IN THE MATTER OF MAURICE CHARLES ACADEMY OF HAIR STYLING, Respondent.

Docket No. 91-18-ST
Student Financial Assistance Proceeding

DECISION

Appearances: William F. Wessel, Esq. of Wessel, Bartels & Ciaccio, New Orleans, Louisiana for the Respondent

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

Before: Judge Allan C. Lewis

This is an action initiated by the Office of Student Financial Assistance within the United States Department of Education (ED) to terminate the eligibility of the Maurice Charles Academy of Hair Styling (Academy) 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 $1,675,000.See footnote 1 1/ This action was proposed based upon preliminary findings of ED's auditors from the Office of the Inspector General of the Department of Education following a survey conducted during December 1990 and January 1991. These findings allege that the Academy denied ED access to the student financial assistance records, failed to satisfy the required standards of administrative capability, failed to administer the Title IV, HEA Programs in the capacity of a fiduciary, and failed to submit two biennial non-Federal audits. ED concludes that Academy failed to administer the guaranteed student loan programs in accordance with the statute and regulations thereunder. Based upon the findings of fact and conclusions of law, infra, Academy's eligibility to participate in Title IV, HEA programs is terminated and a civil fine is imposed in the amount of $192,500.See footnote 2 2/

I. FINDINGS OF FACT

The pertinent facts are set forth in the opinion. The detailed findings of fact are set forth in the appendix, infra. To the extent that proposed findings of fact or conclusions of law by a party have not been adopted in this decision, they are rejected as being inaccurate or unnecessary to the disposition of this case.

II. OPINION

On March 6, 1991, ED notified the Academy that, as of April 1, 1991, it intended to terminate the institution from participation in the Title IV programs pursuant to the regulations promulgated by the Secretary under 34 C.F.R. § 668.86(a), and to fine to school for violation of the regulations under 34 C.F.R. §668.84(a) (1990). On March 21, 1991, and within the period specified by 34 C.F.R. § 668.86(b)(1)(iii) and 34 C.F.R. § 668.84(b)(1)(iii) to request a hearing

on the record, Academy filed its request for a hearing. Accordingly, jurisdiction is proper before this tribunal.

A. Termination Issue

The Secretary is authorized under Section 487(c)(1)(D) of the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, as amended by Section 451(a) of the Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1367 (to be codified as amended 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 subchapterSee footnote 3 3/ . . . 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, . . . any regulation prescribed under this subchapter . . . or any applicable . . . agreement . . . .

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

[t]he Secretary may terminate or limit the eligibility of an institution to participate in any or all Title IV, HEA programs if the institution violates any provision of Title IV of the HEA or any regulation or agreement implementing that Title.

ED proposes to terminate Academy's eligibility to participate in the student loan programs on four grounds: its failure to provide access to its student financial assistance records, its failure to satisfy the required standards of administrative capability, its failure to administer the Title IV, HEA Programs in the capacity of a fiduciary, and its failure to submit two biennial non-Federal audits.

1. Denial of access to student financial assistance records.

The program participation agreement executed by the parties and in effect during the period at issue required, pursuant to Article III, § 7, that Academy provide ED access to its school records--

The functions and activities the Institution agrees to perform include, but are not limited to:
. . . .
7. Providing access to the Secretary, the Department of Education's Inspector General, or person designated by either official to program and accounting records.

Article III of the program participation agreement also required Academy "to perform the functions and activities set forth in 34 C.F.R. Part 690" which addresses the maintenance and retention of records under the Pell Grant program. Reg. Section 690.82 requires each institution to maintain adequate records and "make the records . . . available for inspection by the Secretary's authorized representative at any reasonable time in the institution's office." Maintenance and access to records are required under 34 C.F.R. § 668.23 for the other financial

assistance programs. Records for all programs must be "systematically organized" and "readily available for review by the Secretary." 34 C.F.R. § 668.23(f)(3).

Access and availability of records is necessary for a variety of reasons. Auditors must be free to perform their work with ease and efficiency which includes selecting a sample of student files that are then reviewed and analyzed.

In the instant case, Academy did not provide the auditors during their survey with access to inspect the files of its students who attended the school after July 1, 1987. While access to all of the student files was requested orally, repeatedly, and in writing, repeatedly, Academy provided only 320 files--116 files during the first week of the survey and an additional 204 files during the second week of the survey. As a result of the execution of a search warrant in February 1991, 673 files were discovered in a locked supply closet adjacent to the auditors' assigned work area. Therefore, access was denied the auditors with respect to more than 350 files. In these circumstances, access to student records was clearly denied the auditors even before the auditors were asked to leave the premises by Academy's attorney and to submit, thereafter, all requests for documents in writing to the Academy's attorney.

Academy contends that it was never asked for a particular student's file, leading to a conclusion that the auditors would not and could not aspire to review all 673 student files. Thus, Academy asserts that its initial production of 116 files coupled with its second production of approximately 204 files provided the auditors with a sufficient sample from which a thorough audit or survey could be conducted.

This contention is clearly without merit. First, the regulations and the program participation agreement require that the auditor be given access to the records and this was not done in the instant case. Second, while Academy is correct in pointing out that an auditor may not necessarily review all 673 files in a survey, the determination as to which particular files are selected as a sample must remain within the exclusive province of an auditor. The auditor must be allowed to select, either by systematic or random selection, those files deemed necessary to successfully fulfill the requirements to complete the audit or survey. Any other approach which limits his or her selection process may render the sample biased which, in turn, would not produce an accurate reflection of the records.

Academy also argues that the injection of its attorney into the audit process was necessary to prevent the auditors from requesting documents unrelated to the survey such as Maurice Sciortino's tax return and to prevent the auditors from perusing or copying the private papers of Maurice Sciortino which were stored in the school offices. These problems surfaced after the school effectively denied the auditors access to the student records, as noted above, and therefore, do not affect the resolution of this matter. In any event, the school is required to provide a work area for the auditors under the regulations. In the event a school owner is concerned about the perusal or copying of his or her personal papers, it is the owner's responsibility to secure or remove these papers from the premises. The audit or survey process cannot be restricted or hampered by matters which are under the control of the institution.

2. Records are inaccurate, inconsistent, incomplete and unreliable.

In order to continue to participate in the student financial assistance programs, an institution must demonstrate to the Secretary "that it is capable of adequately administering that program under the standards established" by the Secretary. 34 C.F.R. § 668.14. The Secretary considers an institution to have administrative capability "if it establishes and maintains student and financial records required under § 668.23 and the individual Title IV program regulations." 34 C.F.R. § 668.14. One corollary to administering the programs is that the school's records must be accurate, complete, and reliable. A second corollary is that the school officials must be forthright in their dealings with the Department, including its auditors.

According to the regulations, a participating institution acts as a fiduciary in administering the programs and is, therefore, "subject to the highest standard of care and diligence in administering the programs." 34 C.F.R. § 668.82(b). Its failure to act accordingly may constitute grounds for a fine or a suspension or termination of its eligibility to participate in Title IV programs. 34 C.F.R. § 668.82(c).

A. Enrollment verification reports provided to the auditors.

Under the guaranteed student loan program, the Federal government is responsible for the payment of interest with respect to a guaranteed student loan while the individual maintains his or her status as a student. This responsibility terminates once the student enters into a repayment status which is six months after graduation or withdrawal from the institution.

The enrollment verification report is a device employed by the guaranteed student loan organizations to confirm the enrollment status of students with their respective schools. The school indicates on the enrollment verification report generated by the guaranty agency which students, if any, have withdrawn or graduated. This information is, in turn, passed on to the lenders so that the interest and special payment charges on the guaranteed student loans are billed to the Federal government, if due, and the lenders are notified as to those students from whom to expect payments on their student loans.

In this case, the auditors requested at the entrance conference the enrollment verification reports completed by Academy. After repeated requests, Academy produced three enrollment reports which it represented were completed by it and returned to the Louisiana Guaranty Agency.

