IN THE MATTER OF CAREER EDUCATION, INC.,
Respondent.

Docket No. 91-17-ST
Student Financial Assistance Proceeding

DECISION

Appearances: Steven M. Kraut, Esq., Office of the General Counsel, for the Office of Student Financial Assistance, United States Department of Education.

Paul D. Cullen, Esq., Daniel J. Harrold, Esq., Alan McDowell, Esq., of Collier, Shannon & Scott for Career Education, Inc.

Before: John F. Cook, Chief Administrative Law Judge

I. PROCEDURAL BACKGROUND.

The Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (ED) issued a Notice of Termination as to the Eligibility of Career Education, Inc., (Career) to participate in any of the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 et seq. (Title IV, HEA Programs). A Request for Hearing was thereafter filed by Career.

On May 13, 1992, a letter was sent to all parties stating that a hearing in this proceeding would begin on June 23, 1992, and also that each party was required to serve and file certain statements as well as other information.

On May 26, 1992, the parties filed statements in compliance with the May 13, 1992 letter. However, OSFA requested a postponement of the hearing, which was agreed to by Career. The hearing was scheduled for July 10, 1992.

On June 16, 1992, OSFA filed a Motion for Judgment. This timing necessitated an additional postponement of the hearing.

Career filed arguments in Opposition to OSFA's Motion for Judgment and a Cross Motion for Judgment on July 6, 1992. OSFA filed a reply brief on July 24, 1992, and Career filed a reply brief on August 3, 1992.

Because of a ruling by the U.S. District Court for the District of Columbia in an action involving the same parties a hearing will be unnecessary and an order will be issued terminating the status of Career as an eligible institution under the HEA.

II. ISSUES.

Under the present status of the record, should a determination be made terminating Career's status as an eligible institution under the HEA?

A. In view of the ruling by the U.S. District Court for the District of Columbia granting OSFA's Motion for Summary Judgment, which upheld OSFA's determination that Career does not qualify as an eligible institution under the HEA, what, if any, issues remain to be determined by this tribunal in an administrative proceeding?

B. Does the ruling of the U.S. District Court denying Career's Motion for Partial Summary Judgment (in the nature of mandamus) have any effect upon the question as to what, if any, issues remain to be determined in this proceeding, in view of the fact that the Court, in that ruling, stated: "Plaintiff has access to remedies at law and is presently attempting to resolve this dispute through administrative processes. For these reasons, the Court denies plaintiff's motion for partial summary judgment"?

C. What effect does the doctrine as to issue preclusion have upon the question as to what, if any, issues remain to be determined in this proceeding, in view of the Court's ruling granting OSFA's Motion for Summary Judgment?

III. FINDINGS OF FACT.

A. STIPULATIONS OF FACT.

1. Career Education-Welding was organized on or about June 27, 1988 as a proprietary vocational education institution initially offering instruction in welding.

2. In an application dated September 15, 1988, Mr. James Craddock on behalf of Career Education-Welding applied to United States Department of Education (hereinafter referred to as "ED") for designation as an eligible institution of higher education under the Higher Education Act of 1965, as amended ("HEA"), to provide welding training at Texas City, Texas.See footnote 1 Exhibit A-21-2.

3. In a notice dated October 20, 1988, ED designated Career Education-Welding an eligible "proprietary institution of higher education" and an eligible "vocational school". Exhibit A-1-1.

4. In an application to ED dated March 22, 1989, Career Education-Welding applied to have a branch campus located at 635 Grapevine Highway, Fort Worth, Texas offering diesel truck driver training made an eligible branch campus of Career Education-Welding. Exhibit A-22-1.

5. In a notice dated April 4, 1989, ED designated the Fort Worth, Texas campus as an eligible branch campus of Career Education-Welding. Exhibit A-23-1.

6. On or about March 1, 1990, Mr. Richard K. Crane purchased Career Education-Welding at which time its name was changed to Career Education, Inc. (hereinafter "Career").

7. After March 1, 1990, when Mr. Crane purchased Career Education-Welding, Career was ineligible to receive or disburse HEA student financial assistance monies.

8. In an application dated June 29, 1990, Career filed an application with ED for designation as an eligible institution under Mr. Crane's ownership. Exhibit A-2.

9. In a letter dated August 15, 1990, Ms. Lois Moore of ED's Division of Eligibility and Certification ("DEC") wrote Mr. Crane concerning the June 29, 1990 application of Career. Exhibit A-4.

10. In a letter dated August 23, 1990, Mr. Crane responded to Ms. Moore's letter of August 15, 1990. Exhibit A-5.

11. In a letter dated September 21, 1990, Ronald Selepak of DEC wrote Mr. Crane concerning the June 29, 1990 application of Career. Exhibit A-6.

12. In a letter dated September 23, 1990, Wayne Hartke, counsel for Career, responded to Mr. Selepak's letter of September 21, 1990. Exhibit A-7.

13. Career informed its accrediting body, the Southern Association of Colleges and Schools' Commission on Occupational Education Institutions ("SACS"), by letter dated November 7, 1990, that it was going to ". . . Move its Main Campus, ATDS-Texas City . . . [to] . . . Prairie Hill . . ." and terminate its welding program in Texas City, Texas as of January 25, 1991. Exhibit A-26.

14. SACS recognizes main campus and branch campus designations for the purpose of accrediting educational institutions.

15. The Texas Education Agency ("TEA") is responsible for licensing educational facilities within the State of Texas. TEA requires generally that "a proprietary school shall obtain a certificate of approval for each location where a course or courses of instruction will be offered . . . ." 19 TAC § 69.125(h). For this reason, Career's welding training program in Texas City, Texas and its driver training program in Prairie Hill, Texas were separately licensed by TEA.

16. On January 7, 1991, Career wrote to the TEA, which licenses Career in the State of Texas, respecting the status of its Texas City, Texas welding program stating "[w]e plan to terminate ATDS-Texas, Texas City, Texas as of the close of business, January 25, 1991." Exhibit A-8-1.

17. On February 7, 1991, Career filed a complaint against ED in the United States District Court for Washington, D.C. in Career v. ED, Civil Action No. 91-0259 (NHJ), challenging ED's failure to designate Career as an eligible institution under the ownership of Richard K. Crane. Exhibit A-14. Career filed an amended Complaint on March 22, 1991. A-15.

