IN THE MATTER OF THE BAYTOWN TECHNICAL SCHOOL, INC., Docket No. 91-40-SP

RESPONDENT.

Appearances: James M. Johnstone, Esq., Wiley, Rein & Fielding and Bernard H. Ehrlich, Esq., for Baytown Technical School, Inc., Texas

Stephen M. Kraut, Esq., United States Department of the Education, Washington, D.C.

Before: Judge Daniel R. Shell

DECISION

Background

The United States Department of Education (Education), Office of the Inspector General (OIG) issued an audit on June 29, 1990, covering the period of March 1985 through March 1989. Pursuant to 34 CFR 668.113 and based on the OIG audit, Education's Office of Student Financial Assistance (OSFA), on March 26, 1991, issued a final audit determination which cited the Baytown Technical School, Inc. (Baytown) with two violations of the regulations. The violations are set forth in two findings. In Finding 1, OSFA determined that Baytown disbursed $3,433,517 of Title IV, Higher Education Act (HEA) program funds to students enrolled at two ineligible campuses and in an ineligible nursing program. In Finding 2, OSFA found that Baytown assigned an excessive number of credit hours to its programs that resulted in an overaward of $605,000 in Pell Grant Program funds.

In May 1988, Education promulgated regulations which require institutions desirous of participation in HEA programs to satisfy the statutory definition of an eligible postsecondary institution and to receive Education's approval of such designation.See footnote 1 [1] Eligibility, as defined by the 1988 regulations, extended only to the locations specifically mentioned on the institution's application for eligibility.See footnote 2 [2] Should an institution desire to establish eligibility for a new location or campus, the institution was required to submit an additional application for each new location.See footnote 3 [3]

Procedural History

This is an appeal from a final audit determination issued on March 26, 1991. Baytown filed a timely request for review on May 15, 1991.See footnote 4 [4] On May 29, 1991, Baytown filed a Supplement to Request for Review. The purpose of the latter filing was to enter into evidence documents produced by Education's OIG as a result of Baytown's Freedom of Information Act request.

On June 27, 1991, this tribunal issued an Order to Correct Notice Deficiencies directing OSFA to explain the basis of the liability it seeks to impose. OSFA filed a timely Clarification of the

Amount of and Basis for Baytown's Liability on July 10, 1991. Both parties filed initial briefs on September 27, 1991, and reply briefs on October 11, 1991. A hearing was held on November 14, 1991.

In its reply brief, OSFA argues that Baytown "did not submit any of its exhibits into the record of this proceeding."See footnote 5 [5] Furthermore, OSFA contends that Baytown's exhibits "are not in the record of this case and may not serve as a basis for any decision in this proceeding."See footnote 6 [6] OSFA renewed this argument at the hearing in this case when Baytown moved to have its 85 exhibits entered into evidence.

During the hearing, the tribunal resolved this issue by admitting into evidence Baytown's 85 exhibits. Those exhibits were filed with Education on May 15 and May 29, and June 4, 1991.See footnote 7 [7] At the hearing, this tribunal held that:

[T]he documents were properly before this tribunal had come properly before the tribunal [and] will be accepted as evidence. In addition, I think that it is the responsibility of the administrative law judge in making determinations of fact and law in the case to receive all relevant evidence no matter at what time it is received. But in this particular case, it appears from the facts presented that it is before me at this time. Therefore, it will be accepted as evidence.See footnote 8 [8]

The basis of the tribunal's decision to admit Baytown's exhibits is twofold. First, the admission of exhibits into evidence is within the discretion of the administrative law judge whose duty it is to regulate the course of the proceedings and to ensure fairness and impartiality. Second, Baytown has independently complied with the regulations governing the admission of exhibits into evidence.

The regulations make plain that the "administrative law judge regulates the course of the proceedings and the conduct of the parties following a request for review and takes all steps necessary to conduct fair and impartial proceedings." (emphasis added).See footnote 9 [9] Consequently, it is within the sound discretion of this tribunal to decide when to accept exhibits into evidence after the request for review has been filed.

Furthermore, independent of the administrative law judge's duty to conduct fair and impartial proceedings, Baytown has complied with the requirements of 34 C.F.R. § 668.113(b) and 34 C.F.R. § 668.116(e)(2). Section 668.113(b) requires Baytown to file a timely request for review. Section 668.116(e)(2) requires exhibits or supporting evidence to be submitted with the "initial brief." In note 1 of its initial brief, Baytown correctly directs the tribunal's attention to the fact that the exhibits had already been filed and are cited in the initial brief.See footnote 10 [10] Both the tribunal and OSFA were aware of the existence of all 85 of Baytown's exhibits. Consequently, Baytown submitted its exhibits in a timely fashion.

OSFA makes much of the fact that in note 1 of Baytown's initial brief, Baytown does not use the words "incorporation by reference" in directing attention to the existence of the 85 exhibits.See footnote 11 [11] According to OSFA, the absence of the words "incorporation by reference" means that the exhibits have not been included into the initial brief and therefore

cannot be admitted into evidence without being attached or appended to the initial brief.See footnote 12 [12]

The words "incorporation by reference" do not have the power of a mantra in whose presence exhibits may appear or disappear before the eyes of the administrative law judge. Furthermore, the words "incorporation by reference" do not appear as a requirement in the regulation. OSFA's argument is without merit, a waste of valuable litigation time, and only obfuscates the tribunal's obligation to regulate the course of a meaningful administrative proceeding. Moreover, OSFA's interpretation denies the institution a full, fair, and impartial hearing.See footnote 13 [13]

Accordingly, Baytown has complied with 34 C.F.R. § 668.116(e)(2) because its exhibits were submitted before the initial brief was filed and was referenced in the initial brief.

Factual Summary

Finding One

The main campus, on South Airhart Drive in Baytown, Texas, had been designated by Education as an "eligible" institution on March 18, 1986.See footnote 14 [14] Baytown offered courses in welding and industrial radiography at its main campus. In November 1986, Baytown began operating a new campus on 35th South Street in Texas City, Texas.See footnote 15 [15] In January 1987, Baytown requested the Southern Association of College and Schools (SACS) to accredit the Texas City location as a branch campus of Baytown.See footnote 16 [16] In February 1987, Baytown opened a new site in Baytown, Texas at North Alexander Street. The North Alexander Street location did not offer courses in welding or industrial radiography; it offered only a nurse assistant program. On January 20, 1988, SACS approved Baytown's offering of a nurse assistant program at any location including the North Alexander Street location.See footnote 17 [17]

On June 15, 1987, Baytown closed its South Airhart Drive location, phased out its welding program, and transferred the remaining students and faculty to the North Alexander Street location. As a result, the North Alexander Street location became Baytown's new main campus.See footnote 18 [18] On November 5, 1987, SACS approved the change of location of Baytown's main campus from South Airhart Drive to North Alexander Street.

