

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

IN THE MATTER OF
EMPIRE TECHNICAL SCHOOL,
Respondent.

Docket No. 91-53-SP

Student Financial
Assistance Proceeding Respondent.

DECISION

Appearances:

Leslie H. Wiesenfelder, Esq., and Kelli J. Crummer, Esq., Dow, Lohnes & Albertson, Co-Counsel for the Empire Technical 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.

Based upon an audit of Empire Technical School (Empire or ETS) the Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (Department) issued a Final Audit Determination (FAD) on May 29, 1991. Finding 1 of that determination was that a number of enrolled students at Empire did not meet the admission requirements mandated by the institution's New York State license to operate as a postsecondary institution of higher education. Consequently, the existence of such enrollment resulted in an estimated \$1,701,000 of unsupported cost. Finding 2 stated that Pell Grant payments were made to students who failed to complete the required clock hours of instruction, resulting in questioned costs of \$210,000.

Empire filed a Request for Review of the FAD, with exhibits, on July 18, 1991, and requested a hearing on the record before an administrative law judge. Empire also filed a Motion for Access to Records. The tribunal denied Empire's Motion for Access to Records because it amounted to a request for discovery, which is prohibited under 34 C.F.R. § 668.117(b).

Briefs and exhibits were filed by the parties who also submitted a Joint Memorandum of Stipulations of Fact and Law.

II. ISSUES.

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

1. Has OSFA met its burden of production to establish a prima facie case as to the repayment liabilities asserted against Empire under Finding No. 1?

a. Did Empire's student files that were the subject of the audit contain sufficient documentation that the students had high school diplomas, equivalency diplomas, or other suitable documentation of secondary school completion as is required to comply with the law and regulations governing Title IV student financial assistance programs?

b. Are sworn student affidavits, student self-certifications, or U.S. military discharge papers acceptable documentation that students had high school diplomas, equivalency diplomas, or other suitable documentation of secondary school completion?

2. Has OSFA met its burden of production to establish a prima facie case as to the repayment liabilities asserted against Empire under Finding No. 2?

a. Did Empire disburse an estimated \$210,000 in second Pell Grant payments to students who failed to complete the required clock hours of instruction and thus were ineligible to receive the second Pell Grant award payments made by Empire to them during the award years 1985-86 through 1988-89?

b. Did the statement in Empire's catalog that, "there are no excused absences," apply to all Empire students or only to those students who were not making satisfactory academic progress?

c. Did OSFA's Initial Brief introduce a different basis for Finding No. 2 from the one contained in the final audit determination?

3. If OSFA has met its burden of production to establish a prima facie case as to any specific students, has Empire, in turn, met its burden of persuasion that expenditures questioned or disallowed were proper as to such specific students?

III. STIPULATIONS OF LAW.

The parties have jointly submitted a document in which they purport to stipulate to the following points of law. However, this tribunal is in no way bound by these stipulations, nor does it express any opinion as to the correctness of these stipulations, except as discussed expressly or impliedly in the Opinion section of this decision. The document stated as follows:

1. At Section 126.4(a) the Regulations of the Commissioner of Education state that "schools shall conduct only those curricula or courses which have been approved by the commissioner." Among the data required by Section 126.4(a) to be submitted to the commissioner for approval of courses or curricula is information regarding the school's "minimum entrance requirements."

2. No Federal statute or regulation governing Title IV requires that an actual copy of the high school diploma or GED itself be in the institution's files in order to establish "proper documentation" of high school graduation.

3. Proper documentation of high school diploma or GED under the Title IV student financial assistance programs is as stated in a letter from Fred Sellers, Chief, Policy Section, Pell Grant Branch, Division of Policy and Program Development, OSFA:

In the case of institutions who require a high school diploma for admittance, neither the law nor the regulations governing the Title IV student financial assistance programs require that the institution obtain a copy of the student's diploma. The institution can rely on a certification which the student provided on an application or other document.