ED charges that Academy falsely represented that these documents were the enrollment verification reports submitted to the Louisiana Guaranty Agency.

The first report given to the auditors was a two page report dated December 6, 1989 by Lindy Sciortino which contained the names of 10 students. The print style of this report differs from the print style employed by the Louisiana Guaranty Agency. In addition, the enrollment verification report submitted to the Louisiana Guaranty Agency by Academy reported the status of 51 students whereas the false report given to the auditors provided the status of only 10 students. Academy's motive for this false report and the others submitted to the auditors appears to be a concerted effort by Academy to portray itself as an institution with few students which would be consistent with its limited production of student files.

The second report given to the auditors was dated April 12, 1990 by Lindy Sciortino and consisted of three pages which set forth the status regarding 31 students. Like the above report, this report differs from the report submitted to the Louisiana Guaranty Agency in that its print style does not comport with the print style used by the guaranty agency in its report. In addition, the second and third pages of the report given the auditors had the date of April 4, 1989 in the upper left hand corner while the first page of the report had the date of April 4, 1990 in this position. Louisiana Guaranty Agency generates these reports by computer and it is unlikely that the computer would misdate a portion of the document. Thus, the type style and the misdated pages reflect that the report given to the auditors was a false report. The false report reflected the enrollment status of 31 students while the nine page report submitted to the guaranty agency by Academy provided a status report for 89 students.

The third report provided the auditors by Lindy Sciortino was a four page document hand-dated November 30, 1990 and reported the status for 37 students. Like the other two reports provided the auditors, this report had a print style which was different than the style employed by the Louisiana Guaranty Agency. The false report was four pages in length while the report forwarded by the guaranty agency to Academy was five pages in length and requested the enrollment status regarding 89 students.

In sum, Academy presented the auditors with three enrollment verification reports which were false documents.

B. Academy could not or would not provide the auditors with the requested student files.

This allegation is not relevant regarding whether Academy's records were inaccurate, inconsistent, or incomplete records. Accordingly, it need not be addressed.

C. Academy's student enrollment and attendance records were inaccurate and inconsistent.

Accurate student attendance records are essential in the proper administration of the student financial assistance programs. A second disbursement of a Pell Grant or a guaranteed student loan may not be made until the student has reached the midpoint or second half of his or her academic year. 34 C.F.R. §§ 668.22(c) and 690.3(b). Similarly, a school may not retain a student's tuition proceeds funded by a Pell Grant or a guaranteed student loan unless the student has reached the midpoint or second half of his or her academic term. 34 C.F.R. §§ 682.604(d) and 690.78. Finally, in the event of a student withdrawal, a school may be required to return, as determined by the appropriate regulations and school policy, Pell funds and a portion of a guaranteed student loan to the lender on behalf of the student. 34 C.F.R. §§ 682.605, 682.606, and 690.79(a)(2).

ED alleges that the hours of attendance recorded on the student master attendance records in their files and the school's monthly reports submitted to the Louisiana State Board of Cosmetology were not substantiated by the school's records and inaccurate.

The facts establish this allegation. Of the 116 student files provided the auditors during the first week of the survey, the master student attendance records in 42 files indicated that the student

had attended the school on November 29, 1990. Yet, the sign-in attendance sheet indicated that only five students attended the school on November 29, 1990. Thus, either the attendance sign-in sheet or the student master attendance records were in error. The extent of this discrepancy, together with the HEAF enrollment verification report which suggests phantom students, leads to the conclusion that the student master attendance sheets were falsified.

The Louisiana Guaranty Agency enrollment verification report dated April 12, 1990, by Lindy Sciortino and furnished to the auditors omitted 58 students. Findings 18, 19. Of these 58 students, the hours of attendance reflected in the student attendance records maintained by the school for 43 students differed in the number of hours reported for each student by the school to the State Board. The record does not reflect the amount of the differences except for one student. For student K.P., his attendance record maintained by the school reflected 1,625 hours of attendance while the school reported only 813 hours to the State Board.

There are other strong inferences that the student attendance records reflected greater student attendance than the actual attendance of the students. The auditors found that Academy's records reflected almost no student absences or withdrawals. In addition, Academy disclosed, after some prodding by the auditors, that the school had approximately 65 students attending the institution as of the initiation of the survey on December 17, 1990. Yet, an analysis of the daily attendance sign-in sheets for 13 consecutive school days in December 1990 revealed that only 21 students attended at least one session during this period.See footnote 4 4/ Lastly, only 11 students took the Louisiana cosmetology examination in 1989 while the school reported an enrollment of 167 students in December 1988.

The above findings suggests strongly that the school had phantom students, that is, students who contracted for the education and then dropped out before the completion of their studies and were not accounted for in this manner in the school's records.

In summary, Academy's student enrollment and attendance records were inaccurate and inconsistent.

D. Falsified general education development certificates and proof of the official results of the general educational development tests.

As part of the process to obtain Federal financial aid assistance, each student must establish that he or she is an eligible student under 34 C.F.R. § 668.7 which means, inter alia, that he or she has a high school diploma, its recognized equivalent, or the ability to benefit from the training offered. Students present these documents to the school officials as part of the admission process and, according to one auditor, the schools are not required to verify the accuracy of the documents provided.

ED asserts that Academy's records are unsatisfactory due to the presence of 14 student files which contained falsified general education development certificates and proof of the official results of the general educational development tests purportedly issued by the Louisiana State Department of Education.

It is clear in this case that these documents were falsified; however, this does not resolve the matter. These are documents allegedly provided by the students to the school officials. They are not documents created by the institution. Hence, the question is whether Academy officials participated or abetted in the falsification of these documents, encouraged or directed students to individuals who created these documents, or otherwise knew or should have known that these documents were falsified. In this regard, ED bears the burden of production and the burden of persuasion.

ED's evidence is circumstantial in most respects and Academy offered none. The most direct evidence in support of ED's position is student F.H.'s high school equivalency diploma. Though this student graduated from high school in Mississippi, she was unaware that her student file contained a high school equivalency diploma in her name issued by a Louisiana high school which she never attended. Thus, only school officials could have placed the document in her file. In addition, it was obviously a forged document as the four-inch line above which the appropriate name of the high school is inserted in the diploma is partially obscured by white-out which also suggests that it was a forged document.

The frequency and number of identically forged test result forms for the general education development test suggests that the Academy officials had knowledge that these forms were forged. There was one group of three forms which contained the identical test results including the average test score which was greater than any of the five test scores to be averaged. Therefore, these forms were patently invalid on their face. Here, the inference may be drawn that Academy officials assisted in the forgeries or acquiesced in their submission. This problem also surfaced with respect to another forged general education development test result form involving student S.W.

A second group of seven forged official result forms for the general education development test were made from the same common forged form. Like the above group, this group also had the identical five test scores and average test score.

One auditor testified that he discovered a file with blank general education development certificates and test result forms. Although ED auditors made extensive copies of student files, ED did not produce any copies of these blank certificates and forms. Accordingly, this testimony is entitled to some, but not substantial, weight in resolving this matter.

As noted above, it is rather apparent that Academy officials falsified the student attendance records for the day of November 29, 1990. Lastly, Maurice Sciortino or his son had the motive to produce the forged general education development test score forms in that it would enable individuals to attend the institution and Maurice Sciortino would profit thereby. There is no evidence that any of these students borrowed more money than the cost of his or her education which could suggest that the student's had a motive to obtain and submit a forged document.

Based on the above, ED has carried the burden of production in establishing that Academy officials forged 14 general education development test result forms or certificates.

E. Four of 15 high school diplomas examined were questionable.

ED asserts that four of 15 high school diplomas examined were questionable regarding their authenticity.

A review of the evidence reveals that one diploma for E.W. was a forged document and two diplomas for students L.W. and S.W. were more likely than not forged documents.