In August 1988, SACS acknowledged that it accredited the Texas City location as a branch campus of the Baytown Technical School.See footnote 19 [19] OSFA offered its exhibit G-13: a letter dated January 20, 1988, from an assistant executive director of SACS. In this letter, the executive director states that "[t]he Commission [SACS] approves the addition of the Nursing Assistant program to the curriculum of Baytown Technical Schools located at . . . North Alexandria, [sic] Baytown Texas . . . and . . . Texas City.See footnote 20 [20] On January 22, 1988, Baytown provided Education with all of the necessary information and documentation to support its application to designate the nurse assistant program at the North Alexander Street location as an eligible program.See footnote 21 [21] The nurse assistant program at North Alexander Street was designated an eligible program on January 22, 1988.See footnote 22 [22]

In September 1988, after the adoption of 34 C.F.R. § 600.10(a) and with Education's encouragement, Baytown reapplied to Education for eligibility of the current North Alexander Street - main campus and the Texas City - branch campus .See footnote 23 [23] As stated earlier, SACS declared the Texas City branch eligible in August 1988. Education designated the Texas City branch campus as an eligible location of Baytown, effective September 16, 1988 .See footnote 24 [24]

Baytown submitted Exhibits 13 and 14 as support for its position. Exhibit 13 is a letter dated June 7, 1989, from the executive director of SACS. The SACS executive director states that Baytown "did furnish . . . a 1986-87 Catalog Supplement showing the 111 35th Street address as the place of nursing program instruction" to SACS. There is no mention of the North Alexander location in the letter. Indeed, the letter is captioned "RE: Baytown Technical School - Nursing Assistant Program and Extended Facilities at 111 35th Street, Texas City, Texas 77590. "See footnote 25 [25]

Exhibit 14 is a letter dated June 21, 1989, also from the executive director of SACS. The letter states, in the present tense, that "[t]he Commission [SACS] met on Wednesday, June 21, 1989, to consider the status of your institutional accreditation for Baytown Technical Schools, 2215 North Alexandria Street [sic], Baytown, Texas . . . and its branch facility located at . . . Texas City . . . The Commission acted to approve the Nursing Assistant program for Baytown . . . at North Alexandria [sic] . . . and at . . . Texas City . . . effective January 8. 1987 . . . These actions are contingent upon payment of any branch fees due. "See footnote 26 [26] Baytown offers the "Record of Telephone Conversations" between a SACS official and the Department auditor from the Office of Inspector General which occurred on June 14 and June 15, 1989 .See footnote 27 [27]

Prior to transferring the main campus to North Alexander and-prior to receiving the Texas City authorization, Baytown began disbursing HEA program funds in November 1986 to students attending classes at its Texas City branch campus. From November 1986 to September 15, 1988, Baytown disbursed $1,078,177 of Pell Grant and SEOG program funds and $1,922,930 of Stafford Loan Program funds to students attending classes at the Texas City campus.See footnote 28 [28] From February 1987 through June 15, 1987, Baytown disbursed $118,983 of Pell Grant and SEOG Grant Program funds and $313,427 of Stafford Loan Program funds to students enrolled in
the nurse assistant program at the North Alexander Street campus location.See footnote 29 [29] Consequently, Education's total claim for improper disbursement alleged in Finding 1 is:

Campus	Period	Ineligible Pell\SEOG	Stafford\SLS
Texas City	Nov. 3, 1986 to Sept. 15, 1988	$1,078,177	$1,922,930
North Alexander	Feb. 2, 1987 to June 14, 1987	$118,983	$313,427
Total		$1,197,160	S2,236,357

The following dates highlight the activities which occurred relevant to finding one:

Date(s)	Activity	Campus
May 15, 1991	Baytown filed a timely Request For Review	All
March 26, 1991	OSFA issued its final audit determination	All
June 29, 1990	OIG issued its audit	All
May 21, 1988	effective date of 34 C.F.R. § 600.10	All
June 15, 1987	Baytown closed South Airhart	South Airhart
March 18, 1986	Education designated the campus as "eligible"	South Airhart -
June 21, 1989	SACS issued letter of eligibility to Baytown. The letter as retroactive to January 8, 1987.	Both Branches
September 1988	Baytown reapplied to Education for eligibility designation of North Alexander and Texas City.	Both Branches
January 20, 1988	SACS issues a letter stating that it had approved Baytown's new campuses and nursing program.	Both Branches
January 22, 1988	Baytown provided Education with all documentation for eligibility designation of its nursing program at North Alexander.	North Alexander
November 5, 1987	SACS approved the change of location of the main campus from S. Airhart to N. Alexander. -	North Alexander
February 1987	Baytown began operating a site at North Alexander Street	North North Alexander
June 7, 1989	SACS acknowledged it was aware of Baytown's Texas City nursing program during the 1986-87 academic year.	
September 16, 1988	Education designated Texas City Texas City "eligible"	
August 1988	SACS acknowledged Texas City accrediting Texas City	
January 1987	Baytown requested SACS to accredit Texas City Texas City as a branch of Baytown	

November 1986 - Baytown began operating a new campus in Texas City Texas City

Finding Two

Baytown originally operated its nurse assistant program, oilfield testing program, and two welding programs on a clock hour basis. Expressed in clock hours, Baytown's nurse assistant program originally provided 900 clock hours of instruction,See footnote 30 [30] its oilfield testing program provided 354 clock hours of instruction, one of its two welding programs provided 435 clock hours of instruction, and the other welding program provided 660 clock hours of instruction.See footnote 31 [31]

In January 1988, Baytown converted the measurement of the "educational quantity" of its programs from clock hours to semester hours. The oilfield testing program was converted from 354 clock hours to 20.4 semester hours. One of the two welding programs was converted from 435 clock hours to 16 semester hours, while the other was converted from 660 clock hours to 24 semester hours. The nursing assistant program was converted from 702 clock hours to 31.9 semester hours.See footnote 32 [32]

According to Baytown, the measurement used in making the conversion "equated 1 credit hour with 15 clock hours of classroom instruction, 30 clock hours of laboratory instruction and 45 hours of externship."See footnote 33 [33] In addition to converting from clock hours to semester hours, Baytown offers that "[a]t the time of the conversion, [Baytown] reduced the length of the externship at the end of its nursing assistant course, upgraded staff to include a registered nurse, rewrote and expanded course content to include home health training, and increased actual classroom time by eliminating breaks."See footnote 34 [34] In an Institutional Eligibility Notice, dated February 17, 1988, and effective March 16, 1988, Education approved Baytown's "conversion from clock hours to credit hours."See footnote 35 [35]

OSFA's Arguments

First, in Finding 1, OSFA argues that as of May 21, 1988, the effective date of 34 C.F.R. Part 600, an institution is not eligible to participate in Title IV, HEA programs, unless it complies with the provisions of the institutional eligibility regulations.See footnote 36 [36] Those regulations require an institution to apply to Education to be designated as an eligible institution. Specifically, section 600.20(a) provides, in pertinent part:

An institution that wishes to establish its eligibility to apply to participate in any program authorized by the HEA must first apply to the Secretary for a determination that it qualifies as an eligible institution.

