IN THE MATTER OF Docket No. 91-5-SP
BERK TRADE AND BUSINESS
SCHOOL

Respondent.

Student Financial Assistance Proceeding

DECISION

Appearances: Esther Prepas, Director, and Henry Meaney, Administrator, for Berk Trade and Business School.

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

Before: John F. Cook, Chief Administrative Law Judge

I. PROCEDURAL BACKGROUND.

A final program review determination (determination) was issued by the Chief of the Institutional Review Branch, Region II, Division of Field Operations, Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (Department) to Berk Trade and Business School (Berk) on November 16, 1990. The determination sought to recover monies from Berk based upon activities during the school's participation in the programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. § 1070 et seq.

An audit report had been issued on September 8, 1988. A program review determination was originally issued on October 2, 1990. That determination was rescinded and replaced by the November 16, 1990, program review determination. The determination stated that Berk had satisfactorily resolved findings 2, 4, 5, and 6. Thus, those findings were considered closed. Findings 1 and 3 are the subject of this determination.

Berk first filed a request for review on November 5, 1990, in response to the original determination. In response to the second determination, dated November 15, 1990, the school then filed a second request for review on January 3, 1991.

A prehearing order was issued and the parties filed initial briefs and stipulations of fact.

An oral hearing was held in Washington, D.C. In an attempt to clarify its position, Berk subsequent to the hearing, filed an additional exhibit. Thereafter, OSFA sent new copies of certain Of the exhibits which contained enclosures not previously filed.

II. ISSUES.

In accordance with 34 C.F.R. § 668.118(b), is the program review determination issued by the designated Department official supportable, in whole or in part?

A. Does Berk owe the Department $47,216.10 as calculated by OSFA, $42,040.89 as calculated by Berk, or some other amount, for excess interest and special allowance payments made by the Department to lenders because Berk failed to make all tuition loan refunds in a timely manner?

B. Was Berk's Medical Secretary/Assistant program an eligible program so that its students could receive student financial assistance under Title IV of the Higher Education Act? If not, does Berk owe the Department $36,316.00 for Pell Grants and $983.71 in interest and special allowance payments that are associated with students enrolled in Berk's Medical Secretary/Assistant program?

III. EXHIBITS.

A. Joint Exhibits See footnote 1 [1]

Exhibit A. A true and accurate copy of the latest Program Participation Agreement signed by Berk and the Department, dated November 23, 1990.

Exhibit B. A true and accurate copy of the latest eligibility notice to participate in the Title IV, HEA programs received by Berk from the Department, dated November 4, 1990.

Exhibit C. A true and accurate copy of the Department's record of the total Title IV, HEA program funds received by Berk from 1981 to 1989, and authorized for Berk's receipt in 1990 and 1991, as recorded by the Department's Institutional Data System.

Exhibit D. A true and accurate copy of the Department's program review of Berk, dated September 8, 1988.

Exhibit E. A true and accurate copy of the list of late refunds provided by Berk to the Department on October 17, 1988, in response to the program review.

Exhibit F. A true and accurate copy of the list of students who attended the Medical Secretary/Assistant course at Berk and the type and amount of Title IV, HEA program funds each student received.

Exhibit G. A true and accurate copy of the Department's final program review determination of October 2, 1990.

Exhibit H. A true and accurate copy of Berk's request for a hearing to contest the Department's program review determinations, including enclosures attached to dispute the ineligibility of the Medical Secretary/Assistant course to receive Title IV, HEA program funds.

Exhibit I. A true and accurate copy of the Department's final program review determination dated November 16, 1990.

Exhibit J. A true and accurate copy of the Department's calculation of the interest and special allowance owed by Berk because of Berk's untimely tuition loan refunds.

Exhibit K. A true and accurate copy of Berk's recalculation of the interest and special allowance it believes it owes as a result of untimely tuition loan refunds.

Exhibit L. A true and accurate copy of the Department's letter to Berk advising Berk of the alternative method that could be used by Berk to recalculate the interest and special allowance owed by Berk.

B. Respondent's Exhibits

Resp. Ex. 1. A copy of the Department's Education Eligibility notice dated April 3, 1984, effecting a change of name from Berk Trade School, Inc. to Berk Trade and Business School.

Resp. Ex. 2. A copy of the Department's Institutional Eligibility Notice, dated September 28, 1987.

Resp. Ex. 3. A copy of the letter sent by Berk to NATTS, dated June 9, 1987.

Exhibit 1 - (December 19, 1991). Excerpts of Standards of Accreditation of the National Association of Trade and Technical Schools.

C. OSFA's Exhibits

ED Ex. 1. A signed Declaration of Clifton Knight.

ED Ex. 2. A copy of the Request for Institutional Eligibility for Programs submitted by Berk and received by the Department on January 12, 1987.

ED Ex. 3. A copy of the Department's Institutional Eligibility Notice, dated April 2, 1987.

ED Ex. 4. A copy of the letter sent by Ms. Lois Moore of the Department to Berk, dated May 22, 1987.

ED Ex. 5. A copy of the letter sent by Ms. Lois Moore of the Department to Berk, dated July 20, 1987.

ED Ex. 6. A copy of the letter sent by Ms. Lois Moore of the Department to Berk, dated August 19, 1987, and the attached correspondence.

D. Ruling as to Exhibits

All exhibits listed above are received in evidence.

IV. FINDINGS OF FACT AND OPINION.

A. STIPULATIONS OF FACT. See footnote 2 [2]

1. The Department of Education (Department) and Berk have entered into Program Participation Agreements (PPAs), which collectively cover the time period from Berk's initial participation in the Title IV, HEA programs in 1973 to the present.

2. Exhibit A is a true and accurate copy of the latest PPA signed by Berk and the Department.

3. Berk qualifies to participate in the Title IV, HEA programs as a vocational school under 20 U.S.C. §1085 (c) and as a proprietary institution of higher education under 20 U.S.C. §1088 (b).

4. Exhibit B is a true and accurate copy of the latest notice of eligibility to participate in the Title IV, HEA programs sent to Berk from the Department.

5. Exhibit C is a true and accurate copy of the Department's records of the total Title IV, HEA program funds received by Berk from 1981 through 1989, and authorized for Berk's receipt in 1990 and 1991, as recorded by the Department's Institutional Data System. Figures with an asterisk represent authorized amounts.

6. From June 27, 1988, to July 1, 1988, program specialists William Reilly and Larry Weston from the Department's Regional Office of Student Financial Assistance in New York (ROSFA) conducted a program review of Berk's administration of the Title IV, HEA programs at Berk.