18. Paragraph 3 of Career's original Complaint in Career v. ED. which was filed on February 7, 1991, disclosed to ED the cancellation of the Career welding program. Exhibit A-14-2, ¶ 3.

19. In its February 18, 1991, letter to Career, SACS approved termination of Career's welding training at Texas City and approved the "new main campus at Prairie Hill." Exhibit A-9.

20. To support its contention that Career closed its main campus ED referred to the Career letter to TEA dated January 7, 1991 (Exhibit A-8-1) . . . and to a statement in paragraph 3 of Career's original Complaint, filed February 7, 1991, in Career v. ED (Exhibit A-14-2, ¶ 3). See also Exhibit A-10.

21. Institutions subject to ED regulations are entitled to and from time to time do change the address of their main campuses. Institutions may designate a former branch campus as a main campus.

22. At no time did ED ask Career whether it was Career's intention to continue its operations without a main campus.

23. On February 28, 1991, ED, acting through Molly Hockman, Director, Division of Audit and Program Review, Student Financial Assistance Programs, Office of Postsecondary Education, wrote two letters to Career. One letter was a Notice of Termination of Eligibility ("Termination letter") and the other was a Notice of Emergency Action ("Emergency Action letter"). Exhibits A-10 and A-11. The Termination letter was received by Career on March 5, 1991. Exhibit A-3-5. The Emergency Action letter was received by Career on March 11, 1991. Exhibit A-3-5.

24. On March 14, 1991, Career filed papers with the ED describing the main campus merger and address change and cessation of welding training. Exhibit A-16-1.

25. On March 14, 1991, Career responded to Ms. Hockman with regard to her February 28, 1991 Termination and Emergency Action letters. Exhibit A-17. Career disputed in its letter of March 14, 1991 that Career had violated any ED regulations.

26. On March 19, 1991 and March 27, 1991, respectively Career informed Mr. John Frohlicher, Division of Eligibility and Certification, of its position with respect to the Emergency Action appeal and Termination Action appeal, namely, such proceedings were unnecessary in light of the U.S. District Court's jurisdiction over the matters raised in the two February 28, 1991 letters in Career v. ED. Exhibits A-18 and A- 19.

St. Mary's - Related Facts

27. American Truck Driving School of Michigan, Inc. ("ATDS-Michigan") is owned by Richard K Crane. American Truck Driving School of Texas, Inc. ("ATDS-Texas") is owned by Richard K Crane.

28. ATDS-Michigan and ATDS-Texas are separate vocational education schools which offer or have offered courses in commercial truck driving.

29. Career is a separate corporation from ATDS-Texas and ATDS-Michigan.

30. On or about, December, 1984, ATDS-Michigan entered a contract with St. Mary of the Plains College ("St. Mary's"), a private, independent, not-for-profit liberal arts college located in Dodge City, Kansas. Under the contract, St. Mary's and ATDSMichigan established a tractor-trailer driving program ("the Truck Driving Program"). ATDS-Texas entered into a similar contract with St. Mary's to participate in the Truck Driving Program. The students in this Truck Driving Program received their instruction through a combination of correspondence and residence training.

31. On or about May 13, 1985, ED approved the Truck Driving Program as an eligible program of St. Mary's based upon the information contained in its eligibility application and information provided to ED. Exhibit A-36.

32. When ED approved the Truck Driving Program as an eligible program of St. Mary's, St. Mary's was an eligible institution and ATDS-Michigan and ATDS-Texas were ineligible. Before April 5, 1988, ED regulations permitted an eligible institution to contract with an ineligible institution for the latter to provide up to 100 percent of an educational program of the eligible institution.

33. On or about April 5, 1988, ED amended its regulations so that an eligible institution could not contract with an ineligible institution for the latter to provide more than 50 per cent of the educational program of the eligible institution.

34. In an attempt to comply with this new ED requirement, St. Mary's entered into separate agreements with ATDS-Michigan and ATDS-Texas.

35. On or about July 8, 1988, ED stated, "based on the face of the contract submitted by Saint Mary of the Plains between itself and ATDS and the related statements provided by the North Central Association of Colleges and Schools" it appeared that the contractual arrangement met the relevant regulatory requirements. Exhibit A-37.

36. On or about, July 21, 1989, ED reminded the Higher Education Assistance Foundation to provide lender of last resort services to eligible borrowers in Kansas. Exhibit A-38.

37. Sometime prior to March 1990, ED's Office of Inspector General ("IG") began an audit of St. Mary's administration of the student financial assistance programs in connection with the Truck Driving Program offered under the contracts between St. Mary's and ATDS-Michigan and ATDS-Texas (the "Audit").

38. On March 1, 1990, Franklin L Vandenberg, Acting Regional Inspector General for Audit, wrote a letter to Mr. Wayne Hartke, counsel to ATDS-Michigan and ATDS-Texas concerning the ATDS schools' role in the Audit. Exhibit A-39. This letter indicates that Mr. Vandenberg sent

a copy to NATTS, the agency before whom ATDS-Michigan's application for accreditation was then pending. Other copies of the letter were shown on the face of the letter to have been sent to the Executive Director of SACS and the Assistant Director of TEA. These two bodies license and accredit, respectively, educational institutions within the State of Texas, including Career.

39. On March 12, 1990, Ms. Molly Hockman sent a letter to Mr. Crane concerning ATDS' role in the Audit. Exhibit A-12. Ms. Hockman's letter indicates that copies of the letter were sent to James T. Rogers, the Executive Director of SACS, and Paul W. Lindsey, Assistant Director of TEA. Exhibit A-12-1.

40. The IG completed a final Audit report on or about September 6, 1990. The report alleged that the Truck Driving Program had not complied with certain ED eligibility requirements when the Truck Driving Program was effective. The report recommended that St. Mary's refund to ED student financial assistance monies exceeding $87.1 million.

41. St. Mary's continues to participate in ED's student financial assistance programs.

42. St. Mary's has not been terminated, debarred nor suspended by ED from participation in student financial assistance programs as result of the Audit.