(b) An institution applying for designation as an eligible institution must-(1) Apply on the form prescribed by the Secretary; and (2) Provide all the information and documentation requested by the Secretary to make a determination of its eligibility.

In cases where Education decides to designate an institution as eligible, eligibility does not automatically extend to any location the institution establishes after it receives the eligibility designation. Under Section 600.10(b)(3), if an eligible institution seeks to establish eligibility for a new location, it must submit an additional application to Education for that location. According to OSFA, the letter certifying an institution's eligibility designation clearly spells out that only the location included in the letter is designated eligible.See footnote 37 [37] Section 600.10(b) (of 34 C.F.R.) provides, in pertinent part:

(1) Extent of Eligibility. If the Secretary determines that the entire applicant institution, including all its locations and all its educational programs, satisfies the applicable requirements of this subpart, the Secretary extends eligibility to all educational programs and locations identified on the institution's application for eligibility.

. . . .

(3) Eligibility does not extend to any location that the institution establishes after it receives the eligibility designation. If an eligible institution seeks to establish eligibility for a new location, the institution shall apply under Section 600.20.

According to OSFA, when Education does designate an institution as eligible under the HEA, that designation is effective "as of the date ED[ucation] receives all the information it needs to make that eligibility determination."See footnote 38 [38]

In addition, OSFA contends that Section 600.10 does not represent a new policy. According to OSFA, as far back as the 1986-87 academic yeas, institutions were put on notice that they could not disburse HEA program funds at locations which had not been designated as eligible institutions by Education. OSFA cites the 1986-87 OSFA Federal Student Financial Aid Handbook:

The eligibility of an institution and its programs does not automatically include separate locations, branches, and extensions. If educational services are provided at other locations such as separate campuses, military bases, or other towns or cities, and these locations are not listed in the institution's Eligibility Letter, the institution must document the eligibility of these separate locations.See footnote 39 [39]

While OSFA concedes in its reply brief that it would be applying the provisions on 34 C.F.R. § 600.10(a) retroactively, it insists that the "critical event" was SACS June 21, 1989, grant of retroactive accreditation of the Texas City and North Alexander locations. They argue that the effective date of the regulation precedes the date of SACS June 21, 1989, approval; furthermore, the SACS approval can not be made retroactive.See footnote 40 [40]

Next, in Finding 2, OSFA merely contends that Baytown improperly converted its clock hour programs to semester hour programs. According to OSFA, "Baytown used this procedure because it is much easier to inflate the number of semester hours in a clock hour program if the institution does not use semester hours."See footnote 41 [41] OSFA admits that Education has no regulation that prevents an institution from measuring the "quantity of education" it provides in

its programs in semester hours, but they insist that institutions must meet two factors of Education's 'reasonableness test" when converting from clock hours to semester hours.See footnote 42 [42] According to OSFA, institutions were put on notice of this requirement as far back as 1979 when the test was published in an Education BSFA Bulletin.

Baytown's Arguments

"As an initial matter, Baytown contends that "there is simply no legal basis for either of the Findings" issued in OSFA's final audit determination.See footnote 43 [43] With regard to Finding 1, Baytown contends that Baytown was legally entitled to receive and disburse those funds under the statute and regulations in effect at the time the funds were drawn. Education should, therefore, not be permitted to recover funds.

Baytown argues further that Finding 1 rests on the mistaken notion that 34 C.F.R. § 600.10(a) governs institutional eligibility in HEA programs during the period covered by the audit - March 1985 through March 1989. Baytown characterizes the OSFA's attempt to recover the $3,433,517 program funds which the school disbursed to students enrolled at its Texas City and North Alexander campuses as an attempt "to apply 34 CFR 600.10(a) retroactively."See footnote 44 [44] According to Baytown, "[t]he two locations in question were . . . eligible to participate in SFA programs, because they were both licensed by the State of Texas and had met all requirements of the relevant accrediting agency, SACS."See footnote 45 [45]

According to Baytown, "[t]he only regulation cited by the Department to support [Finding 1] is 34 C.F.R. 600.10(a), which became effective on May 21, 1988. Prior to that time, there was no regulation stating that eligibility dated from the date the Department receives all necessary information. "See footnote 46 [46] Indeed, during the hearing in this case, OSFA acknowledged that no regulations governing the "eligibility application process" prior to May 21, 1988, existed. The following exchange took place between Judge Shell and OSFA counsel, Mr. Kraut:

JUDGE SHELL: Which regulation required the schools to apply each time they opened a branch campus prior to this?

MR. KRAUT: There were no regulations governing the eligibility application process prior to this regulation being in effect. However, there are long standing rules and procedures governing that process that was spelled out -- spelled out in the handbooks that the institution had submitted into the record and that the Department has set out in the record. It was, since your eligibility and your eligibility notice, eligibility was limited to only the locations included in that notice.

MR. KRAUT: There's nothing in the law that requires an institution to apply and be designated by the Department as an eligible institution under the Higher Education Act in order for that institution to be designated an eligible institution of the Higher Education Act for purposes of applying and participating in the Title IV program. Institutions would have to just know. (Emphasis added)

JUDGE SHELL: [T]hey would just . . . have to know that each time they added a campus or

added another building at another site, that they would have to reapply to the Department of Education. . .

MR. KRAUT: No. They would read their eligibility notice. And the eligibility notice would designate them as an eligible institution of higher education.

JUDGE SHELL: [T]he eligibility notice then, you're saying, is tantamount to having the force and effect of law[?]

MR. KRAUT: It provides the institution with actual notice of what the requirements are, of what their eligibility is and it tells them what their eligibility -- inflicted [sic] in that is what their eligibility ain't. And if they want to add something that's not included in their notice, they're on -- this notice puts them on notice that they have to do something.See footnote 47 [47]

Next, to bolster its argument against the retroactive application of the regulation in Finding 1, Baytown contends that Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988), stands for the proposition that administrative rules will not be construed to have retroactive effect.See footnote 48 [48] According to Baytown, OSFA has no "arguable statutory basis to claim the power to make 'retroactive' rules."See footnote 49 [49] As Baytown points out, section 600.10(a) was announced in an October 21, 1986, Notice of Proposed Rulemaking.See footnote 50 [50] The Notice did not specify that the regulation may be applied retroactively.See footnote 51 [51]

Baytown contends that Finding 2 is "an improper attempt to apply 'secret law' retroactively to invalidate and penalize Baytown for a clock to credit hour conversion made in good faith and approved by the Department in accordance with policies and procedures which were consistently in effect at all times relevant to this case."See footnote 52 [52] According to Baytown, "[t]he Department . . . does not, because it cannot, cite any regulation that Baytown violated by its challenged clock to credit hour conversions."See footnote 53 [53] According to Baytown, the fact that Education has never had a regulation governing clock to credit hour conversions "is sufficient to dispose of Finding No. 2."See footnote 54 [54]

Discussion

The discussion of the substantive issues is divided into two part parts: 1) the application of 34 C.F.R.§ 600.10(a) and 2) the conversions of clock hour programs to semester hour programs. As a precursor to the two substantive issues in this case, one must first address the subsidiary issue of when Baytown'n new campuses were accredited by Texas' accrediting agency.

