter of practice, ED sends its Audit Guide, Student Financial Assistance Programs, U.S. Department of Education (May 1988) to the participating institutions. This guide sets forth in general the procedures governing the conduct of the non-Federal biennial audit. Southern acknowledges that it received its copy.

As set forth in the Audit Guide, at I-1, the objectives of the non-Federal biennial audit are--

to assist the Department of Education (ED) in determining whether a recipient has (a) provided financial data, including basic financial statements and other financial reports that can

be relied upon, (b) maintained a system of internal accounting control and other control systems that provide reasonable assurance that it is managing SFA programs in compliance with applicable laws and regulations, and (c) complied with the terms and conditions of Federal awards, and thus its claims for Federal assistance were proper and supportable.

Initially, Southern's bookkeeping and records were maintained by Mr. Paul and his wife. In 1988, Southern contracted with a CPA to perform its audit work which included the preparation of the non-Federal biennial audit which was due on March 31, 1990. The accountant examined some of Southern's records in January and February of 1990 in connection with the biennial audit. However, the accountant failed to complete the biennial audit for 1988 and 1989 and failed to request an extension of time to submit the audit. He did not inform Mr. Paul of this fact. At the same time, however, Mr. Paul did not monitor or obtain reports regarding the accountant's progress toward completing the biennial audit. In July 1990, Southern discovered that the extension had not been requested and that the biennial audit had not been completed. In addition, it learned that the accountant had lost his license. While Southern immediately contacted another CPA to perform this audit, it had not been submitted to ED as of January 15, 1991, the date of the hearing in this case. Prior to August 1990, Concepts Incorporated, a private organization, contracted with the State of Texas to provide privately operated prison facilities for the State. In 1988 or 1989, Southern contracted with Concepts to operate an educational program in the prison facility located in Mineral Wells, Texas.

In August 1990, Southern was prevented by Concepts from continuing to teach various students at the Mineral Wells prison facility. [See footnote 7 7/](#) In August 1990, Southern filed a request with ED for reimbursement of approximately \$75,000 which indicated that all of its incarcerated students in Mineral Wells had graduated. This request was subsequently withdrawn.

On December 6, 1990, Southern renewed its request for approximately \$75,000. On December 27, 1990, the regional office of ED notified Southern that it was postponing action on Southern's request pending the resolution of several issues by the policy division of the Office of Student Financial Assistance which would affect whether ED would honor the request. The issues submitted for resolution included whether programs, which have not been recognized by Southern's state licensing authority and its accrediting commission, are eligible for Title IV funds; whether an institution can claim full or partial reimbursement for courses/programs discontinued by the institution without replacement; and whether incarcerated students enrolled in programs scheduled to extend beyond the student's expected parole date can qualify for Title IV student financial assistance. As of the date of the hearing, January 15, 1991, ED's policy division had not resolved the matter and Southern had not received its requested reimbursement payment.

On August 23, 1990, Southern received a copy of the termination and fine notice dated August 16, 1990, that governs the administrative proceedings between Southern and ED.

As of the hearing date, Southern is apparently current in its refunds with respect to the award years 1990 and 1991 although some refunds were apparently paid late following an audit by the Texas Education Agency.

As of mid-January 1991, Southern had approximately 180 students of which 140 were incarcerated in the Seagoville prison and 40 attended school in Richardson, Texas. These students would complete their programs within approximately six months.

## II. OPINION

In this action, ED seeks to terminate the eligibility of Southern to participate in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, and to impose a fine of \$65,000. On August 16, 1990, ED notified Southern that, as of September 13, 1990, it intended to terminate the institution from participation in the Title IV programs and to fine the institution. On September 11, 1990, and within the period specified by 34 C.F.R. § 668.86(b)(1)(iii) (1990) to request a hearing on the record, Southern filed its request for a hearing. [See footnote 8 8/](#) Accordingly, jurisdiction is proper.