43. Career was not involved in the Audit.

44. Career did not receive formal notice of the Audit, will not have an opportunity to respond to the Audit report, and will not have a right to respond at any ED hearing on a final Audit determination based on the Audit or to appeal an adverse Administrative Law Judge decision on the final Audit determination to the Secretary or the courts.

45. St. Mary's, as the eligible institution which executed the program participation agreement concerning the Truck Driving Program, is the only entity entitled to respond to the Audit report, and will have a right to respond at any ED hearings on a final Audit determination based on the Audit or to appeal an adverse Administrative Law Judge's decision on the final Audit determination to the Secretary or the Courts. Neither Richard K Crane, ATDS-Texas, ATDS-Michigan nor Career are eligible institutions or executed with ED a program participation agreement concerning the Truck Driving Program. Hence, none of the four parties (Richard K. Crane, ATDS-Texas, ATDS-Michigan and Career) are entitled to respond to the Audit report, and will not have a right to respond at any ED hearings on a final Audit determination or to appeal an adverse Administrative Law Judge decision on the final Audit determination to the Secretary or the courts.

46. No formal debarment, suspension, termination or emergency action proceedings have ever been filed by ED against Career, Mr. Crane, ATDS-Michigan or ATDS-Texas with the exception of the February 28, 1991 ED Termination and Emergency Action letters directed at Career.

47. The U.S. Department of Justice stated in its Memorandum of Points and Authorities in Support of Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, filed in ATDS-Michigan v. Department, Civil Action No. 91-0261 (NHJ), that "[a]t the present time, ED

is not using the [A]udit report against plaintiff in any way" but that "at some time in the future . . . [s]ome of the material in the [Audit] report could be used by ED to assist in determining whether Plaintiff is financially responsible . . . and administratively capable.... In that event, of course, plaintiff would be given the opportunity to respond to any "matters ED may identify as troublesome." Exhibit A-35-42.

48. In handling Career's June 29, 1990, application ED has stated that the Audit caused it to "examine and process the application of Career . . . with utmost caution." Exhibit A-32-9, ¶ 27.

49. ED did not give Career an opportunity to respond to matters it found troublesome in the Audit even though its handling and processing of Career's application was admittedly influenced by concerns arising out of the Audit.

B. LIST OF EXHIBITS.

A-1 Copy of ED notice dated October 20, 1988, designating Career Education Welding an eligible proprietary institution and eligible vocational school.

A-2 Copy of Career Education, Inc's eligibility application filed June 29, 1990, based upon an ownership change after Richard C. Crane purchased Career Education-Welding and changed its name to Career Education, Inc.

A-3 Copies of the Declaration and Supplemental Declaration of Career Education, Inc.'s President, James Craddock, filed in Career Education, Inc., d/b/a ATDS-TEXAS v. U.S. Dept. of Education. et al., No. 91-0259 (D.D.C. March 5, 1992).

A-4 Copy of letter from Lois Moore, Division of Eligibility and Certification, to Mr. Richard K. Crane, dated August 14, 1990, concerning the June 29, 1990, eligibility application.

A-5 Copy of letter from Mr. Richard K. Crane to Lois Moore dated August 23, 1990, responding to her August 14, 1990, letter.

A-6 Copy of letter from Ronald Selepak, Division of Eligibility and Certification, to Mr. Richard K Crane, dated September 18, 1990, concerning June 29, 1990, application.

A-7 Copy of letter from Wayne Hartke, Career Education, Inc. counsel, to Mr. Selepak, dated September 21, 1990, responding to Mr. Selepak's September 13, 1990, letter.

A-8 Copy of Career Education, Inc.'s January 7, 1991 letter to Texas Education Agency ("TEA") regarding termination of its welding program at Texas City, Texas.

A-9 Copy of Southern Association of Colleges and Schools - Commission on Educational Institutions' ("SACS") letter of February 18, 1991, to Career Education, Inc. approving Career Education, Inc.'s termination of its Texas City, Texas welding program and approving the "new main campus" at Prairie Hill, Texas.

A-10 Copy of the February 28, 1991, Termination Action letter from ED's Molly Hockman to Career Education, Inc.

A-11 Copy of the February 28, 1991 Emergency Action letter from ED's Molly Hockman to Career Education, Inc.

A-12 Copy of Ms. Molly Hockman's March 12, 1990, letter to Mr. Richard K. Crane concerning ED's Office of Inspector General audit of St. Mary of the Plains College's truck driving program.

A-13 Copy of Complaint filed February 7, 1991, by American Truck Driving School of Michigan, Inc. ("ATDS-Michigan") in ATDS-Michigan v. U.S. Department of Education. et al., No. 91-0261 (D.D.C. December 11, 1991).

A-14 Copy of Career Education, Inc.'s original February 7, 1991, Complaint filed Career Education, Inc., d/b/a ATDS-TEXAS v. U.S. Dept. of Education. Inc. et al.

A-15 Copy of Career Education, Inc.'s March 22, 1991, amended Complaint filed in Career Education, Inc., d/b/a/ ATDS-TEXAS v. U.S. Department of Education. et al.

A-16 Copy of Career Education, Inc.'s March 14, 1991, filing with ED regarding its main campus address change.

A-17 Copy of Career Education, Inc.'s March 14, 1991, response to ED regarding the February 28, 1991 Termination and Emergency Action letters of Ms. Molly Hockman.

A-18 Copy of Career Education, Inc.'s March 19, 1991, response to John Frohlicher of ED regarding participation in an Emergency Action proceeding.

A-19 Copy of Career Education, Inc.'s March 27, 1991, response to John Frohlicher of ED regarding participation in a Termination Action proceeding.

A-20 Copy of Declaration of Edward E. Kynaston, President of PTDIA, filed in Career Education, Inc., d/b/a/ ADTS-TEXAS v. U.S. Department of Education. et al.

A-21 Copy of Career Education-Welding's September 15, 1988, eligibility application to ED to provide welding training at Texas City, Texas.

A-22 Copy of Career Education-Welding's March 22, 1989, application to ED to have a branch campus located at 635 Grapevine Highway, Fort Worth, Texas that offered diesel truck driver training made an eligible branch campus of Career Education-Welding.

A-23 Copy of April 4, 1989, ED notice designating the 635 Grapevine Highway, Forth Worth, Texas, branch as an eligible branch campus of Career Education-Welding.