4. OSFA's policy on "proper documentation" of high school diploma or GED for foreign students is as stated in the February 7, 1989 letter from Ms. Carney M. McCullough, Chief of OSFA's Pell Grant Policy Section:

If a student provides the institution with a written statement attesting that he or she has graduated from high school in a foreign country, the student's statement is sufficient to permit the institution to regard the student as a high school graduate for Title IV purposes.

5. New York State has the authority to determine whether Empire has acted in a fashion inconsistent with its New York State license. New York State has not formally notified Empire that it has made such a finding.

6. An excused class absence is any class absence for which a student is not required to attend a make-up class in order to receive course credit towards graduation.

7. No statute or regulation of the U.S. Department of Education or New York State prohibits an institution's employees or admissions representatives, even if remunerated based on commissions, from acting as notaries if they are in fact notaries.

8. The New York State, Regulations of the Commissioner of Education at Section 126.4(e) state:

(e) Each school shall establish and maintain attendance policies and regulations, acceptable to and approved by the State Education Department, in accordance with the following requirements:

(1) Any student who is absent more than 20% of the total length of the program of instruction who has not maintained satisfactory grades or academic progress, shall be dismissed. The provisions of these regulations pertaining to the payment or refund of tuition shall be applicable to a student so dismissed.

(2) Each school shall have a written policy concerning tardiness and early dismissal.

(3) For purposes of determining the proportion of time a student was enrolled in a course or curriculum when such student leaves before finishing the entire course or curriculum, the school may regard as attendance such absences and tardiness as may have occurred between the first and last day of attendance.

(4) Any make-up session for attendance purposes shall be approved by the licensed school director, and shall consist of instruction in that portion of the course or curriculum which was not received by the student as a result of absences. A record of make-up sessions shall be maintained. Any charge for make-up sessions shall be expressed on the enrollment agreement.

(5) In the case of a prolonged illness or accident, death in the family, or other special circumstances that make attendance impossible or impractical, a leave of absence may be granted to the student if requested in writing by the student or his designee. The approval of such leaves of absence shall be in writing by the school director. No monetary charges or accumulated absences may be assessed to the student during a leave of absence.

(6) Schools may establish attendance requirements permitting less absence and tardiness.

(7) School policy and regulations relating to attendance and leaves of absence shall be submitted to the department for approval prior to implementation and shall be published in the school catalog. Unless the department notifies the school, within 60 days after the receipt of such proposed policy or regulations, that the same have been disapproved in whole or in part, such policy or regulations shall be deemed to have been approved.

(8) A record shall be maintained for the attendance of students at each class, laboratory or session.

(9) Students are eligible to receive Pell Grants and GSLs only if they attend institutions that are eligible to participate in these Federal student financial assistance programs.

(10) In order to be eligible to participate in the Federal student financial assistance programs, an institution must be legally authorized to provide postsecondary education in the State in which it is physically located.

(11) Empire must be authorized by New York State in order to operate as an eligible institution and to permit its students to receive Pell Grants and GSLs.

(12) Incident to the approval from the New York State Department of Education to offer a particular course of instruction, an institution's enrollment requirements for admission to the particular course are also approved.

(13) Institutions must disburse Pell Grants consistent with established standards for payment periods.

(14) ED requires that an academic year equal 900 clock hours.

(15) The second of two payment periods for a Pell Grant at Empire was after completion of 300 clock hours.

(16) Consistent with the school's attendance policy, a school may take into consideration "excused absences" in calculating Pell Grant payment periods, as long as students do not have to make up the hours missed before receiving a degree or certificate.

(17) OSFA may only pursue findings in this proceeding that were identified in the Final Audit determination, since Empire had no notice of any other findings.

IV. EXHIBITS.

A. LIST OF EXHIBITS.

1. OSFA's Exhibits.

Ex. E-1. Final Audit Determination letter, dated May 29, 1991.

Ex. E-2. Final Audit Report, dated November 26, 1990.

Ex. E-3. Pell Grant Program Student Payment Summary, dated September 25, 1989.

Ex. E-4. Letter from New York State Education Department to OIG auditors, dated December 20, 1990.