With respect to student E.W., his file contained a completed school application form on which was stamped "diploma attached" and a copy of his diploma. The information set forth in E.W.'s application is inconsistent with the information set forth in his diploma. According to his application, E.W. was born on June 23, 1960, entered Walter L. Cohen High School in 1976, and either graduated or discontinued his attendance at Walter L. Cohen High School in 1978 at the age of 18. His diploma indicates he graduated from a different high school--Alfred Lawless Senior High School--and that he was 24 years old at the time of graduation. Based upon his application and his age, the evidence supports a conclusion that this diploma was a forged document.

In the matter of L.W., his purported diploma indicates that he graduated from the Joseph S. Clark Senior High School in May 1968. According to hearsay testimony by an auditor regarding the student's file, he was born in 1956 and completed only the tenth grade at Walter S. Cohen High School. Thus, the inconsistency is whether he graduated from high school. According to his year of birth, L.W. would have been 12 when he graduated from high school. Inasmuch as this is highly unlikely and based upon the hearsay testimony regarding the extent of his education, it is more likely than not that the diploma is not authentic.

With respect to student S.W., his purported diploma indicates that he graduated from the Joseph S. Clark Senior High School in May 1985. According to hearsay testimony by an auditor regarding the student's file, S.W. received a general education development certificate and was attending Gary Jobs Corps in San Marcos, Texas between 1984 and 1986. Thus, there are inconsistencies which suggest that the diploma may not be authentic.

The evidence is insufficient regarding the fourth diploma. The year of graduation on the diploma for S.C. appears to be written over. It is not possible to determine whether the date was altered or simply rewritten for clarity. Hence, ED has failed to carry its burden of production in this matter.

F. Three of 46 ability to benefits tests examined were altered.

Absent a high school diploma or a general education development certificate, an individual must show that he or she has the ability to benefit from the education offered at the postsecondary institution in order to participate in the Federal student financial assistance programs. 34 C.F.R. § 668.7(a). A postsecondary school may administer such an examination on its premises to its prospective students.

Of 47 files reviewed regarding the student's ability to benefit test, the tests of three students were altered in part by Academy officials by means of a white-out type material which was used to cover an existing response and then an altered answer was inserted.

For student S.R., 12 answers were altered; for student P.C., 13 answers were altered; and for student N.K., 11 answers were altered.

According to an auditor, Lindy Sciortino admitted to changing some answers on the ability to benefit tests on the ground that certain students found that some of the questions were vague. While this may have been his justification, it, nonetheless, does not excuse altering test scores. These tests are critical in ascertaining whether an individual is entitled to receive Federal financial assistance as a student. Accordingly, the alteration of the tests constitutes a violation of the regulations.

3. Academy officials provided orally misleading information to the auditors.

As noted above, an institution must be capable of adequately administering the Title IV programs. In this regard, school officials must be forthright in their dealings with the Department, including its auditors. Here, ED charges that Academy officials provided orally, misleading information to the auditors.

The nature of this allegation--the oral misrepresentation of facts--has inherent problems. An oral request for information may not be adequately communicated to the other party. Similarly, the party receiving the request may misunderstand the nature of the request. Therefore, such a matter must be established by reliable and substantial evidence.

ED alleges three instances of oral misrepresentations of significant matters by Academy officials to the auditors. One allegation is that Academy officials represented that students attending its branch campus in Jefferson did not receive Federal student financial assistance.

According to the testimony of an auditor, a comparison of guaranty agency "runs" with a list of students who attended the branch campus of Academy and obtained from the Louisiana Board of Cosmetology indicated that some students who attended the branch campus had received student loans. The record does not contain the pertinent guaranty agency "runs" or the information obtained from the Louisiana Board of Cosmetology. Thus, the evidence to establish the misrepresentation is hearsay testimony concerning the contents of various documents.

Hearsay evidence is admissible in these proceedings. 34 C.F.R. § 668.88(c). Its probative weight, however, may vary--

> mere rumor will [not] serve to `support' a finding, but hearsay may do so, at least if more [evidence] is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely [upon] in serious affairs.

NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938), cert. denied, 304 U.S. 576 (1938).

In this case, the records, and presumably business records at that, which would apparently establish that some students who attended the Jefferson campus received student loans, are in the possession of the Department. Yet, this purported, reliable source of evidence was not produced.

In this context, the oral testimony by the auditor regarding the contents of these purported documents is not the kind of evidence which a responsible person would rely upon in making a serious decision. Therefore, it is concluded that ED failed to establish this allegation.

The other allegations concern the school's utilization of HEAF. Initially, Academy represented that only Louisiana Guaranty Agency guaranteed student loans after 1985 and, therefore, HEAF was not used to guaranty loans after 1985. ED charges that this was a misrepresentation. However, this representation was corrected quickly. In this context, this matter does not warrant consideration regarding termination.

Academy revised its representation in that HEAF may have been used after 1985; however, only one enrollment verification report had been received from HEAF and that it had not been returned to HEAF. ED charges that this also constituted a misrepresentation.
The auditors obtained several enrollment verification reports from HEAF and one report was made part of the record. This report was signed by Lindy Sciortino and dated September 25, 1990--less than three months before the survey. This report indicated that there were approximately 266 students attending Academy whose loans were guaranteed by HEAF and that virtually all of these students were enrolled on a part-time basis and rescheduled to graduate in December 1990.

It is apparent, based on reliable and substantial evidence, that Academy misrepresented its relationship with HEAF. Misrepresentations such as this reflect adversely on Academy's ability to administer the student financial assistance programs.

4. Failure to submit biennial audits for the fiscal years 1987 and 1988 and the fiscal years 1989 and 1990.

In 1985, Academy entered into the Pell Grant program and the guaranteed student loan program. At this time, audits of these programs were due every two years. 34 C.F.R. §§ 668.12(a), 690.84(b), and 682.612(e) (1985). Academy continued its participation in these programs during the four award years in issue, i.e. fiscal years 1987 through 1990.

ED asserts that Academy failed to submit the biennial audits for the fiscal years 1987 and 1988 and the fiscal years 1989 and 1990 as was required by the student financial assistance programs.

With respect to these fiscal years, the general rules for the student financial assistance programs required an institution, like Academy, which did not receive campus-based funds, to submit a biennial audit by January 31st of the year following the last year in the audit--

> (1) An institution, which participates in the . . . GSL . . . or Pell Grant programs shall have performed a financial and compliance audit of its Title IV, HEA programs. The audit shall be conducted by an independent auditor in accordance with the general standards and the standard for financial and compliance audits in the U.S. General Accounting Office's (GAO's) Standards for Audit of Governmental Organizations, Programs, Activities, and Functions.
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> . . . .

(3) The institution shall have an audit performed at least once every two years.

. . . .

(4)(ii) If the institution does not receive campus-based funds, the institution shall submit the audit report to the Inspector General by January 31 of the year following the last year covered by the audit.

34 C.F.R. § 668.23(c) (1988).

Academy submitted its biennial audit for the fiscal years 1987 and 1988 in December 1990 which was approximately 22 months late. In addition, the audit was substantially deficient in many areas and, therefore, did not comply with the auditing standards. The audit was rejected and was never resubmitted by Academy. Academy did not submit the biennial audit for the fiscal years 1989 and 1990. Accordingly, Academy failed to submit two biennial audits as required by the regulations.

In conclusion, 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).

While the tribunal may impose sanctions other than termination, it is not appropriate in this case. Academy's violations of the governing regulations are numerous and significant and reflect a blatant disregard for the proper administration of the student financial assistance programs by an institution which administers the programs as a fiduciary.

Academy failed to submit two biennial audit reports covering the fiscal years 1987 through 1990. Biennial audits are essential to ensure that an institution is properly implementing the Federal financial assistance programs. A failure to comply with this requirement is sufficient to warrant termination. Nonetheless, Academy had other infractions. It failed to provide the Department's auditors with access to its records, produced falsified enrollment verification reports, and created falsified documents pertaining to its students. In this context, termination of its eligibility to participate in Title IV programs is clearly warranted.