In its opening brief, Baytown contends that the State's accrediting agency, SACS, "confirmed that [Baytown] was currently meeting and had met since January 8, 1987, all of SACS' accreditation requirements and standards for its nursing 13-16 programs, including those at 35th Street and North Alexander."See footnote 55 [55] In support of its contention, Baytown offered its' exhibits 13 and 14.See footnote 56 [56]

Exhibit 13 is a letter dated June 7, 1989, from the executive director of SACS. That letter states that Baytown "did furnish . . . a 1986-87 Catalog Supplement showing the 111 35th Street

address as the place of nursing program instruction" to SACS. Although there is no mention of the North Alexander location in the letter, the letter expresses SACS' approval of Baytown's nursing program at Texas City. The letter is captioned "RE: Baytown Technical School - Nursing Assistant Program and Extended Facilities at 111 35th Street, Texas City, Texas 77590.-See footnote 57 [57] Consequently, while the letter representing exhibit 13 is silent as to whether SACS had actually approved Baytown's North Alexander Street nursing program, the letter shows that the nursing program at Texas City was legally authorized by the State as of the 1986-87 academic year.See footnote 58 [58]

Exhibit 14 is a letter dated June 21, 1989, from the executive director of SACS. The letter states:

The Commission acted to approve the Nursing Assistant program for Baytown Technical School at 2215 North Alexandria [sic] Street, Baytown, Texas 77520, and at the extended facility located at 111 35th Street, South, Texas City, Texas 77590 (an extension of the branch at 3424 First Avenue, South, Texas City, Texas 77590) effective January 8 1987.See footnote 59 [59]

Although the letter retroactively approves Baytown's new campuses and additional curricula, it is well within the prerogatives and powers of the State of Texas to impose a retroactive accreditation of postsecondary schools within its borders.See footnote 60 [60] This federal tribunal cannot second-guess the wisdom of a State's interpretation or application of its own laws. The Secretary acknowledged the State's primary role in interpreting its own laws in Gulf Coast Trades Center, Dkt. No. 89-16-S, U.S. Dep't of Education (March 7, 1991); notably, a case involving a proprietary school accredited and licensed under the laws of Texas. In that case, the administrative law judge determined that Texas' retroactive authorization of a school to provide postsecondary education programs was dispositive of the issue of whether the State had legally authorized the schools education programs.See footnote 61 [61] Gulf Coast Trades Center is not inapposite to the
case at bar. In both cases, the State of Texas chose to retroactively authorize the postsecondary education offered by the schools involved.See footnote 62 [62]

OSFA relies upon Baytown's exhibit 14 to support the notion that the June 21, 1989, letter from SACS was a "critical event" which triggered the application of 34 C.F.R. § 600.10(a). In OSFA's view, "the use of a regulation that became effective on May 21, 1988 to evaluate an event that occurred on June 21, 1989 is clearly not a retroactive application of that regulation. "See footnote 63 [63] In other words, OSFA invites this tribunal and the Secretary to ignore the state's decision to give Baytown retroactive accreditation.See footnote 64 [64] This tribunal declines OSFA's invitation.

Under federal law, a postsecondary vocational institution must be legally authorized by the state in which it is located to provide a program of education beyond secondary education.See footnote 65 [65] Under Texas law, absent a school's compliance with an applicable exception, schools that are authorized to operate postsecondary education programs within the State must be licensed and accredited.See footnote 66 [66] In cases like the one at bar, the state's determination that a postsecondary school is in compliance with state law ends the matter on that issue for federal tribunals.

Although discerning the proper division of sovereign power between the federal government and the states is difficult, the regulation of schools has traditionally been a creature of state government.See footnote 67 [67] Consequently, not only should federal tribunals be halting and cautious in second-guessing state interpretations of state law generally, but, in cases where the state has already spoken on the issue at hand, federal tribunals are bound by the interpretation made by the state.See footnote 68 [68] In the case at bar, the tribunal finds, as it must, that Baytown's new locations and additional curricula were accredited by Texas on January 8, 1987 and remained accredited throughout the time applicable to this case.

Finding 1 - 34 C.F.R. § 600.10(a)

In support of Finding 1, OSFA points out that under the provisions of sections 600.10 and 600.20, Education designated the Texas City branch of Baytown as an eligible institution as of September 16, 1988.See footnote 69 [69] Education did not designate Texas City an eligible institution until September 16, 1988. Notwithstanding that fact, Baytown disbursed $1,078,177 of Pell Grant/SEOG funds and $1,922,930 of Stafford Loan/SLS funds to students who were enrolled at the Texas City branch.

According to OSFA, "when [Title IV] funds were disbursed, Baytown's 35th South Street in Texas City, Texas location was not an eligible location of Baytown under the HEA."See footnote 70 [70] As of May 21, 1988, the effective date of 34 CFR Part 600, OSFA maintains that an institution is not eligible to participate in Title IV, HEA programs, unless it complies with the Provisions of the Institutional Eligibility Regulations.See footnote 71 [71]

Texas City and North Alexander campuses as an attempt "to apply 34 CFR 600.10(a) retroactively."See footnote 72 [72] According to Baytown, "[t]he two locations in question were . . . eligible to participate in SFA programs-, because they were both licensed by the State of Texas and had met all requirements of the relevant accrediting agency, SACS."See footnote 73 [73] As Baytown points out, the only regulation cited by OSFA to support [Finding 1] is 34 C.F.R. § 600.10(a), which became effective on May 21, 1988. Consequently, Baytown argues that Finding 1 of the final audit determination rests on the mistaken notion that section 600.10(a) is the applicable regulation for determining institutional eligibility for participation HEA programs during the period covered by the audit.

As noted supra, Baytown's main campus was designated an "eligible" institution under pre-1988 Education policy on March 18, 1986. In Finding 1, OSFA is seeking to undo Baytown's past eligibility by requiring Baytown to reimburse Education for funds previously lawfully disbursed. Notably,in its reply brief, OSFA "concedes that ED would be retroactively applying the provisions of 34 C.F.R. § 600.10(a) . . . to determine the effective date of an institution's eligibility . . . where all the critical events relevant to that determination took place before May 21, 1988."See footnote 74 [74] Under the standard set by the U.S. Supreme Court, 34 C.F.R. § 600.10(a) cannot be construed to have retroactive effect unless the express language of Title IV of the HEA of 1965, as amended, 20 U.S.C. § 1070 et seq. permits such effect. OSFA provides no basis for departing from this fundamental principle.