7. ROSFA's program review consisted of a review of twenty one student files: ten student files from award year 1986-1987 and eleven student files from award year 1987-1988.

8. In addition to examining student files, ROSFA's program review consisted of a review of fiscal and accounting records and other student financial assistance forms and procedures.

9. ROSFA's program specialists conducted interviews with Irving Berk, Berk's Director, Ester Prepas, Berk's Director of Operations, Mr. Amad, Berk's Financial Aid Officer and James Ladu, Berk's Administrator.

10. ROSFA's initial program review, dated September 8, 1988, was sent to Berk, and Berk was given 30 days to respond.

11. Exhibit D is a true and accurate copy of ROSFA's program review .

12. As a result of the review of student files, ROSFA's program specialists concluded that some of Berk's guaranteed student loan refunds were either not paid, or were not timely paid, or were incorrectly calculated.

13. As a result of ROSFA's findings regarding Berk's late and miscalculated refunds, Berk was required to review the files of all guaranteed student loan recipients for the period from July 1, 1986 through the time of the program review and establish if refunds were due and made.

14. ROSFA's program specialists concluded that Berk could not document that its Medical Secretary/Assistant course had been approved by its accreditation commission or that the course had been approved for Title IV eligibility.

15. As a result of ROSFA's finding regarding Berk's offering of an ineligible course, Berk was required to determine how many students who attended that course received Title IV funds and the type and amount of funds received.

16. In a letter dated October 17, 1988, Berk responded to ROSFA's program review and provided a list of students to whom late refunds were made.

17. Exhibit E is a true and accurate copy of the list of late refunds provided by Berk to ROSFA in response to the program review.

18. In Berk's response to ROSFA's program review dated October 17, 1988, Berk provided a list of students who attended the Medical Secretary/Assistant course and the type and amount of Title IV, HEA program money each student received.

19. Exhibit F is a true and accurate copy of the list of students who attended the Medical Secretary/Assistant course at Berk and the type and amount of Title IV, HEA program funds each student received.

20. On October 2, 1990, ROSFA issued a final program review determination that calculated the interest and special allowance owed by Berk to the Department as the result of the late refunds identified by Berk in its response to the program review.

21. The amount calculated by the Department that Berk owed for interest and special allowance for late refunds was $47,216.10.

22. In its final program review determination of October 2, 1990, ROSFA advised Berk that it owed the Department $36,316 for improper Pell Grant payments made to all students who attended the Medical Secretary/Assistant course and $983.71 for interest and special allowance on $2350 paid in guaranteed student loan monies to a student attending that course.

23. Exhibit G is a true and accurate copy of ROSFA's final program review determination of October 2, 1990.

24. On November 5, 1990, Berk requested a hearing to dispute the amounts identified by ROSFA as owed to the Department for interest and special allowance payments on late refunds as well as all Title IV, HEA program monies that the Department sought to collect for students who attended the Medical Secretary/Assistant course.

25. Exhibit H is a true and accurate copy of Berk's request for a hearing to contest ROSFA's program review determinations to include enclosures attached to dispute the ineligibility of the Medical Secretary/Assistant course to receive Title IV, HEA program funds.

26. On November 16, 1990, ROSFA rescinded its final program review determination of October 2, 1990 and replaced it with an identical final program review determination, except that the new final program review determination included an example of how the interest and special allowance owed by Berk had been calculated.

27. Exhibit I is a true and accurate copy of ROSFA's final program review determination dated November 16, 1990.

28. On November 26, 1990, ROSFA sent Berk a list of the interest and special allowance that ROSFA calculated for each student who did not receive a refund in a timely fashion to substantiate the liability finding cited in the final program review determination of November 16, 1990. See footnote 3 [3]

29. Exhibit J is a true and accurate copy of ROSFA's calculation of the interest and special allowance owed by Berk because of Berk's untimely tuition loan refunds.

30. On January 2, 1991, Berk sent to OSFA its recalculation of the interest and special allowance Berk believes it owes as a result of untimely tuition loan refunds.

31. Exhibit K is a true and accurate copy of Berk's recalculation of the interest and special allowance it believes it owes as a result of untimely tuition loan refunds.

32. On February 15, 1991, ROSFA provided Berk with the alternative method approved by the Department that could be used to recalculate the interest and special allowance if Berk disputed the original ROSFA calculations.

33. Exhibit L is a true and accurate copy of ROSFA's letter to Berk advising Berk of the alternative method that could be used by Berk to recalculate the interest and special allowance owed by Berk.

B. OPINION AND ADDITIONAL FINDINGS OF FACT.

1. Excess Interest & Special Allowance Payments

Berk argues that the Department's method of calculating the interest and special allowance payments owed by Berk as a result of Berk's untimely refunds to lenders of unearned tuition attributable to the Stafford Loan program is incorrect. Berk disagrees with the Department's "so-called" "simplified formula", in which the Department multiplies the loan refunds amount by the number of months outstanding by .0091. Specifically, Berk disputes the Department's determination that the number of months from the date the refund is due (beginning 30 days after the student withdraws from school) until the date the refund is made (the date that the check is cashed) is calculated by counting any portion of a month as an entire month. Berk cites the example that, under the Department's "simplified formula", a refund due on November 27 and made on April 2 would be counted as six months, even though this is only a 125 day period.

Berk claims that this example should be rounded up to five months, but not six. Berk contends that each 30 day period should count as one month, regardless of what calendar months the period begins and ends in, because the purpose of the rule is to reimburse the Department for the expenses that it has incurred, not to penalize the school. Applying this theory to the charts provided by Berk and used by the Department to calculate the excess interest and special allowance liability, Berk claims that it owes the Department only $42,040.89, instead of the $47,216.10 that the Department claims is owed by Berk.

Berk also contends that the Department's "so-called" "alternative formula" would calculate Berk's liability more precisely, but that the formula is extremely complex, and that the Department refuses to perform this calculation. Therefore, Berk contends that it should not be required to choose between performing this extremely complex calculation itself or accepting the Department's "simplified formula", which Berk claims is unfair.

OSFA argues that Berk must repay to the Department the excess interest and special allowance payments made to lenders because of Berk's failure to make timely tuition refunds to these 9 lenders. Specifically, OSFA contends that the Department provides schools with two alternate methods of calculating the interest and special allowance liabilities. The first method is the Department's "simplified formula", which consists of: the loan refunds amount multiplied by the number of months outstanding multiplied by .0091. According to OSFA, the number of months portion of the "simplified formula" consists of the number of months from the date the refund is due until the date the refund is made, with any portion of a month being considered a full month. OSFA asserts that this formula was developed by the Department for the mutual convenience of the schools and the Department more than two years ago and is not an exact liability calculation, but only an approximation. OSFA argues that it saves schools the time and expense of calculating their liabilities under the "alternative method", which is more precise but also much more complicated. The "simplified formula's" use of .0091 in the Berk calculation is based upon the special allowance rate during the previous eight quarters plus the interest rate during that time. According to OSFA, this factor may sometimes benefit the Department, and at other times benefit the school.