A. Termination Issue. ED is authorized under Section 487(c)(1)(D) of the Higher Education Act of 1965, as added by Section 451.(a) of the Education Amendments of 1980, Pub. L. 96-374, 94 Stat. 1367 (HEA) (to be codified at 20 U.S.C. § 1094(c)(1)(D)), to prescribe regulations for--

(D) the limitation, suspension, or termination of the eligibility for any program under this subchapter . . . of any otherwise eligible institution, or the imposition of a civil penalty under paragraph (2)(B) whenever the Secretary has determined, after reasonable notice and opportunity for hearing on the record, that such institution has violated or failed to carry out any provision of this subchapter . . . or any regulation prescribed under this subchapter . . . .

Pursuant to this authority, the ED promulgated 34 C.F.R. § 668.86(a) (1990) which provides that--

the eligibility of an institution to participate in any or all Title IV, HEA programs [may be limited or terminated] if the institution violates any provision

of Title IV of the HEA or any regulation or agreement implementing that Title.

ED proposes to terminate Southern's eligibility to participate in the student loan programs due to its failure to pay refunds to the holders of loans on behalf of withdrawn students and due to its failure to submit a biennial non-Federal audit for the award years ending June 30, 1988 and 1989.

Southern participated extensively in the GSL and Pell Grant programs, both of which are Title IV, HEA programs. 34 C.F.R. § 668.1(c). Under the general standards for participation in Title IV, HEA programs, an institution shall, under 34 C.F.R. § 668.22(a)(1), return--

- (1) . . . a portion of a refund owed to a student to the Title IV, HEA programs if--
  - (i) The student officially withdraws, drops out . . . on or after his or her first day of class of a payment period; and
  - (ii) The student received financial assistance under any Title IV, HEA program other than the CWS Program.

The amount retained by the institution for the student's actual period of enrollment is calculated according to the institution's refund policy. 34 C.F.R. § 668.22(a)(2).

With respect to a GSL loan, the institution "shall pay that portion of the student's refund that is allocable to" the GSL loan to the holder of the loan. 34 C.F.R. § 682.607(a)(1). For a Pell grant, the refund is paid to ED. 34 C.F.R. § 668.22(e)(5).

Under 34 C.F.R. § 682.607(c)(1987), an institution had 30 days to pay the refund on a GSL loan after the date of the student's withdrawal where the student withdrew before July 20, 1989. For students' withdrawing after July 20, 1989, institution had 60 days to pay the refund after the date of the student's withdrawal. Amendment of Regulation 607, 54 Fed. Reg. 24,114, 24,122 (1989) (to be codified at 34 C.F.R. § 682.607(c)). For Pell grants, refunds were due 30 days after the student's withdrawal. 34 C.F.R. § 668.23(e)(5) (1987).

In the instant case, Southern failed to pay refunds, as of August 1989, in the total amount of approximately \$143,000 to the holders of 112 student loans for loans made under the GSL program during the award years ending June 30, 1988 and 1989. [See footnote 9 9/](#) As of August 1989, these refunds were outstanding on an average of 7.5 months beyond the mandated 30 or 60 day refund period and for a mean period of 7 months beyond the mandated refund date. Thus, there was a significant number of unpaid refunds due the holders of loans on behalf of students and a significant amount of unpaid refunds. Accordingly, Southern has failed to comply with the above regulations governing the refunds of student loans.

The second ground raised in ED's termination notice is Southern's failure to submit its non-Federal biennial audit for the award years ending June 30, 1988 and 1989.

Under 34 C.F.R. § 668.23(c)(1), an institution which participates in the GSL and Pell Grant programs "shall have performed a financial and compliance audit of its Title IV, HEA programs . . . conducted by an independent auditor in accordance with the general standards and the [General Accounting Office's] standards for financial and compliance audits." The biennial audit provides an external means of evaluating the accuracy of an institution's determination of students' eligibility, its awarding and disbursing of aid, and its refunds of students' unearned tuition and other costs. In re Hartford Modern School of Welding, Dkt. No. 90-42-ST, U.S. Dep't of Education (Jan. 31, 1991) at 11. The audit shall be performed at least once every two years and submitted to ED by March 31 of the year following the last award year. 34 C.F.R. §§ 668.23(c)(3) and (4)(i).