Ex. E-5. Empire catalog, 1987-1989.

Ex. E-6. Sworn statement from (student name}, dated May 28, 1985.

Ex. E-7. Sworn statement from an Empire student, dated January 25, 1989.

Ex. E-8. Sworn statement from (student name}, dated April 17, 1989.

Ex. E-9. Sworn statement from (student name}, dated May 19, 1987.

Ex. E-10. Sworn statement from (student name}, dated May 29, 1987.

Ex. E-11. Sworn statement from {student name}, dated June 17, 1987.

Ex. E-12. Sworn statement from (student name}, dated October 15, 1986.

Ex. E-13. Sworn statement from an Empire student, dated August 16, 1985.

Ex. E-14. Sworn statement from {student name}, dated June 12, 1985.

Ex. E-15. Sworn statement from {student name}, dated September 9, 1985.

Ex. E-16. Military Discharge Certificate of {student name}.

Ex. E-17. Military Discharge Certificate of {student name}.

Ex. E-18. Military Discharge Certificate of {student name}.

Ex. E-19. Negative confirmation of {student name} high school graduation received from Edward R. Murrow High School.

Ex. E-20. Negative confirmation of GED certificates allegedly received by {student name} and {student name}.

Ex. E-21. Invalid high school diploma of {student name}.

Ex. E-22. Student Questionnaire of {student name}.

Ex. E-23. Student Questionnaire of {student name}.

Ex. E-24. Student Questionnaire and purported foreign high school diploma of {student name}.

Ex. E-25. Student Questionnaire and purported foreign high school diploma of {student name}.

Ex. E-26. Student Questionnaire and negative confirmation of high school graduation of {student name}.

Ex. E-27. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-28. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-29. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-30. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-31. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-32. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements. Ex.

Ex-33. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements. Ex.

E-34. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-35. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-36. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-37. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-38. Empire documentation in student file of {student name} establishing attendance record of student and Pell Grant disbursements.

Ex. E-39. New York State education laws.

Ex. E-40. Regulations of Commissioner of New York State Department of Education.

Ex. E-41. Memo to File from OIG auditor, dated January 23, 1990.

Ex. E-42. Department's Student Financial Assistance Handbook, 1990-91, concerning calculation of Pell Grant payments.

2. EMPIRE's Exhibits.

Ex. R-1. Final Audit Determination letter, dated May 29, 1991.

Ex. R-2. A copy of a letter from {student name} to Mr. Fred Sellers, dated August 24, 1987.

Ex. R-3. Copies of sworn student certifications, Form DD 214s, student questionnaires, letters confirming graduation status, GEDs, student IDs and college bulletins, and student financial aid applications for various Empire students.

Ex. R-4. A copy of a letter from Mr. Fred Sellers to Mr. Blain Butnerf dated August 17, 1988.

Ex. R-5. A copy of a letter from Mr. Blain Butner to Mr. Carney McCullough, dated February 7, 1989.

Ex. R-6. Affidavit of {student name}.

Ex. R-7. Affidavit of {student name}.

Ex. R-8. Portion of brief submitted by OSFA in another, unrelated case, dated May 27, 1988.

Ex. R-9. Supplemental affidavit of {student name}.

Ex. R-10. Dear Colleague letter GEN-90-33, dated September 1990.

Ex. R-11. Empire high school graduation/GED documentation listing.

Ex. R-12. Revision of summary of projected disallowances, letter confirming graduation status, GED, student questionnaire, and enrollment agreement for various Empire students.

Ex. R-13. Department of Defense instructions for DD Form 214.

B. OBJECTIONS TO EXHIBITS.

1. OSFA'S Objections to Exhibits.

OSFA objects to the consideration of R-8 and R-13. OSFA objects to R-8 on the grounds that it is irrelevant and immaterial. OSFA objects to R-13 based on the grounds that it is irrelevant and without category of admissibility under 34 C.F.R. § 668.116(e) (1).

Disposition of Objections.