According to OSFA, if a school desires a more precise calculation of its liability, the school is always free to utilize the "alternative method", which, according to OSFA, requires computation of the interest rate that the Department pays the holder of a qualifying loan at the rate of 8 percent per year on the unpaid principal balance, plus the special allowance paid to the holder equal to the average of the bond equivalent rate of the 91-day Treasury bills auctioned for the quarter plus 3.25 percent.

OSFA contends that Berk can use either of these methods to calculate its liability, but that Berk cannot create its own "simplified formula." OSFA also contends that if Berk refuses to accept the Department's "simplified formula", it cannot shift the burden to the Department to calculate the school's precise liability under the "alternative method."

Under the Administrative Procedures Act (APA), 5 U.S.C. § 556(d), the proponent of a rule or order has the burden of proof. The agency, which is the proponent of the rule or order in this type of proceeding, has the burden of production (of going forward) to establish a prima facie case,

while under 34 C.F.R. § 668.116(d) the institution requesting the review has the ultimate burden of persuasion to prove that the disallowed expenditures were otherwise proper or that the institution complied with program requirements. An agency meets its burden of production of a prima facie case if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established. State of Maine v. U.S. Dept of Labor, 669 F.2d 827, at 829 (1st Cir. 1982); Hazardous Waste Treatment 10 Council v. U.S. E.P.A., 886 F.2d 355, at 366 (D.C. Cir. 1989); In The Matter of Kentucky Polytechnic Institute, Dkt. No. 89-56-S, U.S. Dept. of Education (April 27, 1990) (Order); In The Matter of Sinclair Community College, Dkt. No. 89-21-S, U.S. Dept. of Education (May 31, 1991) (Decision); In The Matter of Stautzenberqer College, Dkt. No. 90-102-SA, U.S. Dept. of Education (March 11, 1991) (Decision).

The controlling ED regulation in this Subpart H proceeding is 34 C.F.R. § 668.116(d), which states the following:

(d) An institution requesting review of the final audit determination or final program review determination issued by the designated ED official shall have the burden of proving the following matters, as applicable

(1) That expenditures questioned or disallowed were proper;

(2) That the institution complied with program requirements.

In both Kentucky Polytechnic and Sinclair, this tribunal held that 34 C.F.R. § 668.116 (d) is compatible with APA § 556(d) and the case law interpreting that section. Thus here, OSFA, representing the agency, which is the proponent of the order in the final program review determination, has the burden of production (of going forward) to establish a prima facie case, while Berk, the institution requesting the review, has the ultimate burden of persuasion to prove either that it does not have to accept the Department's calculations under the "so-called" "simplified formula" or, in the alternative, perform the complex circulations under the "so-called" "alternative method", or to prove that its own simplified formula for calculating its liability is acceptable under the statutes or regulations; provided that OSFA has carried its burden in the first place. OSFA will satisfy its burden of production of a prima facie case if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established, namely that Berk is required either to accept the Department's "simplified formula" and reimburse the Department in the amount of $47,216.10, or to perform the complex calculations required under what OSFA refers to as the "alternative method."

OSFA's Initial Brief, filed on May 14, 1991, describes the workings of the GSL program in the following manner:

Within the context of the GSL programs, a student applies to a private lender for the loan. A guarantee agency guarantees the lender against default by the borrower and, if necessary, the Department reimburses the guarantee agency for all or part of any default claim it pays. 34 C.F.R. §§ 682.404, 682.405. In addition, the Department pays the lender the interest that is due on most GSLs prior to repayment as well as a "special allowance" until the loans are repaid or go

into default. 34 C.F.R. §§ 682.300, 682.302. The interest benefits and special allowance are based on the unpaid principal balance outstanding on qualifying loans, which is necessarily reduced when a tuition refund is paid to a lender and, conversely, not reduced when a tuition refund is not so paid. 34 C.F.R. §682.303(b)-(d).

OSFA Initial Brief at 4-5.

OSFA then asserts:

Consequently, when a school fails to make required refunds to lenders holding GSLs on behalf of students, it acquires an obligation to reimburse the Department for the interest and special allowance payments that would not have been made if the school had not been derelict in making timely tuition refunds.

OSFA Initial Brief at 5.

OSFA cites no authority, statutory, regulatory, or otherwise, for its assertion that a school "acquires an obligation" to reimburse the Department for interest and special allowance payments made by the Department when a school fails to make required refunds to lenders holding GSLs on behalf of students. However, as OSFA points out, Berk does not dispute the fact that it failed to timely make refunds to lenders on behalf Of students, nor does the school dispute that it must reimburse the Department for the excess interest and special allowance payments unnecessarily expended by the Department because of Berk's failure to timely make required refunds to lenders holding GSLs on behalf of students that had withdrawn from Berk. See footnote 4 [4]

We will therefore proceed upon the basis of Berk's admission that it must reimburse the Department for these monies. However, this then brings us to the question as to whether OSFA has established a prima facie case as to its claim that Berk must either accept OSFA's "simplified formula" in calculating the amount due and reimburse the Department in the amount of $47,216.10 or that Berk must perform the complex calculations required under what OSFA refers to as the "alternative method." In this regard this tribunal cannot ignore OSFA's failure to cite any authority or even any documentation whatsoever for its use of the "so-called" "simplified formula" in calculating Berk's liability.