Despite OSFA's protestations to the contrary, this case is not inapposite with Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). In that case, the Supreme Court rejected the notion that a retroactive application of the law could be permitted in situations where Congress had not expressly provided the Federal agency with the power to promulgate retroactive regulations. In doing so, the Court did not question the well settled principle that retroactive laws are generally abhorred. The Court rejected an attempt by the Department of Health and Human Services to apply revised cost reimbursement regulations retroactively so as to recoup Medicare funds previously paid to participating hospitals under pre-existing regulations. Further, the Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."See footnote 75 [75] As the Court explained, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."See footnote 76 [76] It is clear that OSFA is attempting to recover funds that were disbursed by Baytown prior to the effective date of the regulation, May 21, 1988.See footnote 77 [77] **Therefore**, it is found that **34 C.F.R. § 600.10(a) cannot be given retroactive effect.**

The period of the **audit** in question **covers both** time **prior to** and **subsequent to** the **effective date** of the regulation. The final audit determination issued on March 26, 1991, specifically requires that Baytown "reimburse[]" Education $3,433,517 for HEA program funds that were disbursed by Baytown from November 3, 1986, to September 15, 1988, at the Texas City location and from February 2, 1987, to June 14, 1987, at Baytown's North Alexander Street location.See footnote 78 [78] Since the regulation cannot be given retroactive effect, OSFA cannot recover for any period of the audit prior to the effective date of the regulation. In general, the periods covered by the final audit determination are prior to the effective date of section 600.10(a) with **one exception;** there is an overlap of **four months** with regard to funds that Baytown disbursed at Texas City. Those months are May 21, 1988, to September 15, 1988.

Concerning recovery of funds for the **four months** that the regulation ostensibly covered, OSFA does not, however, provide any evidence as to what amount of funds were disbursed by the Baytown schools during that period. Indeed, OSFA concedes that it is "unable to determine the exact disbursement dates" that the final audit determination is based on.See footnote 79 [79] This tribunal concurs with the OSFA assessment of the final audit determination. Neither can the tribunal determine the exact disbursement dates. This tribunal finds that the final audit determination fails to meet the United States Comptroller General's Government Auditing Standards for acceptable government audit report contents.See footnote 80 [80]

OSFA's failure to provide any evidence of post-May 21, 1988, disbursal by Baytown is fatal. There is no evidence for this tribunal to weigh or consider. Consequently, this tribunal is left with a bald assertion that funds were improperly disbursed. Stated plainly, OSFA has not provided this tribunal with sufficient evidence to support a finding in its favor with regard to the alleged improper disbursal of HEA program funds by Baytown's Texas City location during the period from May 21, 1988, to September 15, 1988.

In conclusion, the facts concerning Finding 1, comport with those cases where courts have invalidated new regulations that change the legal significance of prior conduct.See footnote 81 [81]

The new duty imposed upon Baytown is that it must obtain designation of eligibility from Education for each of its branch campuses or new locations. A regulation is retroactive if it impairs a vested right, creates a new obligation, or imposes a new duty.See footnote 82 [82] Here, the underlying final audit determination is based upon conduct that occurred prior to May 21, 1988, OSFA concedes, as it must, that Education would be retroactively applying the provisions of 34 C.F.R. § 600.10(a) to determine the effective date of an institution's eligibility.See footnote 83 [83] Yet, OSFA seeks to do what it concedes it cannot.See footnote 84 [84] Additionally, as noted, supra, OSFA has not provided the tribunal with any evidence of HEA fund disbursal that occurred after the effective date of 34 C.F.R. § 600.10(a), May 21, 1988. Therefore, the tribunal is constrained to deny Finding 1.

Finding 2 - the conversion of clock hour programs to semester programs

In Finding 2, OSFA insists that Baytown improperly converted its clock hour programs to semester programs. According to OSFA, "Baytown used this procedure because it is much easier to inflate the number of semester hours in a clock hour program if the institution does not use semester hours."See footnote 85 [85]

Baytown responds that Finding 2 is "an improper attempt to apply 'secret law' retroactively to invalidate and penalize Baytown for a clock to credit hour conversion made in good faith and approved by the Department in accordance with policies and procedures which were consistently in effect at all times relevant to this case."See footnote 86 [86](emphasis added) According to Baytown, "[t]he Department . . . does not, because it cannot, cite any regulation that Baytown violated by its challenged clock to credit hour conversions."See footnote 87 [87] According to Baytown, the fact that Education has never had a regulation governing clock to credit hour conversions "is sufficient to dispose of Finding No. 2."See footnote 88 [88]

In its reply brief, OSFA notes that the Education "has not published a final regulation that specifically tells institutions how to convert clock hour programs to credit hour programs."See footnote 89 [89] OSFA also concedes that "institutions are free to convert their clock hour programs to semester hour programs for HEA purposes, and ED must accept an institution's conversion if the conversion was not unreasonable."See footnote 90 [90] Nonetheless, OSFA contends that it may-enforce the Department's clock hour conversion policy despite the absence of any applicable regulation. Acccording to OSFA, institutions were put on notice of this requirement in a 1979 BSFA Bulletin in which Education stated that:

The regulations define an "academic year" as the period of time in which a full time student is expected to complete the equivalent of 2 semesters, 2 trimesters, 3 quarters, or 900 clock hours, depending upon the unit of measurement the institution uses. These minimums are intended to establish relatively equivalent periods of time for institutions using different units to measure program length. Thus, if an institution currently measuring a program in clock hours were to convert that program to semester, trimester, or quarter hours, the program itself should still constitute the same portion of an academic year as it did under the previous method of measuring it. For example, a 900 clock hour program could be three quarters, i.e. another means of measuring the minimum period of time for a full academic year. However, a program of less that

[sic] 900 clock hours could not be converted to a full academic year merely by changing the means of measurement to semesters, trimesters, or quarters.See footnote 91 [91]

Stated simply, the Department's policy on clock hour conversion requires that the institution's conversion be reasonable. There are two factors, according to OSFA, that Education uses in determining whether a conversion is reasonable. The first factor is whether the institution's conversion "kept the academic year equivalencies of clock hour programs and semester hour programs."See footnote 92 [92] The second factor is the "measured . . . result of that conversion against widely accepted definitions-of terms relevant to that determination."See footnote 93 [93] One of the terms relevant to that determination is the term "semester hour."See footnote 94 [94] According to OSFA, [O]ne semester hour involves one hour of classroom instruction a week for the length of a semester which is generally at least 15 weeks. Therefore, one semester hour requires at least 15 hours of classroom instruction. In addition, one semester hour generally
"includes two hours of outside preparation for each hour of classroom instruction, i.e. 30 hours. Thus, one semester hour generally requires 45 hours of work involving both classroom instruction and outside preparation.See footnote 95 [95]

In addition, OSFA recites in its reply brief the definition of "unit of credit" as:

A quantification of student learning. One semester unit represents the time a typical student is expected to devote to learning in one week of full time study (40-45 hours per week including class time and preparation). An alternate norm is one unit for three hours of student work per week (e.g. one hour of lecture and two of study, or three of laboratory) for a full quarter or semester.See footnote 96 [96]

OSFA's argument is that Baytown's conversions did not maintain the required academic year equivalencies between clock hours and semester hours and that the "conversion[s] did not include enough work for the claimed semester hours."See footnote 97 [97] Although Baytown's clock to credit hour conversions do not appear to meet OSFA's required academic year equivalencies, OSFA does not cite a single regulation, and this tribunal has not found one, requiring institutions to convert the measurement of the "educational quantity" of its programs from clock hours to semester hours pursuant to the "reasonableness" test relied upon by OSFA.