The objection to R-8 is sustained; however, the material therein will be regarded as part of the argument in Empire's brief. The objection to R-13 is overruled since part of the exhibit has already been made a part of the stipulation agreed to by both parties.

2. Empire's Admissions and Objections to Exhibits.

a. Empire's Admissions as to Exhibits.

Empire admits the authenticity and admissibility if the following exhibits, and does not object to their being admitted into evidence; subject, however, to the caveat that Empire is not agreeing that they are admissible for the truth of the statements made therein, but only as evidence that the statements were made:

E-1-1-9

E-2-1-25

E-3-1-33

E-4-1

Empire admits the authenticity and admissibility of the following exhibits, and does not object to their being admitted into evidence:

E-2-26-56

E-5-1-11

E-6-1

E-9-1
E-12-1
E-13-1
E- 15 - 1
E-16-1-2
E-17-1
E-18-1
E-20-2-3
E-21-1
E-22-1-2
E-23-1-2
E-24-1-3
E-25-1-2
E-26-1-3
E-39-1-5
E-40-1-8
E-42-1-22

b. Empire's objections.

Empire objects to E-2-57-67, as irrelevant since they do not relate to any of the 21 students who are the subject of Finding No. 1.

Empire objects to E-7-1 in its entirety, as duplicative of R-3-1, except for extraneous and unidentified handwriting. Empire claims to have no knowledge of any of the writing on E-7-1 that is not also on R-3-1.

Empire objects to E-8-1, as duplicative of R-3-5, except for extraneous and unidentified handwriting. Empire claims to have no knowledge of any of the writing on E-8-1 that is not also on R-3- 5.

Empire objects to E-10-1 in its entirety, as duplicative of R-3-10, except for extraneous and unidentified handwriting. Empire claims to have no knowledge of any of the writing on E-10- 1 that is not also on R-3-10.

Empire objects to E-11-1 in its entirety, as duplicative of R-3-15, except for extraneous and unidentified handwriting. Empire claims to have no knowledge of any of the writing on E-11- 1 that is not also on R-3-15.

Empire objects to E-14-1 in its entirety, as duplicative of R-3-31, except for extraneous and unidentified handwriting. Empire claims to have no knowledge of any of the writing on E-14- 1 that is not also on R-3-31.

Empire objects to E-19-1 in its entirety. The grounds claimed are that: the document is of unknown origin; is not self-authenticating since it is a form created by OSFA; contains at least two different sets of handwriting and is legally irrelevant to any issue in this case. {student

name} DD 214 (Exhibit R-3-9) states he has a high school diploma or equivalent; even assuming Exhibit E-19-1 is authentic and admissible for the truth of the statements made therein, which Empire denies, Empire claims that E-19-1 does not contradict R-3- 9; moreover, Empire asserts that there is no evidence anywhere in the record that Empire ever had E-19-1; and Empire states that it is not a guarantor of the information its students provide.

Empire objects to E-20-1 as legally irrelevant to any issue in this case, and claims that E-20-1 does not contest the high school equivalency diplomas for {student name} and {student name}; Empire also claims that E-20-1 merely indicates that the New York State Education Department cannot verify them without further information, following receipt of which "we will be able to check our records further"; and that there is no evidence that Empire had any reason to question these diplomas (E-20-23), which are also R-12-6 and R-3-36, respectively, and that state of affairs is not altered by E-20-1.

Empire objects to E-21-2 in its entirety. The grounds claimed are that: the document is of unknown origin; is not self-authenticating since it is a form created by OSFA; contains at least two different sets of handwriting and is legally irrelevant to any issue in this case; that it is also internally inconsistent and, therefore, meaningless, because it both states when (student name) supposedly "Dropped Out" and who was principal when he "Graduated"; that in his Student Questionnaire (Exhibit R-3-29), {student name} certifies he is a high school graduate; even assuming Exhibit E-21-2 is authentic and admissible for the truth of the statements made therein, which Empire denies, there is no evidence anywhere in the record that Empire ever had E-21-2; and Empire is not a guarantor of the information its students provide.