Counsel for OSFA has admitted that there is no statutory or regulatory authority for the Department's use of the '"simplified formula." Further that counsel responded in the negative concerning a question as to whether there was some sort of a letter or an instruction to institutions as to the formula. Hearing Transcript at 78-79. However, counsel argues that the simplified formula was devised by the Department for the mutual convenience of the parties, because it helps schools avoid having to perform the cumbersome calculations under what OSFA calls the "alternative method."See footnote 5 [5]

While the Department may have the authority to create a "simplified formula" for the convenience of the parties as long as it is a reasonable approximation of the more complicated statutory or regulatory formula and does not extract from the institution more than would be required under the statutory formula, no such authority is cited by OSFA. Even if, arguendo, one assumes that such authority does in fact exist, this "simplified formula" must be documented somewhere. Even a Departmental Directive or memorandum promulgated to the institutions might be acceptable if it stated that in calculating a school's liability for excess interest and special allowance payments, the Department will give schools the choice of using the statutory formula or a "simplified formula." Such directive or memorandum would need to specify the components of the simplified formula so that it could be applied in a routine and consistent manner. It ought to also include a simple example showing a comparison of a calculation under the statutory formula with one under the "simplified formula." It is essential that the Department show that the "simplified formula" is a fair representation of the statutory formula in order to justify its use. Even though a Departmental Directive may be acceptable, the proper means of implementing this procedure is by adoption of a regulation.See footnote 6 [6]

Without such documentation, schools have no foundation for guidelines as to the components of a "simplified formula". Here, outside of the self-serving statements in the program determinations, OSFA supplied no documentation other than the declaration of Clifton Knight in ED Exhibit 1. Mr. Knight, an Institutional Review Specialist with the Institutional Review Branch of the Division of Audit and Program Review within the Department of Education, states in paragraph 4 that the Department developed the "simplified formula" more than two years ago. In paragraph 8, Mr. Knight states the requirement under the Department's "simplified formula" "that the months be calculated from the date the refund is due until the date the refund is made, with any portion of a month being considered as a full month." Neither Mr. Knight nor OSFA provided any written documentation prepared either contemporaneously or subsequent to the claimed adoption of the "simplified formula" more than two years ago.

Moreover, even if this tribunal could accept the "simplified formula" despite the lack of any evidence supporting it, it does not necessarily follow that "any portion of a month being considered a full month" indicates calendar months. Mr. Knight's statement does not use the word calendar when describing portions of a month. For example, a refund due on September 30 but not paid until November 1 would be 32 days late. If any portion of a calendar month counted as one month, then the payment would be considered three months late, because it spanned one and included parts of two of the calendar months of September, October, and November. However, it is equally plausible that the word "month" means a period of approximately 30 days.See footnote 7 [7] For example, on September 30, one would describe the events to occur on November 1 as occurring "about a month from now." One would not describe this period of time as lasting for three months. Even counting the last two days of this 32 day period as being a portion of a second month and thus charging a total of two full months may be justifiable, but, to effectively penalize a school by turning 32 days into three months is arbitrary and punitive in nature, especially without any written documentation whatsoever as to the foundation for this policy.

Once again, the Department might have the power to devise such a formula, but that is not the issue here. The issue is that the Department cannot demand money from schools based not on the

statutory formula or even a formula contained in a regulation or other published Departmental Directive or memorandum, but based solely upon the declaration of one of the Department's own employees. If that were the case, then there would be no need for statutes or regulations to follow, nor would there be a need to make reference to the Department's directives and other published memoranda which interpret those statutes and regulations.

-16 As stated previously the Department could rectify this situation by publishing a regulation, or at least a departmental directive or memorandum, which would set out a properly founded "simplified formula." That way, all parties could refer to this written documentation to perform the calculations and ensure that the formula was carried out in a routine and consistent manner.

Given the fact that OSFA has provided no valid authority whatsoever for the "simplified formula", this tribunal is compelled to rule that OSFA has failed to meet its burden of production to establish a prima facie case with respect to its claim against Berk for $47,216.10 for excess interest and special allowance payments calculated under the "so-called" "simplified formula."

It is true, as OSFA points out, that, "schools cannot be allowed to simply invent their own formulas to establish liabilities." OSFA Initial Brief at 7. Given the problems with the "simplified formula" discussed supra, this tribunal cannot allow Berk to substitute its own modified version of the "so-called" "simplified formula" in order to calculate its own liability.

Thus, the only remaining foundation for the interest and special allowance charges is the statutory formula. OSFA in its briefs refers to two statutes as the source of what it calls the "alternative method": 20 U.S.C. § 1077a and 20 U.S.C. § 1087-1(b)(2).See footnote 8 [8] These two statutes do not specifically authorize the Department to utilize this formula in recovering excess interest and special allowance payments from schools. These statutes describe how the interest rates and special allowance payments that the Department pays to holders of eligible loans are computed. However, as stated above, OSFA has not presented any calculation as to excess interest and special allowance payment liabilities that would be due from Berk based upon the statutory or regulatory formula.See footnote 9 [9]

-17 Aside from any other issues involved herein the determining factor in this case is OSFA's failure to show any foundation or authority for the "so-called" "simplified formula" in that OSFA's counsel could not refer to any statute, regulation, directive or any other published memorandum setting it forth. Further, OSFA did not set forth any explanation showing any relationship of the "so-called" "simplified formula" with any statutory or regulatory formula in 20 U.S.C. §§ 1077a and 1087-1 or in 34 C.F.R. §§ 682.300, 682.302, or 682.303.

Therefore, OSFA has failed to satisfy its burden of production to establish a prima facie case for its use of the"socall" "simplified formula." Consequently, the Department's claim that Berk owes the Department $47,216.10 for excess interest and special allowance payments must fail. Unfortunately, the Department has not performed the calculations under the statutory or regulatory formula and has therefore failed to present a prima facie case in that regard. However, Berk has admitted that it owes the Department $42,040.89 for excess interest and special allowance payments. As a result, Berk must repay the Department $42,040.89.

2. Medical Secretary/Assistant Program

Berk argues that the Medical Assistant/Secretary courseSee footnote 10 [10] was approved for Title IV eligibility. In the course of its discussion Berk made reference to a September 28, 1987 Institutional Eligibility Notice that was issued one year after the Medical Secretary/Assistant program began. Berk asserts that in fact the August 23, 1983 and April 3, 1984 U.S. Department of Education eligibility notices were in effect when the Medical Secretary/Assistant program was first offered in September of 1986. These notices did not list specific courses, and they gave site approval for Berk's 383 Pearl Street facility. Further, these notices did not require the school to notify the Department if additional courses were offered in the future. Berk also points out that the Department's 1990-91 Federal Student Financial Aid Handbook states that if a school adds other educational programs after receiving its eligibility notice, it can make its own determination as to whether the programs are eligible for student financial assistance funds and need not submit them to the Department in advance for approval. Berk does acknowledge that if it incorrectly determines that its educational program satisfies the applicable statutory and regulatory eligibility provisions, the school has to return any student financial assistance funds that were received by students.