A-24 Copy of February 23, 1990, ED notice to Career Education-Welding concerning Career Education-Welding's conversion to semester hours.

A-25 Copy of Texas Education Agency ("TEA") letter to Career Education, Inc. dated August 16, 1991, regarding Career Education, Inc.'s licensure.

A-26 Copy of Career Education, Inc.'s letter to SACS dated November 7, 1990, regarding main campus address change to Prairie Hill, Texas and termination of welding training at Texas City, Texas.

A-27 Copy of TEA letter dated June 14, 1991, to Career Education, Inc. regarding the issuance of certificate of approval.

A-28 Copy of ED letter dated February 28, 1991 to Career Education, Inc. regarding Notice of Emergency Action.

A-29 Copy of ED letter dated February 28, 1991, to Career Education, Inc. regarding Notice of Termination of Eligibility.

A-30 Copy of Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment and for a Preliminary Injunction filed in Career Education, Inc., d/b/a ATDS-TEXAS v. U.S. Department of Education. et al.

A-31 Copy of ED's Memorandum of Points and Authorities in Support of Motion to Dismiss or, In the Alternative, Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment and Preliminary Injunction filed in Career Education, Inc., d/b/a ATDS-TEXAS v. U.S. Department of Education. et al.

A-32 Copy of Declaration of ED's Carol Sperry filed in Career Education, Inc., d/b/a ATDS-TEXAS v. U.S. Department of Education. et al.

A-33 Copy of Plaintiff's Reply Memorandum of Points and Authorities in Support of its Motion for Partial Summary Judgment and for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss or, In the Alternative, Motion for Summary Judgment filed in Career Education, Inc., d/b/a ATDS-TEXAS v. U.S. Department of Education. et al.

A-34 Copy of Memorandum of Points and Authorities in Support of Plaintiff's Motion for a Preliminary Injunction filed in ATDS-Michigan v. U.S. Department of Education, et al.

A-35 Copy of Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss or, In the Alternative, Motion for Summary Judgment and in Opposition to Plaintiff's Motion a Preliminary Injunction filed in ATDS-Michigan v. U.S. Department of Education, et al.

A-36 Copy of ED letter dated May 13, 1985, approving eligibility of St. Mary of the Plains College's ("St. Mary's") truck driving program.

A-37 Copy of ED letter dated July 8, 1988, concerning approval of changes in truck driving program based upon contracts submitted by St. Mary's to ED.

A-38 Copy of ED letter dated July 21, 1989, to HEAF reminding HEAF of its lender-of-last resort responsibilities in Kansas.

A-39 Copy of letter dated March 1, 1990, from ED's Franklin L. Vandenberg to Wayne Hartke, Esq., counsel to Career Education, Inc., concerning audit of St. Mary's eligible truck driving program.

A-40 Copy of March 5, 1992, Memorandum Opinion of the United States District Court in the case of Career Education Inc., d/b/a ATDS-TEXAS v. United States Department of Education, et al.

C. STIPULATIONS AS TO EXHIBITS.

As per the JOINT STIPULATION OF DOCUMENTS, the parties have stipulated that the following documents are authentic and admissible:

Exhibits A-1, A-2, A-4, A-5, A-6, A-7, A-8, A-9, A-10, A-12, A-13, A-14, A-15, A-16, A-17, A-18, A-19, A-21, A-22, A-23, A-24, A-25, A-26, A-27, A-29, A-32, A-36, A-37, A-38, A-39.

D. OBJECTIONS TO EXHIBITS.

1. Stipulation as to Exhibits with Objections Reserved.

As per the JOINT STIPULATION OF DOCUMENTS the parties have stipulated as to the authenticity of the following documents but reserve their rights to object to their admissibility:

Exhibits A-3, A-11, A-20, A-28, A-30, A-31, A-33, A-34, and A-35.

2. Career's Objections to Stipulated Exhibits.

On May 26, 1992 Career issued its STATEMENT AS TO OBJECTIONS TO DOCUMENTS AND DIRECT EXAMINATION OF WITNESSES. In that statement Career stated that with respect to those documents listed in the parties' joint stipulation which were agreed to for their authenticity, but for which the parties reserved their rights to object to their admissibility, Career had no objection to the authenticity or admissibility of these documents.

3. OSFA's Objections to Stipulated Exhibits.

On May 22, 1992 OSFA sent a letter to the tribunal stating its objections with respect to those documents listed in the parties' joint stipulation which were agreed to as to their authenticity, but for which the parties reserved their rights to object to their admissibility. In that letter OSFA stated that it withdrew its objections to the admissibility of each document for the limited purpose of demonstrating that the issues raised in this proceeding were raised and decided in

favor of the Department and OSFA by the District Court in Career Education Inc., d/b/a ATDS-TEXAS v. United States Department of Education, et al. when it granted the Department's motion for summary judgment. OSFA then noted in its letter that except as provided above, OSFA objects to the admissibility of the following documents for the following reasons:

a. OSFA objects to the introduction of the Declaration of James Craddock and Edward Knyaston, Exhibits A-3 and A-20. First, Career has listed these individuals as witnesses. Second, these self-serving declarations were prepared without OSFA having the right to cross-examine the witnesses or challenge any of the statements made by these witnesses. Thus, these declarations should not be admitted into evidence in this proceeding.

b. OSFA objects to Exhibits A-30, A-31, A-33, A-34 and A-35, the legal briefs filed by the parties in Career Education Inc., d/b/a ATDS-TEXAS v. United States Department of Education, et al. Such legal briefs are merely the work product of the attorneys representing each party in that lawsuit and do not and cannot serve as evidence in this proceeding with regard to the eligibility of Career under the HEA. As such, these briefs should not be admitted into evidence in this proceeding. Career was free to use any relevant legal argument contained in those briefs in its prehearing briefs.

c. OSFA objects to Exhibits A-11 and A-28, which are the same document, on the grounds that the Emergency Action OSFA has taken against Career is not relevant to this termination proceeding.

E. FACTS TO BE CONSIDERED AS TO PENDING MOTIONS FOR JUDGMENT.

For purposes of this determination as to the Motions for Judgment filed by each party the above findings of fact resulting from stipulations will be applicable. In addition, the status of the stipulations as to the authenticity and admissibility of the exhibits along with the stated objections is such that all exhibits will be considered in evidence for the purpose of this determination.