B. Fine Issue

Under Section 487(c)(2)(B)(i) of the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, as amended by Section 451(a) of the Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1367 (to be codified as amended at 20 U.S.C. § 1094(c)(2)(B)(i)), the Secretary "may impose a civil penalty upon such 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, 1991) at 18, this 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 6.

Regarding its size, Academy is at the lower range of a medium size institution. During the fiscal years ultimately encompassed within the survey, i.e. 1988, 1989, and 1990, Academy's students received Federal student assistance in the approximate amounts of $1.5 million, $780,000, and $450,000, respectively. The average of the assistance was approximately $900,000. This amount places the institution within the lower range of a medium size school. In re Deloux Schools of Cosmetology, Dkt. No. 89-59-S, U.S. Dep't of Education (Oct. 30, 1990) (students received $7 million in student loans); In re Southern Institute of Business and Technology, Dkt. No. 90-62-ST, U.S. Dep't of Education (May 3, 1991) (students of a small-to-medium size school received $1.4 million in student loans); Hartford Modern School of Welding, Dkt. No. 90-42-ST, U.S. Dep't of Education (Jan. 31, 1991) ($1.2 million in student loans constituted a small-to-medium size school); In re Payne-Pulliam School of Trade and Commerce, Dkt. No. 91-33-ST (Oct. 23, 1992) (students of a small size school received $175,000 to $300,000 in student loans); and In re Katie's School of Beauty Culture & Barbering, Dkt. No. 90-68-ST, U.S. Dep't of Education (Mar. 27, 1991) (students of a small size school received $100,000 in student loans).

In ED's notice of fine, it proposed fines in the total amount of $1,740,000. ED withdrew proposed fines in the total amount of $65,000 during the hearing. Consequently, ED seeks fines in the total amount of $1,675,000 which is determined as follows:

Denial to access of records	$ 25,000
Altered enrollment verification reports	75,000
Failure to produce records	1,250,000
Failure to maintain accurate attendance records	50,000
Altered GED documents	65,000
Altered high school diplomas	20,000
Altered ability to benefit tests	15,000
Misrepresentation of HEA participation	75,000
Failure to submit four biennial audits	100,000
TOTAL	$1,675,000

In addressing the merits of these proposed fines, the tribunal is cognizant that Academy is operated as a sole proprietorship and consequently, Maurice Sciortino, as an individual, will be responsible for the payment of any fine. In addition, the tribunal recognizes that it has already imposed the most severe penalty possible by virtue of its termination of Academy's eligibility to

participate in the Title IV programs. However, the actions of Academy clearly justify the imposition of fines in addition to the sanction of termination.

ED proposes a $25,000 fine for the denial of access to the student financial assistance records by Academy and a $1,250,000 fine for its failure to produce the same records. The latter amount represents, according to the notice, a $5,000 fine for each of the approximately 250 student files which were not produced. According to ED, the figure of $5,000 is the approximate amount of financial assistance received by each of the 250 students. Both fines are based upon the same fact, namely that Academy did not provide the auditors with the requisite files needed to conduct an audit in compliance with the regulations.

As set forth in the termination aspect of this decision, the auditors must be afforded the opportunity to select the files systematically or randomly which are essential to the proper discharge of its audit function. The selection process must reside solely within the providence of the auditors. Academy's failure to produce the student financial assistance files is a most severe violation with broad ramifications and effectively precludes an audit or survey of the student assistance programs.

The significant number of files withheld, over 350, together with the seriousness of the infraction justifies a harsh, yet realistic penalty. In this regard, the Federal government has possession of the student files and the administrative means by which to recover any funds which were misused or are not properly accounted. Based upon the size of the institution and the severity of the violation, a fine in the amount of $150 per file or a total of $52,500 is warranted for the denial of access and the failure to produce the student financial assistance files.

ED proposes the maximum fine of $25,000 per alteration of three enrollment verification reports from the Louisiana Guaranty Agency which were furnished the auditors. These reports were clearly forged documents reflecting the omission of information concerning a significant number of students and were created with the intent to mislead the auditors. Under these circumstances, the maximum amount of the fine is only reduced due to the size of the institution. Accordingly, a fine in the amount of $20,000 per forged enrollment verification report or a total fine of $60,000 is appropriate.

ED contends that a fine in the amount of $50,000 is warranted for Academy's failure to maintain accurate attendance records. The maintenance of accurate student attendance records is essential in the proper administration of the student financial assistance programs. Timely disbursements of a Pell Grant or a guaranteed student loan as well as the amount of a refund of tuition charges in the event of a student's withdrawal are determined based upon the attendance records.

It is readily apparent that Academy did not keep accurate attendance records. For the day of November 29, 1990, 42 student files indicated the student attended the institution on that day, yet the daily attendance sheet recorded only five students in attendance. A comparison of the attendance records maintained by Academy and the attendance information submitted by it to the Louisiana State Board of Cosmetology indicated that, with respect to 58 students who had been omitted from the April 12, 1990 enrollment verification report submitted to the Louisiana Guaranty Agency, there were discrepancies regarding 43 students. Thus, the attendance records

for approximately 80 students are inaccurate. Under these circumstances and based upon the size of the institution, a fine in the amount of $20,000 is appropriate.
ED also seeks the imposition of a $5,000 fine for each document altered by Academy officials. ED asserts that a fine of $65,000 is warranted for the falsification of 13 general education development documents. Similarly, ED pursues a fine of $20,000 for the falsification of four high school diplomas and a fine of $15,000 for the falsification of three ability to benefit tests. The record reflects the falsification of 14 general education development documents and three high school diplomas as well as the alteration of three ability to benefit tests. These documents are essential in the awarding of student financial assistance which, in the context of Academy's students, could lead to a maximum of approximately $5,000 in financial assistance. Thus, falsification and the alteration of these documents represents a most severe violation of the governing regulations. Although the gravity of these violations are significant, the ultimate result affects only one student per violation in contrast to the falsification of enrollment attendance reports. Given these circumstances and the size of the institution, a fine of $1,000 per document is appropriate. Thus, the total fine for these violations is $20,000.

ED also seeks a fine in the amount of $25,000 for each of three instances in which Academy officials allegedly provided, verbally, misleading information to the auditors.

The tribunal determined that there was insufficient evidence to conclude that Academy officials made a misrepresentation regarding the receipt of financial assistance by students attending the branch campus in Jefferson, Louisiana.

The other two purported misrepresentations concern the school's utilization of HEAF. Initially, Academy represented that only Louisiana Guaranty Agency guaranteed student loans after 1985 and, therefore, HEAF was not used to guaranty loans after 1985. The second misrepresentation arose after Academy revised its representation in that HEAF may have been used after 1985. At this point, Academy represented that only one enrollment verification report had been received from HEAF and that it had not been returned to HEAF.

The auditors obtained several enrollment verification reports from HEAF and one report, in fact, had been signed by Lindy Sciortino on September 25, 1990--less than three months before the survey.

Viewing the inconsistent testimony of the auditors in a light most favorable to Academy, the representation by Academy that it did not use HEAF after 1985 was quickly revised during the course of the survey and did not appear to materially affect the survey. With respect to the allegation that Academy had not received and filed enrollment verification reports with HEAF, this was a misrepresentation by Academy. This misrepresentation did not materially affect the survey because the auditors were aware that students of Academy had used HEAF as a guaranty agency before the commencement of the survey. In view of the previously imposed sanction of termination, no fine is warranted.

Finally, ED requests fines in the total amount of $100,000 due to Academy's failure to submit biennial audits for the award years 1987 and 1988 and 1989 and 1990. In ED's view, the failure

to file a biennial audit for each year constitutes a separate violation and, apparently, the amount of the proposed fine was not diminished by virtue of the size of the institution.