As a newly admitted participant in the student financial assistance programs, Southern's first non-Federal biennial audit was due on or before March 31, 1990, under the above regulations. This audit encompassed the award years 1988 and 1989. As of January 15, 1991, the date of the hearing, the biennial audit had not been submitted. Thus, Southern has not complied with the regulations governing the submission of the required non-Federal biennial audit. Southern argues, however, that ED performed a program review with respect to these two years, received additional information submitted by Southern as a result thereof, and therefore the need for the biennial audit is not present. The nature of the biennial audit is, however, more comprehensive in

its scope and depth than a program review. Therefore, the justification for compliance remains and Southern has not satisfied the regulations.

Where, as here, there are violations of the regulations by the institution in a termination proceeding, it is incumbent upon the tribunal to determine the nature of the appropriate sanctions. In this regard, the administrative law judge may--

issue a decision to fine the institution or impose one or more limitations on the institution rather than terminating its eligibility to participate.

34 C.F.R. § 668.90(a)(2).[See footnote 10 10/](#)

As explained below, it is appropriate in the context of the two violations in this case to terminate the eligibility of Southern to participate in the Title IV, HEA programs.

Initially, Southern's nonpayment of refunds represents a significant violation of the regulations governing the student financial assistance programs. The amount of the unpaid refunds as well as the average length of the nonpayment period are substantial. As of August 1989, Southern owed approximately \$148,000 of unpaid refunds which were on average approximately 7.5 months overdue. As of August 1990--one year later when the termination action was initiated--Southern had reduced this liability by approximately \$48,000, but it still owed approximately \$100,000 of refunds which were now some 20 months overdue on average. This amount remained unpaid as of the January 1991 hearing and, based on the record, the likelihood of payment in the future is very speculative.

The nonpayment of refunds did not represent isolated incidents. Of the two campuses subjected to the program review for 1988 and 1989, these unpaid refunds affected over 33% of the student population. In addition, Southern knowingly preferred other creditors over the student-creditors despite the fact that it held these monies in a fiduciary capacity (34 C.F.R. § 668.82) and gave repeated assurances to ED after May 1989 that these refunds would be paid. While it appears that Southern's nonpayment was more likely caused by its cash flow problems, this dilemma does not justify or excuse the nonpayment of refunds where those funds are received in a fiduciary capacity.

Southern argues that its nonpayment of the refunds after November 1989 was due in part to the substantial delay in payment by ED of the loan disbursements after ED placed Southern on the reimbursement payment system and the nonpayment by ED of one request for approximately \$75,000. Southern was placed on this system in November 1989 after it failed to take action to pay the refunds owed by it. In processing reimbursement requests, ED owes an obligation of good faith. In the instant case, ED processed and paid Southern's requests for payment generally within three to five weeks. While payments made five or more weeks after their requests are unnecessarily disruptive to the school's cash flow, these delays are, under the circumstances in this case, insufficient to warrant a lesser sanction or other result. In addition, ED's nonpayment of the \$75,000 request relating to the

Mineral Wells prison situation was reasonable at that time given the need for resolution of several policy questions raised by the request. Accordingly, Southern's failure to pay the refunds is not exonerated.

Southern also did not submit its first non-Federal biennial audit in violation of the regulations. Southern asserts that its failure to file the audit was caused by the negligence and misrepresentations of its CPA who failed to file a request for an extension to file the audit and also failed to inform Southern that he had lost his license which precluded him from performing the audit. This information became known to Southern by July 1990, some three months after the audit was due. While these factors may, in some instances, mitigate the sanction of termination, Southern had ample opportunity to subsequently submit the biennial audit and has failed to do so despite the inclusion of this violation as a ground for termination in the August 1990 notice. Under these circumstances, its argument is not persuasive.

In addition, Southern argues that ED performed a program review with respect to the same two years included in the biennial audit, received additional information submitted by Southern as a result thereof, and therefore the need for the biennial audit is not present. By its nature, however, the biennial audit is more comprehensive in its scope and depth in many instances than a program review. Therefore, the justification for compliance remains.