Berk claims that when the Medical Secretary/Assistant course was offered, it had site approval by the Department, course approval by the New York State Education Department, and institutional accreditation by the National Association of Trade and Technical Schools (NATTS). The New York State Education Department had approved the Medical Secretary/Assistant course on October 22, 1985. Also, Berk had had full NATTS accreditation since 1973. Berk does acknowledge that NATTS must be informed of new courses that are offered by the school. The school argues that it did send a letter to NATTS in June 1987 in an attempt to obtain NATTS recognition of the Medical Secretary/Assistant course because the Department had asked for such recognition, but that NATTS apparently lost the letter and never sent the requested response to the Department.See footnote 11 [11] Berk claims that, in any case, although NATTS must be informed of new courses in order to maintain the school's accreditation, NATTS never specifically approves new courses.

OSFA argues that Berk must repay to the Department all Title IV, HEA program funds received by its students who attended an ineligible program. OSFA states that under the regulations, the Department may approve only certain educational programs or certain of a school's locations to receive federal student financial assistance. Although a school can initially determine the eligibility of any new courses of instruction that it offers without notifying the Department in advance, if the school incorrectly determines that an educational program is eligible, it must repay all student financial assistance funds that students have impermissibly received for instruction in this program.

OSFA contends that here, Berk offered the Medical Secretary/Assistant course beginning in September 1986. When the April 2, 1987 eligibility notice did not list the Medical Secretary/Assistant program, Berk requested the Department to include this course on the school's eligibility notice. The Department advised Berk that it would need, among other things, evidence that the program had been approved by the school's accrediting agency (NATTS). OSFA contented that Berk claimed that NATTS did not approve individual courses, but that

Berk later requested NATTS to send the Department a letter indicating NATTS approval of the Medical Secretary/Assistant program. OSFA alleged that a representative of NATTS told the Department's Lois Moore in a telephone conversation that NATTS' approval of individual programs was required. The Department never received anything from NATTS indicating NATTS approval of the Medical Secretary/Assistant course. OSFA states that the Department twice reminded Berk that the Department needed an accreditation from NATTS for this course and Berk never responded as to those reminders. Therefore, OSFA argues that the Medical Secretary/Assistant course never became an eligible course. As a result, OSFA claims, Berk must return $36,316 in Pell Grants received by students to attend this ineligible course and $983.71 for the interest and special allowance paid on the $2350 GSL used by one student to pay for tuition to attend that course.

As discussed supra during the analysis of the excess interest and special allowance payments, OSFA has the burden of production of a prima facie case, while Berk has the burden of persuasion. OSFA will satisfy its burden of production of a prima facie case if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established, namely that the Medical Secretary/Assistant course offered by Berk was not an eligible program under Title IV of the Higher Education Act, as amended (HEA).

Pages 8-9 of OSFA's Initial Brief contain a description of the procedures that currently govern the addition of new programs by an institution. OSFA states:

In addition to granting an institution eligibility to participate in the Title IV, HEA programs, the -20 Department may approve only certain educational programs or certain of a school's locations to receive Federal student financial assistance. 34 C.F.R. §600.10 (b) (2) . If only a portion of an institution qualifies for participation in the Title IV, HEA programs, the Department notifies the school of the programs or locations which qualify. 34 C.F.R. §600.21 (b). Although the Department defers to the school to determine the eligibility of any new courses of instruction it may offer, 34 C.F.R. §600.10(c)(1), if an institution incorrectly determines that such an educational program is eligible, it is liable to repay all student financial assistance funds its students have impermissibly received in receipt of this instruction. 34 C.F.R. §600.10 (c) (2) .

34 C.F.R. § 600.10(c) (2) currently reads as follows:

(c) Subsequent additions of educational programs. (1) If an institution that has been designated by the Secretary as an eligible institution adds educational programs after that designation, the institution need not apply to the Secretary to have those additional programs designated as eligible programs but may determine on its own whether those programs satisfy the relevant statutory and regulatory eligibility requirements.

(2) If an institution incorrectly determines that its educational program satisfies the applicable statutory and regulatory eligibility provisions, the institution shall be liable to repay to ED all the student financial assistance and other ED program funds it or its students received who were enrolled in that educational program.

Unfortunately, counsel for OSFA has cited regulations that did not exist during the period in question. Neither 34 C.F.R. § 600.10 (b) (2), 34 C.F.R. § 600.21 (b), 34 C.F.R. § 600.10(c)(1), nor 34 C.F.R. § 600.10(c) (2) were in existence during the time that the Medical Secretary/Assistant course was offered. The course in question started in September of 1986 and was concluded at the end of 1987. These regulations were published in the Federal Register on April 5, 1988 and became effective 45 days later. See 53 Fed. Reg. 11,208-11,216 (1988). 34 C.F.R. Part 600, which was first promulgated in 1988, did contain some provisions that had previously been located in 34 C.F.R. Part 668. However, this tribunal has found no prior equivalent in Part 668 or anywhere else for the regulations cited by OSFA here. Nor has OSFA cited any such laws, despite the duty of counsel for OSFA to cite them in his brief if such laws did exist. Therefore, OSFA has cited regulations that were inapplicable during the period in question. It is incredible that counsel for -21 OSFA would cite such regulations as his authority under these circumstances because they cannot be applied retroactively to affect substantive rights involved in a fact situation that came to a conclusion before the regulations became effective.

Berk argues that the 1987 eligibility notice does not apply to the Medical Secretary/Assistant course because that course began in September 1986, when the April 3, 1984 eligibility notice was still in effect. Berk places great weight upon the fact that the 1984 eligibility notice, unlike the 1987 eligibility notice, gave site approval to Berk's four classroom locations and did not list specifically approved courses. Berk also emphasizes that the 1984 eligibility notice does not indicate that the school had to notify the Department if additional courses were offered.

Given the fact that the regulations that govern the subsequent addition of educational programs and provide for the granting of eligibility to only a portion of an institution were not promulgated until 1988, Berk's position appears credible. For example, the regulation that authorizes the Department to notify an institution if it qualifies in whole or in part as an eligible institution, 34 C.F.R. § 600.21, was not promulgated until 1988. 34 C.F.R. § 600.21 currently reads as follows:

(a) The Secretary notifies an institution in writing of the Secretary's determination

(1) Whether the applicant institution qualifies in whole or in part as an eligible institution under the appropriate definition in §§ 600.4 through 600.7; and

(2) Of the HEA programs for which it is eligible to apply for participation.

(b) If only a portion of the applicant qualifies as an eligible institution, the Secretary specifies in the notification of eligibility letter only the locations or programs which qualify. [emphasis added]

To reiterate, this regulation was not in existence during the period in question. Nor were 34 C.F.R. §§ 600.10(b)(1) and (2), which provide for the granting of eligibility to all or only a portion of an institution and refer to the eligibility notice provided for in 34 C.F.R. § 600.21. 34 C.F.R. §§ 600.10(b)(1) and (2), currently state as follows:

(b)(l) 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.