V. DISCUSSION.

OSFA filed a Motion for Judgment requesting that this tribunal terminate the status of Career as an eligible institution under the Higher Education Act of 1965, as amended (HEA), on the ground that the U.S. District Court for the District of Columbia had, on March 5, 1992, upheld OSFA's determination that Career does not qualify as an eligible institution under the HEA.See footnote 2

In turn Career, on July 6, 1992, filed its statement in opposition to OSFA's Motion for Judgment and Career also included a Cross Motion for Judgment.

The District Court, in its decision, pointed out that Career had asked the Court to issue an order in the nature of mandamus to compel ED to reinstate Career's eligibility and certification status and to enter into a program participation agreement with Career. ED contended that in light of the pertinent statute and regulations ED had properly denied Career's request for

eligibility and is in no position to find Career eligible to participate in federal student funding programs or to enter into a program participation agreement with Career.

The Court then reviewed the statutory and regulatory framework as to eligibility and certification. The Court stated, in part, as follows:

Title IV of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. §§ 1070 et seq., authorizes federal student funding programs which enable students to obtain federal financial assistance to pursue higher education. Institutions of higher learning must be approved by ED in order to participate in HEA financial assistance programs. Institutions must undergo a two-step application and approval process in order to be authorized to participate in HEA programs: 1) they must be deemed "eligible" to participate pursuant to 34 C.F.R. § 600.10(e) and, 2) they must be "certified" to participate pursuant to 34 C.F.R. § 668.12(a).

ED may designate an institution as an eligible "proprietary institution of higher education" pursuant to 20 U.S.C. § 1088(b) and 34 C.F.R. § 600.5, or as an eligible "vocational school" pursuant to 20 U.S.C. § 1085(c) and 34 C.F.R. § 600.7. Generally, if the ED Eligibility Branch determines that an institution satisfies the statutory and regulatory requirements for an eligible institution, ED sends the institution a notice designating it as an eligible institution. An eligible institution may include branch campuses, which are specifically referenced as branch campuses in the ED designation of eligibility notice. Under ED policy if an eligible institution closes or ceases to provide education or training programs, that campus and all the branch campuses associated with it no longer qualify as eligible institutions. According to ED, this policy was adopted because accreditation as a branch campus by a recognized accrediting agency is not sufficient to satisfy the accrediting requirements for a main campus, and certain States have different standards for granting legal authorization to operate a main campus and a branch campus.

If a school is found under the applicable statutory and regulatory standards to be eligible as a "proprietary institution of higher education" or as a "vocational school," it must then demonstrate to ED that it is financially responsible under the standards of 34 C.F.R. § 668.13 and administratively capable under the standards contained in 34 C.F.R. §§ 668.14 - 668.15. With respect to certification, if the ED Institutional and Lender Certification Branch determines that a designated eligible institution is financially responsible and administratively capable, as a general rule it sends the institution a program participation agreement signed by ED. The receipt of that signed agreement allows the institution to participate in HEA programs.

In order for a for-profit trade school like Career to qualify as an eligible proprietary institution of higher education or vocational school it must have been in existence for two years prior to submission of its application for eligibility (two-year rule). See 20 U.S.C. § 1088(b)(5), 34 C.F.R. § 600.5(a)(7) (for proprietary institutions of higher education); 20 U.S.C. § 1085(c)(3), 34 C.F.R. § 600.7(a)(5)(i) (for vocational schools). ED considers an institution to have been in existence for two years if it has been legally authorized to provide and has provided a continuous training program to prepare individuals for gainful employment in recognized occupations during the twenty-four months (except for normal vacation periods) preceding the date of application for eligibility. 34 C.F.R. §§ 600.5(a)(7), (600.7(b).

Id. at 2-4.

The Court set forth background facts as to Career as follows:

Career Education-Welding applied to ED for a determination of eligibility in September 1988. The for-profit trade school, located in Texas City, Texas, offered welding training programs. In October 1988, ED notified Career Education-Welding that it qualified as an eligible proprietary institution of higher education and, as such, was authorized to participate in HEA funding programs. Career Education-Welding sought, in March 1989, ED permission to open a branch campus offering truck driver training in Fort Worth, Texas. In April 1989, ED notified Career Education-Welding that the branch campus was eligible as well. The branch campus was later moved from Fort Worth, Texas, to Prairie Hill, Texas.

Career Education-Welding was purchased by Richard Crane (Crane) in March 1990 and renamed Career Education, Inc., (Career), plaintiff in the current litigation. In March 1990, Career filed a change of ownership notice with ED and in June 1990 applied for designation as an eligible institution pursuant to 34 C.F.R. § 600.31. At ED's direction, Career amended its eligibility application in August and September 1990. As of February 1991, ED had not yet made a decision on Career's application, and on February 7, 1991, plaintiff filed an action in mandamus asking that ED be directed to make a determination. The department issued a decision denying plaintiff's request for eligibility on February 28, 1991. Plaintiff sought, but was denied, a preliminary injunction preventing ED from denying it eligibility.

Id. at 5-6.

The Court analyzed certain of the regulatory requirements as follows:

If an institution which ED has deemed eligible undergoes a change in ownership resulting in a change in control, the institution must re-establish HEA eligibility under its new ownership. 34 C.F.R. § 600.31. However, ED provides eligible institutions which have undergone a change in ownership an opportunity to bypass the two-year rule requirement. If the new owner of an institution agrees to the conditions discussed in 34 C.F.R. § 600.31, ED deems it to be the "same school" and the institution need not be established for two years under the new ownership prior to applying for eligibility. Though the "same school" determination allows an institution to forego the two-year waiting period prior to seeking ED authorization to participate in federal funding programs, ED must separately evaluate the institution for purposes of determining its eligibility, financial responsibility, and administrative capability. After determining that an institution is not only eligible, but also financially responsible and administratively capable under the new owner, ED will enter a program participation agreement with the institution.

Id. at 4-5.