For the award years 1989 and 1990, Academy did not file a biennial audit. Academy filed, however, a biennial audit for award years 1987 and 1988. It was submitted some 23 months late; failed significantly to conform to the auditing standards; and was, therefore, returned. A revised audit was never filed. Under these circumstances, it is concluded that Academy failed to file two biennial audits.

ED's current position--that the failure to file a biennial audit constitutes two violations, i.e. a violation for each year--is puzzling. This position is contrary to its position in Katie's School of Beauty Culture & Barbering, Dkt. No. 90-68-ST, U.S. Dep't of Education (Mar. 27, 1991) wherein ED maintained that the failure to file a biennial audit constituted a single violation. In any event, ED's current position contravenes the plain meaning of 34 C.F.R. § 668.23(c)(3). It requires the performance of a single audit covering all student financial assistance programs "at least once every two years." As such, the failure to file a biennial audit constitutes a single violation. See In re Southern Institute of Business and Technology, Dkt. No. 90-62-ST, U.S. Dep't of Education (May 3, 1991). Therefore, under the regulations, Academy committed only two violations--one violation based on its failure to submit a biennial audit for award years 1987 and 1988 and a second violation for its failure to file an audit for award years 1989 and 1990.

The failure to submit audits is an extremely grave violation as it increases ED's costs and hampers its determination of whether an institution is properly administering the financial assistance programs and, if not, the extent the institution may be indebted to the Department and lending institutions for its improper administration of the programs. In re Hartford Modern School of Welding, Dkt. No. 90-42-ST, U.S. Dep't of Education (Jan. 31, 1991) at 19 (citing In re D'or School of Cosmetology and D'or Beauty College, Inc., U.S. Dep't of Education (Aug. 18, 1988) at 9-10). Thus, only the size of the institution is a factor which warrants a reduction in the maximum amount of the fine. Accordingly, a fine in the amount of $20,000 is imposed for the failure to file each of the biennial audits. Thus, the total fine imposed is $40,000.

In summary, it is determined that fines in the total amount of $192,500 are appropriate in light of the size of Academy and the gravity of violations.

C. Academy's motion for a continuance of the proceeding due to the criminal investigation of Maurice Sciortino.

At the hearing in this case, ED presented several witnesses as part of its case-in-chief and rested. Counsel for Maurice Sciortino, who was doing business as Academy, proceeded with the presentation of his case in chief and examined one witness. Following this examination, counsel then moved for a continuance of the proceeding until after the resolution of the criminal investigation of his client and any criminal prosecution which may result therefrom. Counsel urged that the testimony of Maurice Sciortino was an important aspect of his case-in-chief; however, Maurice Sciortino sought to preserve his Fifth Amendment privilege against self-incrimination in view of the pending criminal investigation with respect to his operation of Academy.

ED opposed this motion. The tribunal denied the motion. Thereafter, Maurice Sciortino did not testify on his own behalf and counsel for Maurice Sciortino rested his case.

The Fifth Amendment provides in pertinent part that--

> No person . . . shall be compelled in any criminal case to be a witness against himself, not deprived of life, liberty, or property, without due process of law . . . .

The Fifth Amendment proscribes only compelled self-incrimination, not incriminating statements. United States v. Rios Ruiz, 579 F.2d 670, 675 (1st Cir. 1978).

The Supreme Court addressed the issue of the application of the Fifth Amendment to administrative proceedings on numerous occasions. The Court held that the Fifth Amendment "privilege against self-incrimination can be asserted 'in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.'" Maness v. Meyers, 419 U.S. 449, 464 (1975) (quoting Kastigar v. United States, 406 U.S. 441, 444 (1972)). See Lefkowitz v. Turley, 414 U.S. 70 (1973); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (White, J., concurring); McCarthy v. Arndstein, 266 U.S. 34 (1924); United States v. Saline Bank, 26 U.S. 100 (1828).

The Court also held nearly 80 years ago that a transaction or course of conduct could give rise to both criminal and civil suits.See footnote 5 5/ Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912). Further, the Court held that the government could initiate such proceedings either "simultaneously or successively," giving courts discretion to prevent injury in a case-by-case basis. Id. Therefore, in the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence. SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980), cert. denied, 449 U.S. 993 (1980).

The circumstances that weigh in favor of granting a stay of a civil proceeding include bad faith governmental action or malicious governmental tactics, the absence of counsel for defendant during depositions, and other special circumstances. United States v. Kordel, 397 U.S. 1, 11-12 (1970); Dresser Indus., Inc., 628 F.2d at 1375.

The present proceeding does not involve bad faith, malicious governmental tactics, or the absence of counsel. The initial contact with Maurice Sciortino involved an audit-type investigation which, if violations of the programs are discovered, may cumulate in any one or more of three administrative proceedings--a proceeding to collect improperly disbursed monies, a proceeding to terminate, suspend, or limit the school's eligibility to participate in the student financial assistance programs, or a proceeding to fine a school for violations of the programs. Thus, the termination and fine actions are a natural outgrowth of the audit process within the Department and are not a means to enhance a criminal prosecution of Maurice Sciortino.

Civil proceedings may be stayed under special circumstances and the determination is made on a case-by-case basis. Dresser, 628 F.2d at 1375. Other than agency bad faith or malicious governmental tactics, the D.C. and Federal Circuits agree that--

the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self- incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.

Id. at 1375-76 (citations omitted); Afro-Lexcon, Inc. v. United States, 820 F.2d 1198, 1203 (Fed. Cir. 1987) (quoting Dresser)

The circumstances of the present case do not warrant the application of the above standard and, even if it were applied, the present case should not be stayed. Initially and most importantly, the absence of an indictment weighs heavily against a stay of the proceeding. Dresser, 628 F.2d at 1376. Here, Maurice Sciortino has not been indicted. This matter is apparently under the investigation of a grand jury. The grand jury enjoys very broad powers of discovery. In contrast, no discovery is permitted in the present administrative proceeding.

34 C.F.R. § 668.88(c)(3). Moreover, under the Federal Rules of Criminal Procedure which take effect after an indictment, discovery and depositions are significantly restricted. Fed. R. Crim. P. 15 and 16. Depositions are permitted only with regard to your own witnesses. Fed. R. Crim. P. 15. Here, Maurice Sciortino listened to ED's case-in-chief and cross-examined these witnesses before his counsel moved to suspend the proceeding. Such a motion could have been made before the hearing began. Due to the lateness of this motion and the obvious benefits derived by such action, Maurice Sciortino cannot now complain in good faith that his defense may be exposed and, accordingly, seek a suspension. In addition, ED seeks to terminate the eligibility of Academy from its participation in the student financial assistance programs and seeks substantial civil monetary penalties. These are serious matters concerning the Department's oversight of its programs and therefore require prompt resolution.

Even where there has been an indictment, however, courts have been reluctant to enjoin administrative proceedings. For example, in Diebold v. Civil Service Commission, 611 F.2d 697 (8th Cir. 1979), a county employee was under a criminal indictment for child molestation which also formed the basis for his dismissal from his employment. In an administrative proceeding to contest the loss of his job, the county employee was faced with the choice of electing to remain silent while the administrative commission heard the evidence which would virtually guarantee the loss of his job, or voluntarily testify and waive his Fifth Amendment privilege. In view of this predicament, the county employee brought an action to enjoin the commission from having the administrative hearing until after the criminal case against him was concluded. The Federal district court denied the relief and the matter was appealed to the Eighth Circuit. In affirming the lower court, the Eighth Circuit found that the employee would not be penalized at the administrative hearing if he invoked the Fifth Amendment privilege as this would not constitute a separate ground for dismissal and held--

that, as a matter of law, the dilemma forced upon the appellant was a constitutionally permissible one . . . . [and that] as long as an employee such as Diebold is not faced with the decision to surrender either his job or his constitutional privilege against self-incrimination, his predicament, no matter how undesirable, does not raise constitutional questions. Sanitation Men v. Sanitation Comm'r, 392 U.S. 280, 284, 88 S.Ct. 1917, 20 L.Ed. 2d 1089 (1968).