(2) If the Secretary determines that only certain -22 educational programs or certain locations of an applicant institution satisfy the applicable requirements of this subpart, the Secretary extends eligibility only to those educational programs and locations which meet those requirements and identifies the eligible educational programs and locations in the eligibility notice sent in accordance with § 600.21. [emphasis in original]

Once again, this regulation did not exist during the period in question. The fact that these regulations were added in 1988 indicates that before that time, the regulations did not provide for the granting of eligibility to only a portion of an institution's programs. Nor can we find any provision of the regulations that existed at that time that provided that the Department would send an institutional eligibility notice on which it lists only certain courses as being eligible.

Berk submitted to OSFA an application for a new eligibility form in January 1987. ED Exhibit 2. The Department's April 2, 1987 institutional eligibility notice to Berk listed eligible educational programs, but omitted the Medical Secretary/Assistant program. ED Exhibit 3. On April 10, 1987, Berk acknowledged receipt of the April 2, 1987 eligibility notice and requested the Department to add the Medical Secretary/Assistant course and a Dental Assistant/Technician course to the eligibility notice. Joint Exhibit H-6.

On May 22, 1987, Lois Moore, ED's Chief of the Occupational/Vocational Eligibility Branch, sent Berk a form stating that Berk's eligibility application was incomplete. This form requested Berk to submit a copy of the school's state approval and a copy of the school's accreditation by the appropriate nationally recognized accrediting agency. After both of these typed lines, the words "approving additional programs" were scrawled in handwriting. A handwritten addition also requested Berk to complete page 3 of the enclosed Form ED-1059. ED Exhibit 4.

On June 1, 1987, Berk sent a reply to Ms. Moore which stated that Berk was enclosing a copy of the state approval for the additional programs and the completed page 3 of ED Form 1059. Berk also stated that NATTS does not issue approval for individual programs. Joint Exhibit H-8. However, on June 9, 1987, Berk sent a letter to NATTS, requesting them to submit NATTS approval of the Medical Secretary/Assistant program to Ms. Moore of the Department. The letter also indicated that a Form P-a had been submitted to NATTS. Resp. Exhibit 3.

Apparently, NATTS never sent the requested approval or responded in any other way to Berk's June 9, 1987 letter. The Department again sent a letter to Berk on July 20, 1987, 23 requesting Berk to submit a copy of the school's accreditation. This letter did not contain the handwritten words "approving additional programs." However, it did contain a typed addition by Ms. Moore, which stated, "The additional programs submitted by you need the approval of the accrediting agency. I have talked with NATTS, and NATTS informed me that their approval was required." ED Exhibit 5.

Ms. Moore sent a similar letter on August 19, 1987. This letter contained a typed addition that stated, "Until such time as we receive a copy of a letter issued to your school approving the programs listed on the attached correspondence, the programs will not be approved. The letter (not a certificate) must be from the National Association of Trade and Technical Schools." ED Exhibit 6.

At the hearing, counsel for OSFA admitted that nowhere is there any written authority for the proposition that NATTS or any other accrediting agency must approve a particular program. No statute, no regulation, not even a written ED policy memorandum requires schools to obtain NATTS or other accrediting agency approval for a particular program. Hearing Transcript at 106119. OSFA claims that the July 20, 1987 letter to Berk from Ms. Lois Moore (ED Exhibit 5) is authority for the requirement that NATTS must approve the Medical Secretary/Assistant program. OSFA claims that NATTS told this to Ms. Moore in a telephone conversation. Yet OSFA offers no other evidence to support this unsubstantiated hearsay. As a result, this "evidence" has little probative value.

This is not the kind of evidence on which responsible persons are accustomed to rely in serious affairs. National Labor Relations Board v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938) cert. denied, 304 U.S. 576.

This kind of unsubstantiated hearsay is particularly unreliable because it would be very easy for a misunderstanding to occur between the NATTS representative and the OSFA official as to exactly what was involved.

Different types of programs require different procedures by the accrediting agency. From the hearsay statement of the OSFA official which reports hearsay from "NATTS" we have no idea who represented "NATTS" or whether that person was in a position to give reliable information; and we do not know how the question was asked or what was actually said in response. There are too many possible variables involved here for a responsible person to rely upon the hearsay upon hearsay for the purpose of making a determination in a serious affair. A responsible person would not rely upon this kind of information in making a decision that had serious consequences as to his or her business affairs.

-24 OSFA contends that, even without written documentation for this position, a reasonable and necessary interpretation of 34 C.F.R. § 600.5(a)(6) supports the view that specific programs must be approved by the accrediting agency, because otherwise an accredited school could suddenly add courses that are totally unrelated to the subject matter that the school taught when it was accredited, and not need additional approval to do so. OSFA gives the example that an accredited trucking school could suddenly add cosmetology courses that would be accredited without any further review of the school.

Once again, OSFA has cited a regulation that was not in existence during the time of the events of this case. However, the former 34 C.F.R. § 668.3 (1986), which was in effect during the time period in question, is essentially similar to the present 34 C.F.R. § 600.5.See footnote 12 [12] On its face, the regulation in question, 34 C.F.R. § 668.3(a)(6) (1986), does not support OSFA's position. The regulation reads:

A "proprietary institution of higher education" is:

(a) An educational institution which-
. . . .

(6) Is accredited by a nationally recognized accrediting agency or association; and

The law is very clear. The text of the regulation requires only that the school be accredited by a nationally recognized accrediting agency or association. The parties here do not dispute that Berk was accredited by NATTS, which is a nationally recognized accrediting agency.

The general rule of statutory construction is that there is no occasion for construction where the language is clear and unambiguous and does not lead to absurd or impracticable results. Kenai Peninsula Borough v. Andrus, 436 F. Supp. 288 (D. Alaska 1977) (citing Caminetti v. United States, 242 U.S. 470, 485 (1917)). An administrative regulation, like a statute, is subject to the normal rules of statutory construction. Harnischfecer Corp. v. U.S. Environmental Protection Agency, 515 F. Supp. 1310, 1314 (E.D. Wis. 1981). See also Rucker v. Wabash R.R. Co., 418 F.2d 146, 149 (7th Cir. 1969). Since the regulation involved here is very clear in requiring only that an institution be accredited by a nationally recognized accrediting agency or association, no further interpretation or analysis is necessary.See footnote 13 [13]

The clear language of the regulation gives credence to Berk's argument that NATTS never approves specific courses. Berk states that it does notify NATTS of new courses, but NATTS just checks to make sure that this type of course fits in with what the school has already been teaching and is accredited for. According to Berk, NATTS does not do an in-depth review of the substance of the course; the State does that.