In sum, the nonpayment of refunds and the failure to file the biennial audit constitute a sufficiently strong basis to terminate Southern's eligibility to participate in the student financial assistance programs.

B. Fine Issue. In addition to the proposed termination of the eligibility of Southern to participate in the student loan programs, ED also seeks a civil fine in the amount of \$65,000. Under Section 487(c)(2)(B)(i) of the Higher Education Act of 1965, as added by Section 451.(a) of the Education Amendments of 1980, Pub. L. 96-374, 94 Stat. 1367 (to be codified at 20 U.S.C. § 1094(c)(2)(B)(i)), ED "may impose a civil penalty upon an institution of not to exceed \$25,000 for each violation or misrepresentation" of any provision of this subchapter or any regulation thereunder.

In *In re Hartford Modern School of Welding*, Dkt No. 90-42-ST, U.S. Dep't of Education (Jan. 31, 1990) at 18, the tribunal held that--

In determining the amount of the fine, 34 C.F.R. § 668.92(a) provides that the Administrative Law Judge and the Secretary "shall take into account . . . [t]he gravity of the violation . . . and [t]he size of the institution." The gravity of the violation reflects the relative degree of the seriousness of the violation vis-a-vis other violations as well as the relative nature and extent of the violation itself. In addition, an imposition of a fine functions as a "punishment of the offender as well as [a] warning to others." In *re Caguas College of Technology and Science*, U.S. Dep't of Education (Oct. 25, 1988) at 10.

Southern had approximately 1,100 students during the fiscal years 1988 and 1989 in all its programs who received loans totalling approximately \$1.4 million each year. This volume of loans is comparable to the \$1.2 million of loans received by the students of Hartford, an institution previously characterized as a small-to-medium size institution. *Id.* at 18. A similar

determination is warranted in the instant case as there are proprietary institutions substantially larger and smaller than Southern in terms of the total amount of loans received annually by their students, e.g. students received approximately \$12 million in student loans in *In re Trend Colleges, Inc.*, Dkt. No. 90-56-ST, U.S. Dep't of Education (case pending before the tribunal); \$7 million in student loans in *In re Deloux Schools of Cosmetology*, Dkt. No. 89-59-S, U.S. Dep't of Education (Oct. 30, 1990) at 52; and \$100,000 in student loans in *In re Katie's School of Beauty Culture & Barbering*, Dkt. No. 90-68-ST, U.S. Dep't of Education (Mar. 27, 1991) at 17. Thus, Southern, like Hartford, is a small-to-medium size institution.

ED proposed a fine in the amount of \$65,000 in its notice of termination and fine. The notice does not specify the manner in which the amount of the fine was determined other than to state that ED "intends to fine the School \$65,000 based on the violations set forth in Part I of this letter." The alleged Part I violations were Southern's failure to pay refunds in excess of \$140,000 and to file the non-Federal biennial audit for the years 1988 and 1989.

In its brief, ED divides the \$65,000 fine into two components, \$45,000 for the unpaid refunds and \$20,000 for the failure to file the biennial audit. [See footnote 11 11/](#) ED asserts that the \$45,000 figure was reached by seeking less than \$500 per unpaid refund as of the time the fine was proposed. In its view, this figure is consistent with the fine of \$500 per each unpaid refund levied in *In re Eastern Technical School*, Dkt. No. , U.S. Dep't of Education (July 24, 1989) and the \$1,000 fine per each unpaid refund levied in *Deloux*. Although 38 refunds were subsequently paid, ED still believes that the \$45,000 fine is appropriate in light of the remaining 74 unpaid refunds totalling more than \$90,000 which were at least 20 months delinquent at the time of the hearing and the 38 previously unpaid, but now late paid, refunds.

ED seeks a \$20,000 fine for the failure to file the biennial audit. Based on a recommendation to the designated departmental official, this figure purports to reflect a fine of \$5,000 per school (of which there were two), per award year (of which there were two). In ED's view, the \$20,000 fine is eminently reasonable in light of a \$20,000 fine levied in *Hartford* for a failure to file an audit for a single year.