In its discussion the Court stated:

Plaintiff seeks partial summary judgment on its cause of action in the nature of mandamus. Summary judgment may be awarded where based upon affidavits and evidence of record the

Court finds that 1) there are no genuine issues of material fact, and 2) judgment is required as a matter of law . . . . This Circuit has held that "[m]andamus is proper only if '(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff.'"

. . . Plaintiff has not shouldered the heavy burden it carries in a mandamus action and, therefore, its motion for partial summary judgment must be denied.

Id. at 6-7 (citations omitted).

The Court went on to state:

Plaintiff has not presented adequate bases for issuance of a writ of mandamus. Plaintiff interprets the "same school" determination to mean that ED has determined Career to be eligible and certified as was its predecessor, Career-Education Welding. According to ED interpretation [SIC] of its own regulations, however, the "same school" determination discussed in the Notice letter serves the limited purpose of allowing plaintiff to forego the two-year rule requirement. In compliance with its interpretation of the regulation, ED permitted Career under Crane's ownership to immediately seek an eligibility determination after Crane agreed to the 34 C.F.R. § 600.31 conditions. Upon consideration of plaintiff's request for eligibility, ED determined that Career did not qualify and denied its request. Because Career was found ineligible, ED made no finding as to its financial responsibility or administrative capability for purposes of certification. . . . Until Career establishes eligibility, and ED evaluates and certifies plaintiff, ED will be in no position to enter a program participation agreement with plaintiff.

Id. at 8-9.

The Court then concluded, as to Career's motion:

Finally, plaintiff has not demonstrated that other adequate remedies are unavailable. Plaintiff has access to remedies at law and is presently attempting to resolve this dispute through administrative processes. For these reasons, the Court denies plaintiff's motion for partial summary judgment.

Id. at 10.

After disposing of Career's motion, the Court then considered the defendants' Motion to Dismiss or for Summary Judgment and stated as follows:

As discussed above, summary judgment is appropriate where based upon affidavits and evidence of record the Court finds that 1) there are no genuine issues of material fact, and 2) judgment is required as a matter of law. White, 909 F.2d at 516 (D.C. Cir. 1990). For the reasons discussed below, the Court finds that defendants have met this burden and are entitled to summary judgment.

Id. at 10.

The Court evaluated the facts presented to it and set forth its own interpretation as to their effect as follows:

> The fundamental issue in this dispute is the legal significance of the "same school" determination made pursuant to 34 C.F.R. § 600.31. With respect to that legal issue, there are no genuine issues of material fact. The material, undisputed facts are that in its February 28, 1991, Notice letter ED deemed Career the "same school" but denied its request for eligibility. Defendants assert that the "same school" determination related solely to the two-year rule requirement, while plaintiff submits that the determination meant ED found Career-Education Welding to be the same as its successor Career and that the eligibility and certification of the former institution would transfer to the latter. The court must determine which interpretation is correct.

Id. at 10-11 (emphasis added).

After discussing certain legal principles the court stated:

> The statutory and regulatory guidelines applicable to HEA funding programs -- specifically eligibility determinations -- demonstrate a strong desire on the part of Congress and the Secretary to scrutinize closely institutions prior to permitting them to participate in HEA funding programs and to monitor the use of HEA funds. In light of this intent, the Court finds ED's interpretation of § 600.31 reasonable. Here, ED was faced with an institution that had undergone numerous, critical changes in ownership, curriculum, and location. Given the regulatory framework, ED properly scrutinized Career's institutional capacity before granting it access to federal funds.
>
> Because the Court finds ED's interpretation of the applicable regulations reasonable and also finds its application of the regulation in this case to be consistent with that interpretation, the Court defers to the agency's expertise and experience. In light of these findings, the Court concludes that defendants are entitled to judgment as a matter of law and thus grants the motion of defendants.

Id. at 12 (emphasis added).

The District Court thus upheld ED's determination that Career does not qualify as an eligible institution under the HEA.

OSFA argues that this tribunal should grant OSFA's motion to terminate Career's status as an eligible institution under the HEA because Career did not appeal issues that were resolved by the District Court, which resolved that ED correctly denied Career's eligibility application.See footnote 3

OSFA argues that Career's request for an administrative hearing on the record, dated March 19, 1991, requested an on-the-record appeal with respect to "those issues the District Court does not resolve in the pending litigation." Thus, claims OSFA, Career limited its administrative appeal. As OSFA points out in arguments as to its Motion for Judgment of June 16, 1992, the normal procedure is that an institution challenges an OSFA determination through an

administrative proceeding, receives a final agency decision, and judicially appeals this decision to the District Court if the institution is dissatisfied.See footnote 4 Here, Career reversed the process by seeking the District Court's decision first. Career, however, argues that OSFA, in its Motion to Dismiss or in the alternative, Motion for Summary Judgment, had asked the District Court to allow Career the option of seeking administrative review of OSFA's determination following judicial resolution of that issue.See footnote 5

The Memorandum Opinion of the U.S. District Court for the District of Columbia, issued on March 5, 1992, does not directly address this issue. However, in denying Career's motion for partial summary judgment, the court on page 10 did state, "Plaintiff has access to remedies at law and is presently attempting to resolve this dispute through administrative processes. For these reasons, the Court denies plaintiff's motion for partial summary judgment."See footnote 6

If the Court had not gone on to discuss and grant OSFA's Motion for Summary Judgment, the above mentioned statement would indicate that the Court did contemplate that Career should be allowed to exhaust its administrative remedies.

OSFA further asserts that Career had a full and fair opportunity in the District Court to litigate its claim that OSFA wrongfully determined that Career was not an eligible institution under HEA, and that since the District Court rejected that claim, Career is barred under the doctrine of issue preclusion from raising this issue and all arguments related to it in a case involving the same two parties before this tribunal. OSFA also argues that even though the District Court did not specifically address Career's arguments regarding the closing of its main campus in Texas City, Texas, these arguments were put before the Court and were necessarily decided against Career when the Court granted OSFA's motion for summary judgment. Thus, argues OSFA, Career is now barred by issue preclusion from relitigating them against OSFA.See footnote 7

In response, Career argues that the District Court's decision to grant OSFA's motion for summary judgment in its March 5, 1992, opinion, thus affirming OSFA's ineligibility determination, is not binding on this tribunal. In support of this view, Career points out that the Court did not say that its decision was a binding determination that OSFA was entitled to terminate Career's eligibility.See footnote 8 This observation is of no significance, first, because the Court did not say that its decision was not binding, and second, when a Court grants a motion for summary judgment and so orders, it does not need to redundantly state that the decision is binding.