Empire objects to E-25-3 as irrelevant to any issue in this case and containing handwriting of unknown origin.

Empire objects to E-26-4 in its entirety. The grounds claimed are that: the document is of unknown origin; is not self-authenticating since it is a form created by OSFA; contains at least two different sets of handwriting and is legally irrelevant to any issue in this case; that it is also internally inconsistent, and thus, meaningless, because it both states the date when {student name} supposedly "Dropped Out" and who was principal when he "Graduated"; that in his Student Questionnaire (Exhibit R-3-21-22), {student name} certifies that he graduated from Boys and Girls High School, as does the letter from the high school itself, which is Exhibit R-3-23; that even assuming Exhibit E-26-4 is authentic and admissible for the truth of the statements made therein, which Empire denies, there is no evidence anywhere in the record that Empire ever had E-26-4; what Empire had was R-3-21-23, which are more than sufficient as a matter of law, and, in any event, Empire is not a guarantor of the information its students provide.

Empire objects to each of the following on the grounds of relevancy and admissibility:

E-27-1
E-28-1
E-29-1
E-30-1
E-31-1

E-32-1
E-33-1
E-34-1
E-35-1
E-36-1
E-37-1
E-38-1

The additional basis for the objection is that these exhibits purport to relate to Finding No. 2; however, Empire contends, for the reasons set forth in Section II of Empire's Reply Brief, these exhibits are irrelevant since there is no showing that these 12 students are the subject of Finding No. 2. Empire asserts that they also are inadmissible since OSFA cannot go outside the single issue framed in the Final Audit Determination.

Empire objects to E-41-1 as triple hearsay that is irrelevant for any purpose in this case. To establish the law of the State of New York governing Empire with respect to this issue, which is the intended purpose of E-41-1, OSFA cannot rely on what someone of unknown knowledge and unknown authority "indicated" was required. Moreover, no effective date is stated for this alleged "requirement." Empire also claims that this exhibit is inadmissible because there is a total absence of any foundation; it is not self-authenticating; and it is not admissible for the truth of the statements therein. Since E-41-1 cannot be admitted for its truthfulness, it cannot be admitted at all according to Empire.

Disposition of Objections.

The objection to E-2-57-67 is sustained. The objections to E-7-1, E-8-1, E-10-1, E-11-1, E-14-1, E-19-1, E-20-1, E-21-2, E- 25-3, and E-26-4 are overruled. Hearsay evidence of this nature is admissible and there is some relevancy; however, the infirmities claimed are noted and the exhibits will be evaluated for probative value later. The objections to E-27-1, E-28-1, E 29-1, E-30-1, E-31-1, E-32-1, E-33-1, E-34-1, E-35-1, E-36-1, E 37-1, and E-38-1 are overruled, however, the probative value of the exhibits will be evaluated later.

The objections to E-41-1 are overruled because hearsay evidence of this type is admissible, however, for the reasons set forth in the decision this document has no probative value.

V. FINDINGS OF FACT AND OPINION.

A. STIPULATIONS OF FACT.^{1/}

1. The United States Department of Education (ED) issued a final audit determination letter to Empire dated May 29, 1991.
2. ED's Office of Inspector General (OIG) conducted field work at Empire from January through May 1990 incident to an audit of Empire.

3. The purpose of the OIG's audit was to determine whether Empire administered the Pell Grant and Guaranteed Student Loan (GSL) programs in accordance with applicable laws and regulations.

4. The OIG did a preliminary review of 25 student files as part of its audit work. These files were randomly chosen from a list of 806 potential students who received Pell Grants during award year 1988-89.

5. The OIG ultimately reached its conclusions based on an audit sample on 201 students. Twenty-five files in addition to the initial 25 were reviewed from award year 1988-89, 50 files were reviewed from award year 1987-88, 50 files were reviewed from award year 1986-87, and 51 files were reviewed from award year 1985-86.

6. Empire is authorized to provide a program of education beyond the secondary level by the New York State Department of Education.

7. Empire applied to the New York State Department of Education to receive approval to offer its particular courses of instruction.