The allegations raised in support of the fines are the identical grounds upon which the termination of Southern's eligibility to participate in Title IV programs was sanctioned. Moreover, Southern urges that the repayment of \$48,000 of refunds should ameliorate the proposed sanctions of termination and the \$65,000 fine. The tribunal agrees. While the nature and extent of the violations warrants termination in this instance, this is the severest of penalties and little purpose would be served by imposition of an additional significant financial penalty absent unusual circumstances.

Regarding the unpaid refunds, this is a severe violation. However, in *Hartford*, at 19, where the average amount of the unpaid refund was approximately \$1,700, the tribunal rejected as excessive the fines of \$500 or \$1,000 per unpaid refund levied in *Eastern Technical* and *Deloux*, respectively. Here, the average amount of an unpaid refund is approximately \$1,250. Thus, ED's proposed fine is unreasonable. Southern has repaid approximately \$48,000 of the \$148,000 in unpaid refunds, a factor which warrants consideration. Accordingly, a fine in the amount of \$15,000 for the unpaid and late paid refunds is appropriate in light of these circumstances and

the termination sanction. In the event Southern pays the GSL refunds to the holders of the outstanding student loans and the Pell Grant refunds to ED within 45 days after this decision becomes final, then the \$15,000 fine shall be annulled.[See footnote 12 12/](#)

With respect to Southern's failure to file the biennial audit for 1988 and 1989, ED urges, contrary to its position set forth in Katie's School of Beauty Culture, that the failure to file the biennial audit constitutes two separate violations, one for each year. Its argument is contrary to the plain meaning of 34 C.F.R. § 668.23(c)(3) which requires the performance of a single audit covering all the student assistance programs "at least once every two years." Cf. Hartford, at 19-20. Thus, the failure to file a biennial audit which encompasses two years constitutes a single violation. ED also asserts that the failure to file biennial audits for each of the two campuses represents two separate violations. This position is inconsistent with the 34 C.F.R. § 668.23(c)(1) which requires that the audit to be performed with respect to the "institution," not with respect to each of the institution's campuses. Therefore, under the regulations, Southern has committed only one violation over-all for its failure to submit a biennial audit covering two campuses for the student financial assistance programs.

While Southern has committed a single violation with respect to its failure to file the biennial audit, it is an extremely serious matter. In this case, however, ED performed a program review with respect to the same two award years. Accordingly, it delved into many matters which would have been examined in the audit. In light of this fact and the imposition of the termination sanction, a fine in the amount of \$15,000 is appropriate. In the event Southern submits to ED the biennial audit for the award years 1988 and 1989 within 45 days after this decision becomes final, then the \$15,000 fine shall be annulled.[See footnote 13 13/](#)

### III. ORDER

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

ORDERED, that the eligibility of Southern to participate in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, is terminated; it is further

ORDERED, pursuant to 34 C.F.R. § 668.95(a), that Southern immediately pay the remaining unpaid refunds owed to the holders of the Guaranteed Student loans (or to the United States Department of Education with respect to Pell grants) on behalf of its withdrawn students during the award years 1988 and 1989; it is further

ORDERED, pursuant to 34 C.F.R. § 668.95(a), that Southern immediately and in the manner provided by law pay the United States Department of Education a sum of \$5,068 representing excess interest and special allowances incurred by it as a result of unpaid Guaranteed Student Loan refunds; it is further

ORDERED, that Southern immediately and in the manner provided by law pay fines in the total amount of \$30,000 to the United States Department of Education or such lesser amount as may be due under this decision.

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

Issued: May 3, 1991  
Washington, D.C.

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*[Footnote: 1](#) 1/ More specifically, ED seeks to terminate Southern from participating in the Pell Grant, Supplemental Educational Opportunity Grant, Perkins Loan, and College Work-Study programs, and the Guaranteed Student Loan programs which includes the Stafford Loan, PLUS, and Supplemental Loans for Students programs.*

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*[Footnote: 2](#) 2/ To the extent that proposed findings of fact or conclusions of law by a party has not been adopted in this decision, they are rejected as being inaccurate or unnecessary to the disposition of this case.*