Id. at 699-700.

Therefore, the Eighth Circuit refused to enjoin the administrative proceeding.

Like the former employee in Diebold, Maurice Sciortino was not faced with a loss of his school's eligibility to participate in the student financial assistance programs and a civil fine if he did not testify in the present proceeding. These matters are resolved based upon the evidence presented, not the invocation of the Fifth Amendment by Maurice Sciortino.

Accordingly, for the foregoing reasons, the motion to suspend the proceeding by Maurice Sciortino was properly denied.

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 the Maurice Charles Academy of Hair Styling 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, that the Maurice Sciortino, d/b/a as Maurice Charles Academy of Hair Styling immediately and in the manner provided by law pay a fine in the total amount of $192,500 to the United States Department of Education.

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Allan C. Lewis
Administrative Law Judge

Issued: May 17, 1993
Washington, D.C.

APPENDIX --
FINDINGS OF FACT

1. The Maurice Charles Academy of Hair Styling is a cosmetology school consisting of a main campus located at 4432 Magazine Street, New Orleans, Louisiana 70115 and a branch campus located at 308 Maine Street, Jefferson, Louisiana 70121.

2. Academy is a sole proprietorship operated by Maurice Charles Sciortino. He is assisted by his son, Lindy Sciortino, who is the Financial Aid Director and the Registrar.

3. Academy began its participation in the Title IV, HEA programs in January 1985.

4. The Department of Education and Maurice Sciortino executed program participation agreements over the years which permitted Academy to participate in the Title IV, HEA programs, covering the period of time from 1985 to the present.

5. Academy participated in the Stafford Loan and Pell Grant Programs, which constituted the only federal financial assistance for which Academy was awarded Federal funds.

6. Academy's students received the following amounts of student financial assistance for the award years 1987 through 1989 and for the period July 1, 1989 through December of 1990:

Period	Amount
1987	$1,589,781
1988	783,859
1989	452,836
1990 (partial)	186,960 (estimated)

7. As a result of an observation made by a member of the Louisiana Board of Cosmetology that Academy was reporting to the Board more students than were actually attending classes, the Department commenced procedures which would allow it to survey or audit Academy.

8. On November 27, 1990, Eddie King, an auditor, contacted the Financial Aid Director of Academy, Lindy Sciortino, and advised him that a survey concerning the receipt and expenditure of student financial assistance funds would begin in December. The auditor requested that numerous documents be assembled for review including the student files.

9. A confirmation letter, dated November 28, 1990, was sent to Maurice Sciortino, owner of Academy and indicated that an entrance audit conference would be held on December 17, 1990, at 10:30 a.m. The confirmation letter also contained a list of items that should be made available to the auditors at the beginning of the survey. The letter did not mention that the student financial assistance files were to be made available to the auditors.

10. The attachment to the confirmation letter requested the following information for the audit survey:

a. Current organizational charts, personnel listings by function area, school catalogs, tuition and other charges to students for all course offerings;
b. School's satisfactory progress and refund policies;
c. Listing of all Federal bank account names, numbers, and locations;
d. Applications for Institutional Eligibility and Certification (ED Form E 40-34 P, formerly ED Form 1059), ED Notices of Eligibility, and SFA Program Participation Agreements;
e. Accrediting agency approvals and associated documents;

f. Guaranty agency's most recent review;
g. Corporate financial statements, SFA audit reports and management letters, and any other audit/review reports;
h. Contracts with SFA servicers/consultants;
i. Default Reduction Plan;
j. Master enrollment records and SFA payment ledgers/control accounts;
k. Federal bank account statements and canceled checks;
l. Pell Grant Institutional and Student Payment Summaries;
m. Drop out rate calculations for last two completed years;
n. Placement data for last two completed years;
o. Federal Cash Transaction Reports (PMS 272);
p. Budgets showing cost of education;
q. Identification of any automated systems utilized, including hardware and software specifications.

11. Initially, ED proceeded with a survey rather than an audit approach. Under a survey approach, the auditors' plan is to determine whether there are potential areas of significant weaknesses in the school's program. This is accomplished through a general overview of the program and a less detailed inquiry into areas than would occur in an audit situation. In the event the investigation produces evidence of significant weaknesses or problems, the investigation may then develop into an audit which results in an audit report. An audit report will generally propose adjustments as a result of its findings.

12. The survey began on December 17, 1990, with an entrance conference. Eddie King, David Kimble, and Lee Greear represented the Office of the Inspector General, as auditors, and Maurice Sciortino and Lindy Sciortino (Academy officials) represented Academy. The scope of the audit, as explained during the entrance conference, was to review all student recipients of Federal student financial assistance from July 1987 through December 1990. At this time, the auditors requested all student files. Academy produced 116 student files which were stored in two boxes and represented that these were all of the student files.

During the first week of the survey, the auditors repeatedly made requests for other student files because, according to guaranty agency reports, they believed there were a substantial number of missing student files. At the end of the first week, the survey was discontinued due to the holidays and was scheduled to resume in January 1991. Prior to leaving, the auditors left with Maurice Sciortino on December 20, 1990, a written request for documents to be provided at the beginning of the second week of the audit in January 1991. This request included "[a]ll student files (financial aid, academic, etc.) from July 1, 1987 to present."

On the second day of the resumption of the survey in January 1991, Academy provided approximately 180 student files in the morning and an additional 24 files in the afternoon. At this point, Maurice Sciortino represented, again, that the student files produced, a total of 320 files at this point, constituted all student files.

Late in the afternoon of the third day, Maurice Sciortino conferred with his attorney by phone. Thereafter, in a conference call with the auditors present, Maurice Sciortino related allegations of

perceived irregularities by the auditors which included disruption of the business climate at the school, xeroxing documents when he was out of the office, xeroxing an excessive number of documents relating to the student financial assistance programs, and requesting access to his personal bank account, canceled checks, and his Federal income tax returns. In addition, Maurice Sciortino voiced concern that the auditors might read or copy personal documents which were stored in or near the area set aside by Academy for the auditors to work.

Maurice Sciortino's attorney requested the auditors to cease their work immediately and to submit thereafter, in writing, a list of any documents which the auditors needed in order to perform their survey. Maurice Sciortino's attorney represented that he would then review the auditor's request and, if the documents were pertinent to the survey, request Maurice Sciortino to make the documents available. Maurice Sciortino's attorney also advised the auditors that he wanted to be present when the auditors performed any work at the school. At this point, the auditors ceased their work and left the premises.

On January 14 of the following week, Maurice Sciortino's attorney contacted an auditor and repeated the above instructions. Approximately three weeks later, on February 6, 1991, Academy's records were seized pursuant to a search warrant. The seized records included 673 student files which were stored in a locked supply closet adjacent to the work area occupied by the auditors. This supply closet had been identified previously by Academy as a storage area for school supplies and cleaning equipment. The files were of students who attended Academy after July 1, 1987. Inasmuch as Academy provided the auditors with access to 320 of these files during the survey, Academy did not provide the auditors with access to approximately 353 student files of which, ultimately, 14 were determined to be missing.

13. The seized student files were taken to the Office of the Inspector General in Baton Rouge, Louisiana.

14. Academy was never requested by the auditors to produce by name the file of any specific student.

15. In response to a request by the auditors, Lindy Sciortino provided the auditors with three documents during the first week of the survey which were represented to be the enrollment verification reports submitted to the Louisiana Guaranty Agency.