8. The two programs addressed in the OIG audit were Empire's Computer Programming and Medical Secretary with Word Processing courses.

9. Seventy-seven of the 201 student files reviewed involved students who were enrolled in either the Computer Programming or Medical Secretary with Word Processing courses.

10. Empire's Computer Programming and Medical Secretary with Word Processing courses were approved by the New York State Department of Education as courses of instruction with an enrollment requirement that applicants have achieved either a high school diploma or General Education Development (GED) certificate.

11. Empire's 1987-1989 Bulletin states:

In cases where a high school diploma or equivalency is required for admission, documentation to confirm that this requirement is met must be brought to the school. Applicants not having such documentation in their possession will be asked to sign a form authorizing appropriate agencies or institutions to release this information to (Empire). In cases where such contact is impractical or impossible, as with certain secondary schools in foreign countries, a sworn affidavit is acceptable as evidence of meeting entrance requirements.

12. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that she was graduated from high school in the Soviet Union.

13. In the student file of Empire student, {student name}, there was a signed student questionnaire form in which he stated that he was a high school graduate, and a copy of a document that has his name on it and purports to be his foreign high school diploma.

14. In the student file of Empire student, {student name}, was a DD Form 214, Military Discharge Certificate, which includes a block that is checked to indicate that he was a high school graduate.
15. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that he graduated from Gimbol High School in Columbia.
16. In the student file of Empire student, {student name}, there was a DD Form 214, Military Discharge Certificate, which includes a block that is checked to indicate that he was a high school graduate.
17. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that he was graduated from Manchester of Commerce High School in England, and a signed student questionnaire form in which he stated that he was a high school graduate.
18. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that she was graduated from Georgetown High School in Guyana, and a signed student questionnaire form in which she stated that she was a high school graduate.
19. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that he graduated from 4-7 High School in China, a signed student questionnaire form in which he stated that he was a high school graduate, and a copy of a document that has his name on it and is purported to be his diploma from Beijing Aeronautics Institute.
20. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that she was graduated from Colegio National Manta High School in Manta, Ecuador, and a signed student questionnaire form in which she stated that she was a high school graduate.
21. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that he was graduated from Covent Garden High School in Guyana.
22. In the student file of Empire student, {student name}, there was a signed student questionnaire form in which he stated that he was a high school graduate, and a letter from the principal of Boys and Girls High School on the high school's letterhead which stated that {student name} was a graduate.
23. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that she was graduated from high school in Jamaica.

24. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that she was graduated from Kinsale High School in the West Indies, and a signed student questionnaire form in which she stated that she was a high school graduate.
25. In the student file of Empire student, {student name}, there was an Empire form with the student's notarized signature on it and states that he was graduated from high school in Guyana.
26. In the student file of Empire student, {student name}, there was a signed student questionnaire form in which he stated that he possessed a GED certificate.
27. In the student file of Empire student, {student name}, there was a signed student questionnaire form in which he stated that he was a high school graduate and a copy of a document that has his name on it and is purportedly a graduation diploma from Andrew Jackson High School.
28. In the student file of Empire student, {student name}, there was a signed student questionnaire form in which she stated that she was a high school graduate, and a copy of a document that has her name on it that purports to be her foreign high school diploma.
29. In the student file of Empire student, {student name}, there was a signed student questionnaire form in which he stated that he possessed a GED certificate.
30. In the student file of Empire student, {student name}, there was a copy of a document that had her name on it that purported to be her GED certificate.
31. In the student file of Empire student, {student name}, there was a copy of a document that had his name on it that purported to be his GED certificate.
32. In a letter to the Office of Inspector General, the New York State Department of Education stated that it could not locate any information in its records concerning the awarding of GED certificates to {student name} and {student name}. The letter requests information concerning the test centers where the GED tests were taken so that the records could be checked further.
33. Empire was unable to locate any documentation suggesting {student name} was a high school graduate or had a GED. His file contained a DD Form 214, Military Discharge Certificate, which included a notation that he was not a high school graduate.
34. The Empire form which students signed to state that they were graduated from high school was notarized by one of two notaries who were also ETS admissions representatives. ETS admissions representatives received remuneration based on either a straight commission contingent upon admissions that included incentives involving admissions.
35. The audit determination letter requests that Empire refund to ED \$24,125 in Pell Grant awards and refund \$32,908 to appropriate GSL lenders for providing Federal student financial assistance to allegedly ineligible students.