Nor does Career's claim that the District Court decision was based on civil litigation standards that would not apply in an administrative proceeding stand up to scrutiny. Career argues that in the District Court Career was seeking a writ of mandamus directing OSFA to issue an eligibility letter and certification. Career refers to the Court's statements regarding the heavy burden carried by the plaintiff in a mandamus action and asserts that the Court dismissed Career's motion because of this heavy burden, which would not apply in an action before this tribunal. In addition, Career asserts that in denying mandamus relief, the Court could have denied relief on any of the three grounds necessary for obtaining such relief, including the possibility that Career was unable to show that there were no other adequate remedies available, such as the remedy in this proceeding. Finally, Career argues that although the District Court gave substantial

deference to OSFA's interpretation of ED regulations, this tribunal would not give such deference to OSFA's interpretation.See footnote 9

As OSFA points out, the District Court not only denied Career's request for a writ of mandamus, but also granted OSFA's motion for summary judgment.See footnote 10 Thus the heavy burden placed by the Court on Career in the mandamus request did not apply to OSFA's motion for summary judgment, in which the Court had to find that (1) there were no genuine issues of material fact, and (2) judgment is required as a matter of law.See footnote 11 Based upon this the Court found that OSFA had correctly determined that Career had lost its eligibility.

As for OSFA's argument that this tribunal must defer to ED's interpretation of its own regulations, this issue is not directly relevant to this decision, since we are determining only whether this tribunal can proceed to hear Career's case. The issue as to the level of deference given by the tribunal to ED's interpretation is relevant only when this tribunal actually hears the substantive arguments of both parties. In passing, however, it should be noted that interpretation of a regulation for its use in all cases is not the same as application of that regulation in a particular case. Even if deference is accorded to ED's interpretation of a regulation, the tribunal still must rule objectively as to whether OSFA correctly applied the rule in a particular case.

Despite the flaws in some of Career's arguments, the proposition that the District Court's granting of OSFA's motion for summary judgment is binding, and thus affirmed OSFA's ineligibility determination, is not free from question. Career points out at pages 2-5 of its first brief that OSFA at pages 16-17 of its memorandum filed with the District Court (Ex. A-31), urged the Court to dismiss Career's motion and to leave Career to pursue its administrative remedy.See footnote 12

Career also points out at pages 2-5 of its first brief and at pages 2-4 of its Reply Brief that OSFA's memorandum to the District Court and OSFA's representations to this tribunal indicated that OSFA's decision as to Career's ineligibility would not become final until an administrative review had been held and the Secretary of Education had issued his final decision.See footnote 13 Thus, Career argues, the District Court's decision is not conclusive with respect to a final ineligibility determination that was never reached by ED and thus never presented to the District Court for review.

The net result is that the District Court's two determinations as to the respective motions filed by each of the parties before it, have created a kind of ambiguity as to what, if anything, remains to be determined in an administrative review. The Court's statements in the portion of its March 5, 1992, decision that denied Career's request for a writ of mandamus would indicate that the Court contemplated that Career should be allowed to exhaust its administrative remedies. Yet, the Court went on in its March 5, 1992, decision to rule on OSFA's eligibility determination anyway, by granting OSFA's Motion for Summary Judgment.

Many federal court decisions indicate that judicial relief is not warranted until all administrative remedies have been exhausted.See footnote 14 However, the doctrine of exhaustion of remedies is subject to numerous exceptions. Application of the doctrine to specific

cases requires an understanding of its purposes and of the particular administrative scheme involved.See footnote 15 It is certainly within a court's discretion to hear a case even though the administrative remedies have not yet been exhausted, unless exhaustion of administrative remedies is specifically required by statute.See footnote 16

Since the District Court did choose to make a determination as to OSFA's Motion for Summary Judgment, and thereby upheld OSFA's determination that Career does not qualify as an eligible institution under the HEA, such determination must now be recognized and given effect under the doctrine of issue preclusion. See footnote 17 As relates to the District Court action and this administrative proceeding, the parties are essentially the same; the facts presented so far are substantially, if not fully, identical; and the issues are in substance the same. In addition the arguments as to the issues, which are in substance the same as in this proceeding, were also presented by the parties before the District Court.See footnote 18

In Montana v. United States, 440 U.S. 147 (1979), the Court stated at page 153:

Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2-3 (1942); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion).

In American Iron and Steel Institute v. U.S.E.P.A., 886 F.2d 390 (D.C. Cir. 1989) the Court stated at page 397:

See Restatement (Second) of Judgments § 27 (1982) ("[w]hen an issue of . . . law is actually litigated and determined . . . and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties"). Even in the absence of any opinion a judgment bars relitigation of an issue necessary to the judgment, see National Classification Committee v. United States, 765 F.2d 164, 171 (D.C. Cir. 1985). . . .See footnote 19

Also in Robi v. Five Platters, Inc., 838 F.2d 318 (9th Cir. 1988), the court stated at page 322:

The doctrine of issue preclusion prevents relitigation of all "issues of fact or law that were actually litigated and necessarily decided" in a prior proceeding. Segal v. American Tel. & Tel. Co., 606 F.2d 842, 845 (9th Cir. 1979), quoted in Americana, 754 F.2d at 1529.

Therefore, although the combination of the two determinations by the District Court as to the respective motions for judgment filed by each of the parties created some ambiguity, the principles of issue preclusion must be recognized here. The final determination by the District Court granting ED's Motion for Summary Judgment, which upheld ED's (OSFA's) determination that Career does not qualify as an eligible institution under the HEA, must be considered conclusive as of this time. See footnote 20 Accordingly, OSFA's Motion for Judgment terminating the status of Career as an eligible institution under the HEA will be granted upon the basis that the District Court previously decided that OSFA correctly determined that Career does not qualify as an eligible institution under the HEA.

In event the Court of Appeals reverses or remands the District Court's determination, then a motion can be made to reopen this determination, if appropriate.