16. Academy submitted to the Louisiana Guaranty Agency an enrollment verification report signed and dated November 6, 1989 by Lindy Sciortino. This document was generated by the guaranty agency. Academy reflected therein the enrollment status regarding 51 students. This document was five pages and bore the date stamp affixed by the guaranty agency upon its receipt from Academy.

17. Lindy Sciortino provided the auditors with an enrollment verification report dated November 6, 1989 which was allegedly submitted to the Louisiana Guaranty Agency. This report contained two pages and reflected the status regarding 10 students. The print style on this document was different than the print-type employed by the Louisiana Guaranty Agency.

18. Academy submitted to the Louisiana Guaranty Agency an enrollment verification report signed and dated April 12, 1990 by Lindy Sciortino. This nine page document was generated by the guaranty agency. Academy reflected therein the enrollment status regarding 89 students. This document bore the date stamp affixed by the guaranty agency upon its receipt from the Academy.

19. Lindy Sciortino provided the auditors with an enrollment verification report which he previously had dated April 12, 1990 and represented to the auditors that it had been submitted to the Louisiana Guaranty Agency. This report consisted of three pages which reflected the enrollment status of 31 students. This document was not printed in the style employed by the Louisiana Guaranty Agency. Page one of the report bore the printed date of April 4, 1990 in the upper left hand corner. Pages two and three bore the printed date of April 4, 1989 in the upper left hand corner.

20. Academy did not submit to the Louisiana Guaranty Agency the enrollment verification report with the printed date of October 10, 1990. This was a five page document generated by the guaranty agency and sought the enrollment status regarding 85 students.

21. Lindy Sciortino provided the auditors with an enrollment verification report which he dated November 30, 1990 and represented to the auditors that it had been submitted to the Louisiana Guaranty Agency (HEAF). It bore the printed date of October 10, 1990. This report consisted of four pages which reflected the enrollment status of 37 students. This document was not printed in the style employed by the Louisiana Guaranty Agency.

22. The auditors knew before the survey began in December of 1990 that Academy had previously been associated with two guaranty agencies, the Louisiana Guaranty Agency and Higher Education Assistance Foundation. However, as of December 1990, the only guaranty agency used by Academy for the guaranty of student loans was the Louisiana Guaranty Agency.

23. According to the testimony of auditor Greear, the auditors first broached the subject of which guaranty agencies were used by Academy with Lindy Sciortino during the latter part of the first week of the survey. Lindy Sciortino told the auditors that Academy ceased using HEAF in approximately 1985. When asked for the enrollment verification reports from HEAF, Lindy Sciortino replied initially that Academy had not received any reports and then later, in the same conversation, indicated Academy may have received some reports but never returned the reports to HEAF.

According to the testimony of auditor King, Lindy Sciortino first told the auditors during the entrance interview that Louisiana Guaranty Agency was the only agency which guaranteed student loans for Academy students. At a later interview, Lindy repeated that the school only used the Louisiana Guaranty Agency and had not used HEAF. Lindy went on to say that no HEAF enrollment verification reports had been returned to HEAF by Academy.

The auditors subsequently obtained several HEAF enrollment verification reports completed by Academy from HEAF; however, only one report was made part of the record.

24. A HEAF enrollment verification report was completed by Academy, signed by Lindy Sciortino, and returned to HEAF on or about September 25, 1990. This report was based on a computer run produced by HEAF on August 21, 1990. According to this report which had projected graduation dates for students ranging between June 1989 and December 1990, there were 74 students with a projected graduation date between May 1989 and December 1990. According to the response by Academy, there were, as of September

25, 1990, 266 enrolled students whose loans were guaranteed by HEAF and virtually all of these students were enrolled on a part- time basis. As to virtually all of these students, Academy changed their various projected graduation dates to December 1, 1990.

25. Academy officials represented to the auditors that students attending school at the New Orleans campus received Federal student financial aid assistance. Academy officials also represented that students attending the Jefferson campus did not receive Federal student financial assistance.

26. According to the testimony of one auditor, a comparison of guaranty agency runs with information received from the Louisiana State Board of Cosmetology indicated that some students attending the branch campus in Jefferson had received student loans.

27. After some prodding by the auditors, an Academy official informed the auditors that the school had approximately 65 students attending the institution as of the initiation of the survey on December 17, 1990.

28. Upon arriving at Academy each day, each student was required to sign-in on the daily attendance sheet and indicate the time of his or her arrival. Upon leaving, the student indicated the time of his or her departure on the daily attendance sheet. At the end of the month, it was the practice of Academy to transfer the attendance information from the daily attendance sheets for that month to the master attendance sheet retained in each student's file. The sign-in attendance sheets were then discarded.

29. The auditors were only provided the daily attendance sheets for November 29, 1990, the five days of the school week for the first and second weeks of December 1990, and the first two days of the third week of school in December 1990. The survey commenced on the Tuesday of the third week of December 1990.

The daily attendance sheets for the above period revealed that only 21 students attended at least one session during this period.

An analysis of the attendance sheets is as follows:

11/29 12/3 12/4 12/5 12/6 12/7 12/10 12/11 12/12 12/13 12/14 12/17 12/18 Total
---
B,S x 1
E,E x 1
H,F x 1

J,W x 1
M,T x 1
S,A x 1
W,D x 1
L,N x x 2
R,R x x 2
T,K x x x 3
T,M x x x 3
D,N x x x x 4
B,C x x x x x x 6
B,T x x x x x x 6
T,N x x x x x x 6
B,J x x x x x x x 7
B,C x x x x x x x 7
R,A x x x x x x x 7
T,L x x x x x x x x x x 10
R,S x x x x x x x x x x x 11
E,Y x x x x x x x x x x x 12

Total 5 6 7 10 8 9 7 7 6 10 9 2 7 93

30. The November 29, 1990, attendance sheet indicated that five students attended the school. Of the 116 student files provided the auditors during the first week of the survey, the attendance records in 42 files indicated that the student had attended the school on November 29, 1990.

31. The Louisiana Guaranty Agency enrollment verification report dated April 12, 1990, by Lindy Sciortino and furnished to the auditors omitted 58 students. Findings 18,19. Of these 58 students, the hours of attendance reflected in the student attendance records maintained by the school for 43 students differed in the number of hours reported for each student by the school to the State Board. The record does not reflect the amount of the discrepancies except for one student. For student K.P., his attendance record maintained by the school reflected 1,625 hours of attendance while Academy reported only 813 hours to the State Board.

32. In Louisiana, the official results of a general education development test are sent to the student prior to his or her receipt of the diploma. One diploma is issued per student and sent directly to the student. A copy of the diploma is not retained in the State office which issues the diploma or the local school which administered the test.

33. Of the 23 general educational development certificates or proof of the official results of the general educational development test purportedly issued by the Louisiana State Department of Education and obtained from the student files at Academy, 14 certificates or proof of results were forgeries. The State of Louisiana did not issue certificates or proof of official results to students C.A., M.B., C.B., T.B., L.B., R.C., L.H., F.H., S.H., D.K., L.S., A.V., E.W., and S.H. although their student files contained such a purported document.

Regarding students C.A., M.B., L.B., R.C., D.K., A.V., and E.W., their files contained an Official Results of the General Education Development Test form allegedly issued by the State of Louisiana. In each case, this form was a forgery. Each form represents that the individual was a member of the military; however, each student was not a member of the military. On each form, the scores in the five test categories, the location of the testing, and the testing agent must be typed-in. The scores in each of the five test categories are identical and physically located in exactly the same place on each document. The typed-in word Washington as the location of the testing area has a typeover on the "n" in each document. More importantly, the type-set employed by the State of Louisiana to insert the location of the testing and the testing agent was gothic and these items are not printed in gothic on each of the documents. In addition, the signature of the Louisiana Director of Secondary Education is added to each form by means of a rubber signature stamp. This signature appears in exactly the identical place and at the identical slant on each of these forms. Thus, each Official GED Result form was a forgery and was prepared from the same forged form.