Notably, Finding 2 does not rest upon the issue of whether the state of Texas required Baytown to use clock hours instead of credit hours to measure its programs. Baytown's conversion was approved by the State prior to its implementation.See footnote 98 [98] This case is inapposite from French Fashion Academy, Dkt. No. 89-12-S, U.S. Dep't of Education (Secretary Decision March 30, 1990), precisely because in the case at bar, Texas approved Baytown's conversion. In French Fashion Academy, however, New York had not approved the institution's conversion from clock to credit hours.See footnote 99 [99] Indeed, New York ostensibly prohibited conversions from clock to credit hours. The Secretary noted that in "a State that [only] legally authorizes programs of postsecondary education in clock hours, [institutions within that State] must measure those programs in clock hours."See footnote 100 [100] Since Texas permitted Baytown's conversion, the rule of French Fashion Academy does not apply.See footnote 101 [101]

In sum, this tribunal is obliged to finding violations of law, not violations of statements of policy. While a statement of policy may assist the tribunal in interpreting the law, policies and procedures, it, without more, cannot carry the weight of law. The existence of a statutory violation may be appraised against the backdrop of published policy statements or published bulletins but these indicia of policy cannot stand alone as the basis of a regulatory violation. Therefore, the tribunal denies OSFA's assertion in Finding 2 that Baytown assigned an excessive number of credit hours to its programs that alone as the basis of a regulatory violation. Therefore, the tribunal denies OSFA's assertion in Finding 2 that Baytown assigned an excessive number of credit hours to its programs that resulted in an overaward of $605,000 in Pell Grant Program funds.See footnote 102 [102]

Summary of the Case

The case may be summarized in four points. First, the State of Texas has the power to interpret it own laws and this tribunal cannot second-guess the wisdom of the state's interpretation of its own laws. The State of Texas chose to retroactively authorize the postsecondary education eligibility of Baytown. Second, OSFA may not retroactively give effect to 34 C.F.R. § 600.10(a). Third, neither the final audit determination nor any other OSFA evidence is capable of providing a basis for the determination of HEA funds disbursed during the period of May 21, 1988 to September 15, 1988. Fourth, OSFA has not shown a statutory nor regulatory basis for asserting the demand made in finding 2 for an overaward of funds. It is the conclusion of this tribunal that OSFA's final audit determination demand that Baytown Technical School, Inc., reimburse Education and "the appropriate lenders" the sum of $3,433,517 based on Finding 1 and $605,000 based on Finding 2 be denied.

It is therefore the order of this tribunal that the matter be dismissed in favor of the Baytown Technical School, Inc., with prejudice.

Issued: January 13, 1993
Washington, D. C.

Daniel R. Shell
Administrative Law Judge

Footnote: 1 [1] *1 See 20 USC 1088(b), 1085(c), 1088(a), and 1094(a). If the Department determines that an institution is an eligible institution under the relevant definition, an eligibility notice is issued.*

Footnote: 2 [2] *2 See 34 C.F.R. §§ 600.20, 600.21, and 600.10(b)(1) and (2). Education published its Eligibility Regulations in the Federal Register on April 5, 1988 and the regulations became effective May 21, 1988.*

Footnote: 3 [3] *3 34 C.F.R. §§ 600.10(b)(3) and 600.10(a).*

Footnote: 4 [4] 4 Although the final audit determination was dated March 26, 1991, Baytown received it on April 1, 1991. Under Section 668.113(b), the timeliness of a request for review is calculated from the date an institution "receives the final audit determination." Accordingly, Baytown's request was timely. See 34 C.F.R. § 668.113(b).

Footnote: 5 [5] 5 OSFA Reply Br. at 16.

Footnote: 6 [6] 6 Id. at 17.

Footnote: 7 [7] 7 On May 15, 1991, Baytown filed exhibits with its timely Request for Review. On May 29, 1991, Baytown filed a Supplement to Request for Review. Based on documents received from Education through the Freedom of Information Act, additional exhibits were also filed. On June 4, 1991, Baytown filed its final exhibit, Exhibit 85, a declaration by one of Baytown's attorneys.

Footnote: 8 [8] Tr. at 7.

Footnote: 9 [9] 34 C.F.R. § 668.117(a).

Footnote: 10 [10] See Baytown's Initial Br. at 1 n.1.

Footnote: 11 [11] Tr. at 6.

Footnote: 12 [12] See Tr. at 4-6.

Footnote: 13 [13] There is nothing novel in the notion that a tribunal is empowered to determine what procedures may properly accommodate the interests of fairness and efficient fact-finding. See e.g., Ohio v. Kentucky, 410 U.S. 641, 644 (1973).

Footnote: 14 [14] See Ed. Ex. G-5; OSFA Initial Br. at 11.

Footnote: 15 [15] Texas' State licensing authority, the Texas Education Agency (TEA), did not consider the facility in Texas City an additional "campus." Instead, the agency considered and authorized the Texas City location as an "additional classroom facilit[y]." See Baytown Ex. 6.

Footnote: 16 [16] Ed. Ex. G-7. SACS is an accrediting agency of the State of Texas. See Baytown Initial Br. at 2; OSFA Initial Br. at 12. The Texas City branch, like the South Airport Drive main campus, was licensed by Texas' licensing authority, TEA. Baytown Initial Br. at 2; Baytown Exs. 3, 4 and 10.

Footnote: 17 [17] See OSFA Initial Br. 15; Ed. Ex. G-13.

Footnote: 18 [18] OSFA Initial Br. 14. As Baytown notes in its opening brief, Baytown "first submitted complete evidence of eligibility to Education on January 22, 1988, for [the] North Alexander" location. Baytown Initial Br. 3. See also note 6.

Footnote: 19 [19] Ed. Ex. G-8, at 4.

Footnote: 20 [20] Id.

Footnote: 21 [21] OSFA Initial Br. at 15

Footnote: 22 [22] Id.

Footnote: 23 [23] Ed. Ex. G-8, at 1. According to OSFA, Education did not receive Baytown's application for designation of eligibility until September 16, 1988.

Footnote: 24 [24] See Ed. Ex. G-9, at 3. See also notice dated October 18, 1988.

Footnote: 25 [25] Baytown Ex. 13.

Footnote: 26 [26] Baytown Ex. 14.

Footnote: 27 [27] See Baytown Ex. 68.

Footnote: 28 [28] OSFA Initial Br. at 15-16.

Footnote: 29 [29] OSFA Initial Br. at 15-16.

Footnote: 30 [30] 30 In January 1988, Baytown reduced the number of clock hours in its nurse assistant program from 900 to 720 clock hours of instruction.