36. Empire measured its instruction in clock hours.

37. Empire offered courses of 600 clock hours in length.

38. Empire's 1987-89 Bulletin states:

The technical nature of (Empire) training makes it essential that a student be present for all class hours each instructional day. If a student must be absent, he is expected to notify the school in advance.

A student who is not maintaining Satisfactory Academic Progress (SAP) is not allowed to be absent for more than 20% of the total course hours for which he/she is registered. There are no excused absences.

39. The OIG audit found 8 Students in the 201 files reviewed who the auditor alleged improperly received second Pell Grant disbursements because absences were allegedly incorrectly added to class hours attended.

40. The OIG audit found 4 students in the 201 files reviewed who the auditor alleged improperly received second Pell Grant disbursements even if absences were added to class hours attended.

41. The audit determination letter requests that Empire refund \$7,332 for allegedly improper second Pell Grant disbursements.

42. Finding No. 1 of the audit is based exclusively on Empire's noncompliance with the alleged requirements of New York State regarding eligibility documentation.

43. Empire was operating with a New York state license during the audit period and prior to the OIG audit, no issue had been raised with Empire by New York State concerning the validity of Empire's license during the period covered by the audit. To date, New York state has not formally raised the issue with Empire concerning the validity of its license during the audited period.

44. Of the 21 students that are the subject of Finding No. 1 of the audit, ten allegedly obtained their high school or equivalency diplomas in the U.S. and ten allegedly obtained them outside the U.S.

45. Ten of the 21 students identified in Finding No. 1 of the audit had within their student files an Empire form which had the student's notarized signature on it and states that he or she had graduated from high school.

46. Twelve of the 21 students identified in Finding No. 1 of the audit had within their student files signed student questionnaires in which the student stated that he or she had graduated from high school. These questionnaires included this language prior to the student's signature:

I hereby certify the information provided herein is true and correct to the best of my knowledge and belief.

47. Empire had multiple forms of supporting documentation on record for several students. Documentation on record within certain student files included actual GED certificates and Department of Defense ("DD") form 214, entitled "Certificate of Release on Discharge From Active Duty."

48. Form DD 214 is signed by an authorized government official and includes a block in which the individual who is the subject of the form checks whether he or she has achieved a high school diploma or equivalent. Effective for the period of time at issue, the Department of Defense instructions for DD 214, among other things, expressly states:

B. APPLICABILITY AND SCOPE

* * *

DD Forms 214 and 215 (or other substitutes) will provide:

* * *

c. Appropriate governmental agencies with an authoritative source of information which they require in the administration of Federal and State laws applying to personnel who have been discharged, otherwise released, or transferred to a Reserve component of the Military Services.

* * *

POLICY AND PROCEDURES

a. DD Form 214 is an important record of service which must be prepared accurately and completely. Any unavoidable corrections and changes made in the unshaded areas of the form during preparation shall be neat, legible and initialed on all copies by the authenticating official. The recipient will be informed that making any unauthorized change or alteration of the form will render it void.

* * *

RESPONSIBILITIES

1. The DD Forms 214 and 215 are a source of significant and authoritative information used by civilian and governmental agencies to validate veteran eligibility for benefits.

49. Empire's records contained a letter of confirmation from Boys and Girls High School confirming that {student name} is a high school graduate.

50. Empire was entitled to rely on copies of a student's high school diploma or GED certificate as long as Empire had no conflicting documentation regarding the student's high school graduation, and the document appeared to be authentic. Subject to the above conditions, Empire is not a guarantor that the information its students provide is true.

51. Empire's policy on maintaining Satisfactory Academic Progress was the same throughout the award years 1985-86 to 1988-89 inclusive.