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*[Footnote: 3](#) 3/ In September 1988, Southern began a program in the federal prison facility located in Seagonville, Texas. It also began a program in July 1989 in the state prison facility located in Mineral Wells, Texas.*

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*[Footnote: 4](#) 4/ Though authorized to participate in several student financial assistance programs, it appears that Southern utilized only the Pell Grant and GSL programs.*

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*[Footnote: 5](#) 5/ These figures do not include an additional 10 to 12 students whose lenders were owed refunds for award years 1988 and 1989. This omission was discovered substantially later during an audit by the Texas Educational Agency and Southern has paid these refunds. The amounts of these refunds, however, is not determinable based on the record.*

*In addition, ED incurred excess interest and special allowance payments in the total amount of \$5,068 as a result of the unpaid GSL refunds. Southern does not dispute its liability to ED for these payments.*

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*[Footnote: 6](#) 6/ Under the Pell Grant program, the maximum amount available for a student was only \$2,300.*

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*[Footnote: 7](#) 7/ According to Mr. Paul, Concepts Incorporated then allowed another school to replace Southern in the prison program, a school in which Concepts held a financial interest. Also, according to Mr. Paul, Concepts indicated that it was dissatisfied with certain deficiencies in Southern's program at the Mineral Wells prison. However, this dissatisfaction was not*

*expressed until after Concepts's school had received its accreditation by the Texas Education Agency, one of the prerequisites for educational programs.*

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*[Footnote: 8](#) 8/ All regulations are cited in their current form unless otherwise noted.*

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*[Footnote: 9](#) 9/ In the present case, there were also six unpaid refunds involving \$5,500 of Pell Grant funds.*

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*[Footnote: 10](#) 10/ ED argues that 34 C.F.R. § 668.95, which allows the administrative law judge or the Secretary to order various corrective actions such as the payment of refunds, supplements rather than supplants the termination remedy. Therefore, according to ED, the tribunal or the Secretary may not order a sanction in lieu of termination or a sanction which has not been proposed by the designated departmental official, i.e. the Director of the Division of Audit and Program Review within the Office of Student Financial Assistance. This view is inconsistent with the general regulatory scheme and the breadth of 34 C.F.R. §§ 668.90(a)(2) and 668.95. These latter provisions provide the tribunal and the Secretary with the flexibility necessary to fashion an appropriate sanction according to the nature and extent of the established violations. In so doing, the sanction adopted may be, in some circumstances, different than that proposed by the designated departmental official. In addition, ED's position is incongruent with the decisional process as it would allow the initial or lower level decision-maker, i.e. the designated departmental official, to bind the Secretary and the administrative law judge who are higher level decision-makers regarding the sanction in each case. Accordingly, its argument is rejected.*

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*[Footnote: 11](#) 11/ This position is based on the testimony of the Chief, Program Compliance Branch, who submits recommendations regarding proposed termination actions to the Director, Division of Audit and Program Review. This latter individual acts as the designated departmental official to perform various functions regarding the student financial assistance programs, one of which involves determining the amount of the fine in the notice of fine under 34 C.F.R. § 668.92. Where the fine has been appealed to this tribunal, it is the tribunal, not the designated departmental official, which has the authority to determine the amount, if any, of the fine. 34 C.F.R. § 668.92. While this determination is based on the facts in each case and not the views of the designated departmental official, it would assist the tribunal as well as provide notice to the institutions if the designated departmental official would include in the notice of fine the amount of fine proposed for each violation or groups of violations. Such action might eliminate or reduce the need for testimony by ED regarding this matter.*

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*[Footnote: 12](#) 12/ In order to avail itself of this annulment, Southern must submit to ED within this period evidence of payment of the outstanding loans. Alternatively, Southern may pay the total amount of the refunds due for the GSL loans to ED within the 45 day period; however, Southern should designate specifically the purpose for which these funds are submitted. ED will, in turn, process the refunds.*

*The date on which this decision is final in the event neither party appeals this decision to the Secretary is 20 days after the initial decision is received by both parties. 34 C.F.R. § 668.90(c)(1).*

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*Footnote: [13](#) 13/ This audit shall comply with 34 C.F.R. § 668.23(c)(1).*