Footnote: 31 [31] 31OSFA Initial Br. at 16-17.

Footnote: 32 [32] 32Id. at 17-18.

Footnote: 33 [33] 33Baytown Initial Br. at 5; Baytown Exs. 35 and 36.

Footnote: 34 [34] 34Baytown Initial Br. at 5.

Footnote: 35 [35] 35 Baytown Initial Br. at 6; Baytown Ex. 38, at 1. Baytown's state licensing agency, TEA, issued a certificate of approval granting approval to Baytown to measure its programs "on a credit hour basis" effective July 1, 1989. See Baytown Ex. 44, at 2.

Footnote: 36 [36] 36 OSFA Initial Br. at 19.

Footnote: 37 [37] 37See, e.g., Ed. Ex. G-5.

Footnote: 38 [38] 38 OSFA Initial Brief at 20.

Footnote: 39 [39] 39 Ed. Ex. G-3, at 2-19; but see note 55. The Department's former policy was, as OSFA concedes in its opening brief, when an institution changed locations and the

change was approved by the appropriate state agency, the programs eligible at the old location were deemed eligible at the new location. To wit, Section 600.10 codifies a new Department policy.

Footnote: 40 [40] *40 Education's reply brief at 9-10.*

Footnote: 41 [41] *41 OSFA Reply Br. at 13.*

Footnote: 42 [42] *42 See OSFA Initial Br. at 34.*

Footnote: 43 [43] *43 See Baytown Initial Br. at 8.*

Footnote: 44 [44] *44 Id. at 9.*

Footnote: 45 [45] *45 Id. at 10. In its opening brief, Baytown also points out that Education "routinely deemed schools eligible to participate in SFA programs as of the date of accreditation" even if the school had operated for years without notifying Education. Initial Br. at 10; Baytown Ex. 1.*

Footnote: 46 [46] *46Baytown Reply Br. at 6.*

Footnote: 47 [47] *47 Tr. 100, 103, 104. Although counsel for OSFA contends that the eligibility notice has the force and effect of law because the notice informs an institution of "what the requirements are," counsel does not point to, and this tribunal does not know of any, legal theory upon which this contention could be based. Although federal agencies have broad discretion in implementing the statutory scheme for which they are responsible, administrative law is formulated by adjudication, rulemaking, or by declaratory order. Other methods are generally viewed as an abuse of agency discretion. See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); SEC v. Chenery, 332 U.S. 194 (1947).*

Footnote: 48 [48] *48 Baytown Initial Br. at 9-10.*

Footnote: 49 [49] *49 Baytown Initial Br. at 11.*

Footnote: 50 [50] *50 51 Fed. Reg. 37,366-37,378.*

Footnote: 51 [51] *51 Notably, the regulation itself does not provide for the retroactive application of its provisions. See 53 Fed. Reg. 11,208-11,222.*

Footnote: 52 [52] *52 Baytown Initial Br. at 16.*

Footnote: 53 [53] *53 Baytown Reply Br. at 2.*

Footnote: 54 [54] *54 Baytown Initial Br. at 13.*

Footnote: 55 [55] *55 Baytown Initial Br. at 4.*

Footnote: 56 [56] 56 OSFA offers its exhibit G-13: a letter dated January 20, 1988, from an assistant executive director of SACS which states that "[t]he Commission [SACS] approves the addition of the Nursing Assistant program to the curriculum of Baytown Technical Schools located at . . . North Alexandria, [sic] Baytown Texas . and . . . Texas City."Id. OSFA's exhibit does not contradict the evidence offered by Baytown. The letter simply states that SACS had approved Baytown's new campuses and its new programs. It is significant that even by OSFA's own admission, the nursing programs were approved by SACS prior to the effective date of 34 C.F.R. § 600.10(a). Indeed, OSFA concedes, as it must, that the Department's policy in 1987 and -1988 specified that when an institution changed locations and the change was approved by the appropriate state agency, the programs that were eligible at the old location were also considered eligible at the new location. See OSFA's Clarification of the Amount of and Basis for Baytown's Liability as Indicated in OSFA's March 26 1991 Final Audit Determination at 7n.6.

Footnote: 57 [57] 57 Baytown Ex.13.

Footnote: 58 [58] 58 In January 1987, Baytown requested SACS to accredit the Texas City location as a branch of Baytown. Ed. Ex. G-7. As noted supra, the Texas City branch and the nursing programs were effectively approved by SACS on January 8, 1987.

Footnote: 59 [59] 59 Baytown Ex. 14.

Footnote: 60 [60] 60 According to Baytown, the "Record of Telephone Conversations" between a SACS official and an the Department auditor from the Office of Inspector General which occurred on June 14 and June 15, 1989, shows that "SACS . . . dropped the ball" by failing to acknowledge or respond to Baytown's application for the accreditation of its branch campuses. The "record of telephone conversations" states that "SACS is taking the position that the nursing assistant campus at 111 35th Street South was accredited from its beginning as an extension of the welding school at 3524 First Street."

Footnote: 61 [61] 61 Gulf Coast Trades Center, Dkt. No. 89-16-S (ALJ Decision) at 30. Significantly, the Secretary affirmed the administrative law judge's determination that the school was authorized to provide postsecondary education under State law and recognized that the Department should "decline to instruct the State on how it should interpret its own, clearly written, laws." (Decision of the Secretary) at 3.

Footnote: 62 [62] 62 See also, In re French Fashion Academy, Dkt. No. 89-12-S (March 30, 1990) (Decision of the Secretary), in which the Secretary affirmed the administrative law judge's determination that New York's retroactive approval of French Fashion Academy's eligibility to offer postsecondary education programs was dispositive of the issue whether an effective approval had occurred. The State's decision ended the matter. A State's retroactive approval of a school's eligibility is effective during the dates indicated by the State.

Footnote: 63 [63] 63 OSFA Reply Br. 12.

Footnote: 64 [64] 64 Elsewhere in its reply brief, OSFA characterizes the "critical periods" of the final audit determination as "November 1986 through September 16, 1988 with regard to the Texas City location and February 1987 through January 20, 1988 with regard to the Baytown location." OSFA Reply Br. at 12n.4.

Footnote: 65 [65] 65 20 U.S.C. §§ 1141(a)(2) and 1088(a)(1)(B), (b)(2).

Footnote: 66 [66] 66 See TEX. ADMIN. CODE tit. 19, §§ 5.211 and 69.124 (1992); Baytown Ex. 3. The exceptions under state law are not applicable to this case. The exceptions apply to schools located within Texas which offered short-term courses, review courses, itinerant schools, and schools which opened classroom facilities within a ten mile radius of the main campus. See TEX. ADMIN. CODE tit. 19, § 69.124(c).