VI. CONCLUSIONS OF LAW.

A. Under the doctrine of issue preclusion, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in a subsequent proceeding based on a different cause of action involving a party to the prior litigation.

B. In view of the U.S. District Court's ruling in the case entitled Career Education, Inc., d/b/a ATDS-TEXAS v. United States Department of Education et al., granting ED's Motion for Summary Judgment which upheld ED's (OSFA's) determination that Career does not qualify as an eligible institution under the HEA, such determination is conclusive in this proceeding and cannot be relitigated here.

C. In view of the ruling of the U.S. District Court, which upheld OSFA's determination that Career does not qualify as an eligible institution under the HEA, the status of Career as an eligible institution under the HEA must be terminated.

D. The U.S. District Court's comment in its ruling denying Career's Motion for Partial Summary Judgment that Career "has access to remedies at law and is presently attempting to resolve this dispute through administrative processes" does not overcome the effect of the District Court's additional determination in granting ED's (OSFA's) Motion for Summary Judgment.

VII. ORDER.

Based upon the foregoing findings and conclusions, OSFA's Motion For Judgment is GRANTED. ACCORDINGLY, IT IS ORDERED, That Career Education Inc.'s status as an eligible institution under the Higher Education Act of 1965, as amended, is terminated.

IT IS FURTHER ORDERED, That Career Education Inc.'s Cross Motion for Judgment is DENIED.

In event the United States Court of Appeals for the District of Columbia reverses or remands the March 5, 1992, decision of the United States District Court for the District of Columbia and the effect of that determination is such that administrative proceedings may be held, then a motion may be filed to reopen this determination so that proceedings may be had in accordance with the ruling of the Court of Appeals.

John F. Cook Chief Administrative Law Judge

Issued: August 28, 1992
Washington, DC

SERVICE

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Footnote: 1References herein to "ED" include the employees of that agency. Also references to "ED" and "OSFA" are at times used interchangeably. Essentially they constitute the same party for purposes of this proceeding.

Footnote: 2Career Education, Inc. d/b/a ATDS-TEXAS v. United States Department of Education et al., No. 91-0259 (D.D.C. March 5, 1992).

Footnote: 3In that regard, it is the understanding of this tribunal that an appeal has been filed with the U. S Court of Appeals for the District of Columbia as to the District Court's Decision of March 5, 1992.

Footnote: 4Administrative Procedures Act (APA). 5 U.S.C. § 551 et seq.

Footnote: 5 Career Education, Inc.'s Opposition To Motion For Judgment And Cross Motion For Judgment (Career Brief 1) at 2.

Footnote: 6 Thus OSFA's assertion on page 14 of its Reply Brief, filed on July 24, 1992, is erroneous in that it states: "However, a review of the Court's March 5, 1992, 12 page decision reveals not one mention of an administrative review of ED's eligibility determination, nor is there any discussion of exhaustion of administrative remedies."

Footnote: 7 *OSFA Argument as to the Motion For Judgment at 11-13. See also OSFA Reply Brief at 8-9.*

Footnote: 8 *Career Brief 1 at 2.*

Footnote: 9 *Career Brief 1 at 5-9.*

Footnote: 10 *OSFA Reply Brief at 15-16.*

Footnote: 11 *White v. Fraternal Order of Police, 909 F.2d 512, 516 (D.C. Cir. 1990).*

Footnote: 12 *It is of no use to OSFA to argue, as it does in footnote 7 on page 15 of its Reply Brief, that "ED hardly argued at all, two pages out of a 37 page brief, about Career's exhaustion of its administrative remedies." Whether this argument filled two pages or twenty, OSFA still made the argument and requested the relief.*

Footnote: 13 *See ED's Memorandum of Points and Authorities in Support of its Motion to Dismiss or, in the Alternative, Motion for Summary Judgment at 16, (Ex. A-31), and OSFA's Prehearing Reply Brief to this tribunal at 1-2.*

Footnote: 14 *See, inter alia, West v Bergland, 611 F.2d 710, (8th Cir. 1979), cert. denied, 101 S.Ct. 79, 449 U.S. 821, 66 L.Ed.2d 23 (1980); Fairchild, Arabatzis & Smith, Inc. v. Sackheim, 451 F.Supp. 1181 (S.D.N.Y. 1978); A & B Wiper Supply, Inc. v. Consumer Product Safety Commission, 514 F.Supp. 1145 (E.D. Pa. 1981).*

Footnote: 15 *McKart v. U.S., 395 U.S. 185, 193, 89 S.Ct. 1657, 1662 (1969); Ass'n of National Advertisers, Inc. v. F.T.C., 627 F.2d 1151, 1156 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980).*

Footnote: 16 *See, inter alia, United Farm Workers of America, AFL-CIO v. Arizona Agr. Employment Relations Bd., 669 F.2d 1249 (9th Cir. 1982); Securities & Exchange Commission v. G.C. George Securities, Inc., 637 F.2d 685 (9th Cir. 1981); Reser v. Califano, 467 F.Supp. 446 (W.D.Mo. 1979); and Brown v. Carlson, 431 F.Supp. 755 (W.D.Wis. 1977).*

Footnote: 17 *American Iron and Steel Institute v. U.S. E.P.A., 886 F.2d 390, 397 (D.C. Cir. 1989), cert. denied, 110 S.Ct. 3237; Montana v. U.S., 440 U.S. 147, 153-154 (1979); Arizona v. California, 460 U.S. 605, 619 (1983); NOW v. Operation Rescue, 747 F.Supp. 760,766 (D.C. Cir. 1990); Synanon Church v. U.S., 820 F.2d 421 (D.C. Cir. 1987); Thomas v. General Services Administration, 794 F.2d 661, 664 (Fed. Cir. 1986).*

Footnote: 18 *It should be noted that in both the District Court and here, both parties filed motions and cross motions for judgment.*

Footnote: 19In this regard the absence of discussion by the District Court as to some of the facts (such as the closure of Career's main campus) does not lessen the impact of the principle of issue preclusion.

Footnote: 20We understand that Career has appealed the District Court's decision to the Court of Appeals; however, such an appeal does not at this time interfere with the decision's applicability for the purpose of issue preclusion. Robi v. Five Platters, Inc., 838 F.2d 318, 327 (9th Cir. 1988).