OSFA makes much of the fact that despite Berk's claim that NATTS had never issued individual program approvals, Berk requested such an individual program approval from NATTS on June 9, 1987. However, Berk contends that it did so only because the Department had asked the school to do so. Given Ms. Moore's May 22, 1987 letter to Berk asking the school to submit approval from its accrediting agency for the Medical Secretary/Assistant program, it is not unreasonable for Berk to have requested specific course approval from NATTS, especially since Berk claims that even though NATTS normally does not give specific course approval, the accrediting agency might do so if a school asked the agency for such a letter. Berk naturally wanted to comply with Ms. Moore's letter in order to avoid the situation that it is in right now. Attempting to comply with the Department's request does not indicate any contradiction on Berk's part. The fact that Berk did not again seek specific course approval from NATTS even after the Department had notified Berk through its July 20, 1987 and August 19, 1987 letters that ED had not received anything from NATTS does not indicate malfeasance by Berk. Perhaps Berk would have been wise to respond to these letters or to again attempt to obtain a specific course approval from NATTS, but if NATTS does not grant specific course approvals, Berk may well have believed that such efforts would have been fruitless.

At the hearing, the parties discussed NATTS Form Pea. When a school adds a new program, it sends Form P-a and a letter to NATTS, but this occurs within 30 days after the course begins. Form P-a lists the name of the course, the length of the course, and the number of hours.

OSFA claims that the fact that Berk sends Form P-a to NATTS after Berk adds a new program indicates that even if the accrediting agency does not notify the school when the program has been approved, as Berk argues, it surely notifies the school if the program has not been approved. Hearing Transcript at 143. OSFA's argument appears credible, but it only serves to bolster Berk's position. If the accrediting agency does not notify the school that a program has been approved, how can Berk be required or expected to supply such an approval to the Department. Moreover, if the accrediting agency would notify a school if there was a problem with an added program, as OSFA claims, the fact that there is no evidence here in the record of any such notification by the accrediting agency, if anything, suggests that the Medical Secretary/Assistant program presented no problem.

Berk also submitted with its December 19, 1991 letter to the judge another exhibit that was incorrectly labelled "Exhibit 1", despite the fact that Berk had already submitted a different "Respondent's Exhibit 1" with its Initial Brief. There was no objection by OSFA's counsel as to this exhibit. Therefore it will be received in evidence.

This exhibit contains part of the NATTS Standards of Accreditation booklet. On page 5 of this booklet, NATTS distinguishes the requirements for a "Program Approval" from those for a "Degree Program Approval." The section entitled "Program Approval" states:

No report is necessary when a school adds a single course to an existing program. However, the addition of a new program requires the filing of a New Program Report.

A New Program Report must be filed with the Commission within thirty days after the first class begins . . . .

The very next section is entitled "Degree Program Approval" and states:

Schools must have each degree program reviewed and approved by the Accrediting Commission before the program is offered.

In other words, degree programs must have specific NATTS approval before they are offered. New non-degree programs must be accompanied by the filing of a report within 30 days after the first class begins. Nothing indicates that NATTS must approve non-degree programs. The only requirement is that a report be submitted. As Berk points out in its December 19, 1991 letter, the Medical Secretary/Assistant program was not a degree program. Thus NATTS approval does not appear to be required under the NATTS guidelines.

Even without this evidence, the law is very clear that an

-27 institution such as Berk was required only to have general institutional accreditation by a nationally recognized accrediting agency or association. Berk had such accreditation by NATTS,

a nationally recognized accrediting agency. No regulation required Berk to obtain individual approvals from the accrediting agency each time that Berk added a course.

For these reasons, this tribunal concludes that OSFA has not satisfied its burden of production to establish a prima facie case, and that even if it had, Berk has satisfied its burden of persuasion. The evidence presented is not sufficient to enable a reasonable person to draw the inference sought to be established by OSFA, namely that the Medical Secretary/Assistant course offered by Berk was not an eligible program under Title IV of the Higher Education Act, as amended. OSFA's argument that despite the plain language of 34 C.F.R. § 600.5(a)(6), a reasonable and necessary interpretation of that statute would require specific approval by the accrediting agency is unpersuasive. The regulation requires only accreditation of the educational institution by a nationally recognized accrediting agency. OSFA admits that no statute, regulation, or other written documentation supports its position, yet OSFA would require Berk to know that it was supposed to obtain NATTS approval for this specific course. OSFA would require such NATTS approval despite the fact that no evidence has been presented indicating that NATTS ever required agency approval for specific courses, and in fact, the evidence that was presented indicates that NATTS did not issue approval of individual programs. For these reasons OSFA has failed to satisfy its burden of establishing a prima facie case.

VI. CONCLUSIONS.

A. OSFA has failed to satisfy its burden of production to establish a prima facie case for its use of the "simplified formula." Thus the Department's claim that Berk owes the Department $47,216.10 for excess interest and special allowance payments must fail. Unfortunately, the Department has not performed the calculations under the statutory or regulatory formula and has therefore failed to present a prima facie case in that regard. However, Berk has admitted that it owes the Department $42,040.89 for excess interest and special allowance payments. Therefore, Berk must repay the Department $42,040.89. Consequently, the program review determination is supportable in part.

B. OSFA has failed to satisfy its burden of production to establish a prima facie case for its claim that the Medical Secretary/Assistant program was an ineligible program. Therefore, the Medical Secretary/Assistant program must be considered an eligible program, and Berk does not owe the Department $36,316.00 for Pell Grants and $983.71 for interest

-28 and special allowance payments associated with this program.

VII. DETERMINATIONS AS TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

OSFA and Berk filed their posthearing briefs which, in part, contained proposed findings of fact and conclusions of law. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. ORDER.

Based on the foregoing findings of fact and conclusions of law, Berk Trade and Business School is hereby ORDERED to repay the U.S. Department of Education the sum of $42,040.89.

John F. Cook
Chief Administrative Law Judge

Issued: December 10 , 1992
Washington, D.C.