Footnote: 67 [67] 67Maryland v. Wirtz, 392 U.S. 183 (1968). In determining whether particular sovereign powers have been granted by the Federal Constitution to the Federal Government or have been retained by the States, courts consider whether a power is delegated to Congress under Article I or whether a power is an attribute of state sovereignty reserved by the Tenth Amendment. See e.g., Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985); Perez v. United States, 402 U.S. 146 (1971); McCulloch v. Maryland, 4 Wheat. 316 (1819); Martin v. Hunter's Lessee, 1 Wheat. 304 (1816). Stated plainly, in some circumstances the power of the Federal Government is subject to limits that are set by the reserve powers of the states.

Significantly, even though Congress has the ability to fix the "terms on which it shall disburse federal money to the States," the spending power of Congress is not unfettered. Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17 (1981). The concept of Federalism has long played a role in Constitutional jurisprudence. While Congress has broad powers under the Commerce Clause, the Spending Clause and the Supremacy Clause (to name just the ubiquitous Constitutional sources of Congress' power), the fact that the Tenth Amendment sets some limits on Congress' power to compel states to govern according to Congress' instructions has rarely been questioned. See e.g., Tafflin v. Levitt, 493 U.S. 455-(1990); Coyle v. Oklahoma, 221 U.S. 559 (1911).

Plainly, if this tribunal were to consider the wisdom of Texas' interpretation of its own laws permitting it to retroactively certify the eligibility of schools within its borders, the administrative law judge only could do so in the Texas' interpretation of its own laws permitting it to retroactively certify the eligibility of schools within its borders, the administrative law judge only could do so in the presence of statutory authority permitting The Secretary of Education to directly regulate the State's regulation of its postsecondary schools. No such authority exists. Consequently, the tribunal must defer to the determination of the State of Texas as to when the State has legally authorized Baytown to operate postsecondary education programs at its branch campuses. As stated supra, that date was January 8, 1987.

Footnote: 68 [68] 68 See e.g.. Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986); New York v. Ferber, 458 U.S. 747 (1982).

Footnote: 69 [69] 69 See Ed. Ex. G-9, at 3.

Footnote: 70 [70] 70 OSFA Initial Br. at 22. According to OSFA, Baytown also disbursed $32,410 in Title IV funds to students enrolled in an ineligible nursing program at the institution's North Alexander Street location.

Footnote: 71 [71] 71 Id. at 19.

Footnote: 72 [72] 72Baytown Initial Br. at 9.

Footnote: 73 [73] 73Id. at 10. In its opening brief, Baytown also points out that the Department "routinely deemed schools eligible to participate in SFA programs as of the date of accreditation" even if the school had operated for years without notifying Education. Initial Br. at 10; Baytown Ex. 1.

Footnote: 74 [74] 740SFA Reply Br. at 9.

Footnote: 75 [75] Georgetown Univ. Hosp., 488 U.S. at 208.

Footnote: 76 [76] Id.

Footnote: 77 [77] 77Indeed, OSFA's reading of "retroactivity" would drain all of the meaning out of the term. The logical conclusion of OSFA's argument is that any institution which failed to comply with Section 600.10(a) prior to that section's adoption could be required to "reimburse" Education for all Title IV, HEA Program funds disbursed by that institution over a course of an untold number of years. To wit, in this case, the auditor went back as far as 1985 ostensibly in an attempt to enforce a 1988 regulation.

Footnote: 78 [78] 78Ed. Ex. G-5, at 5.

Footnote: 79 [79] 79Ed. Ex. G-2, at 5.

Footnote: 80 [80] 80 See Government Auditing Standards (1988) at 7-4:

The report should present the findings and finding elements developed in response to the audit objective. Sufficient, competent and relevant information about the findings should be included to promote adequate understanding of the matters reported and to provide convincing, but fair presentations in proper perspective. Appropriate background information that readers need to understand the findings should also be included.

Footnote: 81 [81] 81 See e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988); National Wildlife Fed'n v. Marsh, 747 F.2d 616 (llth Cir. 1984); cf. Association of Accredited Cosmetology Schools v. Alexander, No. 91-5332, 1992 WL 339386 (D.C. Cir. Nov. 24, 1992).

Footnote: 82 [82] 82Neild v. District of Columbia, 110 F.2d 246, 254 (D.C. Cir. 1940).

Footnote: 83 [83] 83OSFA Reply Br. at 9.

Footnote: 84 [84] 84Notably, OSFA does not contend that the HEA contains express authorization of retroactive rulemaking. For such authority to exist, the HEA's provisions establishing "the Secretary's general rulemaking power" must contain express authorization of retroactive rulemaking. See Georgetown Univ. Hosp., 488 U.S. at 213. As OSFA recognizes, the statute lacks any express grant of general power to promulgate retroactive regulations.

Footnote: 85 [85] 85OSFA Reply Br. at 13.

Footnote: 86 [86] 86Baytown Initial Br. at 16.

Footnote: 87 [87] 87Baytown Reply Br. at 2.

Footnote: 88 [88] 88Baytown Initial Br. 13. Baytown does recognize that the Department's Office of Inspector General made recommendations that would cover the case at bar but argues that "[s]ince the new recommendations have not been published as a regulation, they cannot be applied against Baytown." Baytown Initial Br. at 13. In support of its contention, Baytown cites two federal cases in which the court voided the enforcement of an agency policy for want of publication. See Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977) and Herman v. Heckler, 576 F. Supp. 218 (N.D. Cal. 1983). According to Baytown, failure to publish an agency statement of general policy or a substantive rule of general applicability voids the agency's attempt to use the non-published policy to adversely affect the rights of participants in government programs. This tribunal agrees. See Administrative Procedure Act, § 3(a)(1)(D), 5 U.S.C. § 552(a)(1)(D).

Footnote: 89 [89] 89OSFA Reply Br. at 14.

Footnote: 90 [90] 90Id.

Footnote: 91 [91] 91 OSFA Initial Br. at 35; Ed. Ex. G-22, at 3.

Footnote: 92 [92] 92OSFA Reply Br. at 14.

Footnote: 93 [93] 93Id. at 15.

Footnote: 94 [94] 94See OSFA Initial Br. at 33.

Footnote: 95 [95] 95Id. at 33.

Footnote: 96 [96] 96Id.

Footnote: 97 [97] 97 OSFA Initial Br. at 38.

Footnote: 98 [98] 98Baytown Ex. 37; SACS approved Baytown's proposed clock to credit hour conversion on November 25, 1987. See also 34 C.F.R. §§ 600.3(c)(2) and 600.7(a)(3)(ii)(B) (although these regulations were not effective until April 5, 1988, under the regulations, Baytown would be legally authorized to measure its programs in credit hours).

Footnote: 99 [99] 99 Id. at 3.

Footnote: 100 [100] 100 Id.

Footnote: 101 [101] 101 See e.g., In re Electronic College and Computer Programming, Dkt. No. 91-7-ST, U.S. Dep't of Education (Initial Decision April 10, 1992) (where the Administrative Law Judge recognized that "while the French Fashion Academy decision stands, it has no binding precedential effect on" cases where the state does not prohibit clock to credit hour conversions).

Footnote: 102 [102] 102 On page 15 of the final audit determination, OSFA ostensibly reduced the amount it was seeking by $61,900 from $605,500 to $543,600.