The Official Results of the General Education Development Test form purportedly issued by the State of Louisiana for students C.B., T.B., and S.H. were also forgeries. The individuals identified as the testing and scoring agents on the forms were not so employed by the State. Each result form indicates the test taken by the individual. On each of the student's result form, a bogus test was identified as the test taken by the individual. While an official form bears the signature of the Louisiana Director of Education which is added by means of a rubber signature stamp, these forms bore the typed-in name of the an individual who was not the director at the time of the purported issuance of the official results form. Lastly, each form had the identical test scores in each of the five test categories and an identical, purported average test score of the five test categories which was substantially in excess of the average of the test scores and higher than any of the individual test scores. Thus, these forms were clearly invalid on their face and were forgeries.

The same problems identified in the above paragraph are present with respect to the Official Results of the General Education Development Test form purportedly issued to student S.W. Thus, it is a forged document. In her case, the average test score of the five test scores was substantially in excess of the actual average of the test scores and higher than any of the individual test scores. Thus, this form was clearly invalid on its face.

The Louisiana State High School Equivalency Diploma purportedly issued to student L.H. was a forged document. The type-set used to insert the individual's name and location of her studies on the document was not the type of type-set employed by the State of Louisiana. In addition, the superintendent's signature block on these forms contains the signature of a superintendent in whose parish the individual performed the studies which led to the issuance of the diploma. In the case of L.H.'s document, the superintendent signature's block contains the signature of the wrong superintendent. This superintendent performed his duties in a different parish than where the individual purportedly performed her studies.

The Louisiana State High School Equivalency Diploma purportedly issued to student F.H. is a forged document. The four-inch line above which the appropriate name of the high school is inserted is partially deleted by white-out and the high school name of John McDonogh appears

on this line. F.H. graduated from a high school in Mississippi and never attended John McDonogh, a Louisiana high school.

34. Of 15 high school diplomas taken from the student files and examined, one diploma was a forged document and two diplomas were more likely than not forged documents.

With respect to student E.W., his file contained a completed school application form on which was stamped "diploma attached" and a copy of his diploma. The information set forth in E.W.'s application is inconsistent with the information set forth in his diploma. According to his application, E.W. was born on June 23, 1960, entered Walter L. Cohen High School in 1976, and either graduated or discontinued attendance at Walter L. Cohen High School in 1978 at the age of 18. His diploma indicates he graduated from a different high school--Alfred Lawless Senior High School--and that he was 24 years old at the time of graduation. Based upon his application and his age, the evidence supports a conclusion that this diploma was a forged document.

A diploma in the file of student L.W. indicated that he graduated from the Joseph S. Clark Senior High School in May 1968. One auditor testified that S.W.'s file indicated that L.W. completed only the tenth grade at Walter S. Cohen High School. Thus, the presence of a diploma does not comport with this representation. In addition, his application indicated that he was born in 1956. Assuming this representation was correct, L.W.'s diploma was issued when he was 12 years old. This evidence supports the conclusion that the diploma was more likely than not a forged document.

A diploma for student S.W. was present in his file. The diploma indicates that S.W. graduated from the Joseph S. Clark Senior High School in May 1985. One auditor testified that S.W.'s file indicated that S.W. received a general education development certificate. The presence of these two documents is inconsistent. A general education development certificate is issued to an individual who has the equivalency of a high school education but has not completed high school. In addition, S.W.'s file indicated that he was attending Gary Jobs Corps in San Marcos, Texas between 1984 and 1986--the same period, according to the diploma, when S.W. was purportedly attending high school in Louisiana. Thus, this evidence supports the conclusion that the diploma was more likely than not a forged document.

The year of graduation on the diploma for S.C. appears to be written over. It is not possible to determine whether the date was altered or simply rewritten for clarity.

35. The Ability to Benefit test is administered on the premises of the institution.

36. According to an auditor, Lindy Sciortino admitted to changing answers on the Ability to Benefit tests on the ground that some students found some questions were vague.

37. Of the 47 files reviewed regarding the student's ability to benefit test, the tests of three students were altered in part by means of a white-out type material which was used to cover over the existing response. An altered answer was then inserted. For student S.R., 12 answers on the test were altered; for student P.C., 13 answers were altered; and for student N.K., 11 answers were altered.

38. The biennial audit for the fiscal years 1987 and 1988 was submitted on behalf of Academy in December 1990. It was rejected by the Office of the Inspector General for failing to comply with the following standards:

a. Failure to review internal controls as required by AU Section 320 of the American Institute of Certified Public Accountants (AICPA) Statement of Auditing Standards and Chapter IV of the Government Auditing Standards, 1988 Revision.
b. Discrepancies in the review of compliance as required by AU Section 339 of the AICPA and Chapter IV of the Government Auditing Standards.
c. Failure to comply with field work standards by not providing a written audit program cross-referenced to the working papers as required by AU Section 339 of the AICPA and Chapter IV of the Government Auditing Standards.
d. Based on the non-compliance above, failing to exercise due professional care as required by AU Section 230 of the AICPA and Chapter III of the Government Auditing Standards.

39. In December 1991, Academy's certified public accountant, who had prepared the biennial audit, was notified of its rejection by the Office of the Inspector General. There is no evidence reflecting whether Academy was notified of its rejection by the Office of the Inspector General.

40. Academy failed to file a biennial audit for the fiscal award years 1989 and 1990.

41. On March 6, 1991, ED issued a notice of termination and fine. On or about March 26, 1991, Academy filed a timely request for a hearing regarding the notice of termination and fine.See footnote 6 6/

SERVICE

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On May 17, 1993, a copy of the attached decision was sent by certified mail, return receipt requested to the following:

Ronald Lipton
Acting Director, Compliance and Enforcement Division
Student Financial Assistance Programs
Room 4025, ROB-3
7th and D Streets, S.W.
Washington, D.C. 20202-5341

William F. Wessel
Wessel, Bartels & Ciaccio

127 Camp Street
New Orleans, Louisiana 70130

On May 17, 1993, a copy of the attached decision was also sent to--

Russell B. Wolff, Esq.
Office of the General Counsel
U.S. Department of Education
Room 4091, FOB-6
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110

Footnote: 1 *1/ More specifically, ED seeks to terminate the Academy from participating in the Pell Grant, Supplemental Educational Opportunity Grant, Perkins Loan, College Work-Study programs, and the Guaranteed Student Loan Programs which include the Stafford Loan, PLUS, and Supplemental Loans for Students programs.*

Footnote: 2 *2/ A fine proceeding may be a complementary sanction to the limitation, suspension, or termination of the eligibility of an institution to participate in Title IV, HEA programs. Accordingly, it is appropriate to include a fine action in the same proceeding which requests the limitation, suspension, or termination of an institution's eligibility to participate in student financial assistance programs. In re Electronic College and Computer Programming, Dkt. No. 91-7-ST, U.S. Dep't of Education (July 10, 1992).*

Footnote: 3 *3/ This subchapter refers to part F of subchapter IV of chapter 28 of Title 20.*

Footnote: 4 *4/ These were the only daily sign-in attendance sheets available for the auditors to inspect. It was the Academy's policy to transfer the attendance information from these sheets to the student's master attendance files at the end of each month. The daily attendance sheets were then discarded.*

Footnote: 5 *5/ The principles governing civil proceedings addressed subsequently are equally applicable to an administrative action. SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980), cert. denied, 449 U.S. 993 (1980); Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1955); Missouri Terminal Oil Co. v. Edwards, 659 F.2d 139 (Temp. Emer. Ct. App. 1981).*

Footnote: 6 *6/ ED offered proposed Exs. GG-1 through GG-8 which are photographs of the premises of the school. Academy objects to their admission on the ground that these photographs were not provided to counsel before the hearing. Inasmuch as these photographs merely assisted the tribunal in understanding the oral testimony, these photographs are admitted into evidence.*