Footnote: 1 [1] *Counsel for OSFA and Berk's representative agreed by stipulation that all of the joint exhibits are admissible, without objection.*

Footnote: 2 [2] *This part of the findings of fact is based upon stipulations contained in the Joint Statement filed by the parties.*

Footnote: 3 [3] *In the stipulation, the last date in this paragraph was erroneously listed as "November 26, 1990.*

Footnote: 4 [4] *34 C.F.R. §682.607, which is not cited by OSFA in any of its briefs or oral argument, nor in the final program review determinations of October 2, 1990 or November 16, 1990, is cited in finding 1 of ROSFA's initial program review of September 8, 1988. This regulation requires schools to timely repay refunds to lenders after a student withdraws. This regulation does not deal with the issue as to whether schools should be required to reimburse the Department for interest and special allowance payments made by the Department when a school fails to make required refunds to lenders holding GSLs on behalf of students.*

Appendix 6 to the Department's Audit Resolution System Departmental Directive and Handbook was issued on August 9, 1988. Although Appendix 6 was not cited by either party and does not appear to directly apply to this type of case, a brief examination of Appendix 6 is appropriate. At page 2, it states:

It is recommended that regulations be published to support the following aspects of ED's interest policy. ED should consider taking steps to develop such regulations, but, in the meantime, Audit Liaison Officials (ALOs) are advised to seek OGC review of audit determinations involving findings which implement the following aspects of the interest policy:

The Department will seek to recover imputed interest when recipients maintain excess cash balances, misuse Federal advances or use Federal funds for purposes which the recipient knew or should have known were erroneous, undocumented or unallowable. In all these cases, interest may be charged from the date of the violation or erroneous claim. [emphasis added].

While these statements do not parallel the facts in this case, they do involve a similar principle. However, failing to timely make required refunds to lenders holding GSLs on behalf of students is not precisely the same as "us[ing] Federal funds for purposes which the recipient knew or should have known were erroneous, undocumented or unallowable."

Next, on page 4, the Appendix states:

When ED determines that a recipient has excess computed cash or that it has used ED funds for unauthorized purposes, ED requests the refund of actual or imputed interest on the excess or misused funds to offset the additional borrowing cost to the Government or to recover the benefit received by the recipient as a result of the misused funds. [emphasis added].

Once again, although this statement is not directly applicable to the facts in this case, it does involve a similar principle.

Finally, on page 6, the Appendix states:

Additional steps that FMS [the Department's Financial Management Service] may use in resolving excess computed cash findings include the following:
FMS will assess a liability for imputed interest based on Treasury Department quarterly rates. To assist FMS in this calculation, the audit report should include a supporting schedule of the calculation of the imputed interest for each year in question. [emphasis added].

There are therefore two points of significance which are derived from Appendix 6. First, in cases which are somewhat similar in nature to the instant case, the Department's Financial Management Service makes the calculations of interest due using procedures similar to the statutory formula set forth by OSFA and described at pages 9 and 16-17 of this decision, rather than taking the position that the recipient of the funds must bear this burden as OSFA contends in this case. And, second, the Department's Audit Review and Policy Council recommended that regulations be published to embody the Department's interest policy. This is what should have been done as to OSFA's "so-called" "simplified formula."

Footnote: 5 [5] *Also no authority is cited by counsel for OSFA for its claim that the duty to make calculations as to the interest due under the statutes and regulations falls upon the institution rather than OSFA. This approach presents a particular problem for OSFA in view of the fact that it must establish a prima facie case as to the amount of interest claimed to be owed by Berk.*

Footnote: 6 [6] *In footnote 4 reference has been made to Appendix 6 of the Audit Resolution System Departmental Directive and Handbook which relates to the collection of interest in circumstances different from those involved here. However, in the circumstances involved in Appendix 6 there is at least a directive to reference as a foundation. Even as to those circumstances, Appendix 6 contains a recommendation by the Audit Review and Policy Council that regulations be adopted embodying that policy.*

Footnote: 7 [7] *Paragraph 3 in Berk's December 19, 1991 letter to this tribunal raises an interesting point in stating the following: "ED Exhibit 1.2 shows OSFA's simplified formula having three components. Two of those components are exact to the fourth decimal place. However, the third component can vary by almost 300% (30 days can be as little as 1 month; 32 days can be as much as 3 months)." Actually, 30 days can be as little as one month (refund due on January 1 and made 30 days later on January 31), while 29 days can count as three months (refund due on January 31 and made 29 days later on March 1). Thus under OSFA's interpretation of the simplified formula, the amount owed by a school can actually be three times greater over a 29 day period than over a 30 day period.*

Footnote: 8 [8] *In this regard OSFA also refers to 34 C.F.R. §§ 682.300, 682.302, and 682.303.*

Footnote: 9 [9] *Apparently, no calculation of the "so-called" "alternative method" has ever been done by the Department so that we could see how much more difficult or expensive it would be to calculate it or, more importantly, how it compares with the "simplified formula." Even one example of comparison would be helpful in trying to understand what is involved. At the hearing, counsel for OSFA admitted that the difficulty and expense of calculating liabilities under the "alternative method" was much greater than the difficulty and expense of calculating liabilities under the "simplified formula", but argued that this difference was irrelevant. Hearing .Transcript at 85-87. This argument, however, misses the point. One cannot determine how the "simplified formula" compares with the statutory formula or how difficult or expensive calculating the liabilities under the alternate formula would be since the Department has failed to present any evidence showing a comparison, not even in one single, simple example. The problems caused by the absence of this kind of evidence were expressed repeatedly by the tribunal during oral argument. Hearing Transcript at 82-97. The significant point which deserves emphasis is the fact that one cannot determine how accurate the "simplified formula" is compared to the precise calculation under the "alternative method" when the "alternative method" has not been utilized. In the absence of a competent regulation or departmental directive, there is no way of making a comparison between the "simplified" and the statutory formulas.*

Footnote: 10 [10] *The words "course" and "program" will be used interchangeably throughout the opinion to denote a sequence of instruction that does not lead to the granting of a degree. A program may consist of one or more courses, but the word "program" here indicates a sequence of instruction that does not lead to the granting of a degree. Programs that do lead to the granting of a degree will be so specified or will be described as "degree programs." The current definition of an "educational program" under 34 C.F.R. § 600.2 also denotes a degree program.*

Footnote: 11 [11] *Berk's director stated that she contacted NATTS after the audit and got verbal responses from several committee members and they said they couldn't locate this letter. Hearing Transcript at 62.*

Footnote: 12 [12] *The current 34 C.F.R. § 600.5 (1991) is virtually identical to the former 34 C.F.R. § 668.3 (1986), except that the present regulation contains an expanded description of the ability to benefit test, which is not at issue here.*

Footnote: 13 [13] *It is worth noting that arguments of counsel for an administrative agency do not have the probative force of an official agency interpretation. See 2A SUTHERLAND, STATUTORY CONSTRUCTION § 49.05 (4th ed.), at 363.*