52. The 1983-85 Undergraduate Bulletin for John Jay College states that "an applicant for admission must present evidence of having received a high school diploma... or having passed a (GED) Examination." Empire had {student name} John Jay College student identification card in its files. Student identification cards are issued to students at an institution as a means of identifying those individuals as students of the institution.

53. The New York State Education Department in the letter approving Empire's Computer Programming and Introduction To Operations Course stated that "Each applicant must have a high school diploma, equivalency or other suitable documentation of secondary school completion..."

54. Empire's 1987-1989 Bulletin under the heading "GRADUATION REQUIREMENTS" states:

To be eligible for a Diploma or a certificate of Achievement, as well as the school's placement assistance, a student must complete the entire course of study with a passing grade average and must have his tuition paid in full. Specific graduation requirements vary by course and are therefore discussed under each course description.

55. For the Computer Programming course Empire's 1987-1989 Bulletin under "Graduation Requirements" states:

65 or better on course final examinations and a programming grade of 75 or better; course final examinations and programming grades each count as 50% of the final curriculum.

It contains no specific language on class attendance.

56. For the Medical Secretary with Word Processing course, Empire's 1987-1989 Bulletin under "Graduation Requirements" states:

70 or better on examinations; Midterm examinations carry twice the weight of other examinations; final examinations carry four times the weight of other examinations.

It contains no specific language on class attendance.

57. The repayment liabilities identified by the OSFA auditor in the audit findings for Empire were estimates allegedly based on the sample results.

B. OPINION AND ADDITIONAL FINDINGS OF FACT.

1. Burden of Production.

Toward the end of their respective briefs, both Empire and OSFA discuss the issue of the burden of proof. Empire argues that OSFA has failed to meet its burden regarding the repayment liabilities asserted under Finding Nos. 1 and 2. Empire points to the estimated liabilities calculated by OSFA based upon the student samples audited. Empire also claims that an additional element of liability under Finding No. 2 is that the students did not complete more than half of the course, and that because OSFA neither made nor established such an assertion, OSFA has failed to meet its burden of production. Empire contends that OSFA's burden of production requires OSFA to provide substantial evidence. Empire Initial Brief at 19-23. Empire Reply Brief at 19-20.

OSFA argues that it does not rely on estimated liabilities to establish its case, because specific minimum dollar liabilities are documented, and the school is given the option to calculate the precise additional amount owed. OSFA asserts that only if the school refuses to do so, are estimated liabilities imposed. As a result, OSFA contends, it has met its burden of production. OSFA Reply Brief at 15-16.

Under the Administrative Procedure 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 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. Dep't of Education (April 27, 1990) (Order); In The Matter of Sinclair Community College, Dkt. No. 89-21-S, U.S. Dep't of Education (May 31, 1991) (Decision); In The Matter of Stautzenberger College, Dkt. No. 90-102-SA, U.S. Dep't 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 FAD, has the burden of production (of going forward) to establish a prima facie case. Empire, the institution requesting the review, has the ultimate burden of persuasion to prove that it complied with the Title IV program requirements relating to documentation of high school diplomas or equivalents and disbursements of Pell Grants, 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 inferences sought to be established, namely that Empire's records did not contain sufficient documentation that the students had received high school diplomas or equivalents, or other suitable documentation of secondary school completion and that Empire improperly disbursed Pell Grant payments to certain students.

While Empire claims that OSFA has failed to meet its burden of production to establish a prima facie case because the FAD estimated liabilities for Empire in Finding Nos. 1 and 2, Empire apparently ignores the fact that the FAD also documented specific minimum dollar liabilities, as OSFA has argued. Finding No. 1 of the FAD found that of 201 files reviewed, 21 students who were enrolled in the institution's Computer Programming or Medical Secretary with Word Processing courses did not meet the admission requirements mandated by Empire's New York State license to operate as a postsecondary institution of higher education. On page 2 of the FAD, it states:

The auditor advised us that the 21 students cited received \$57,034 (\$24,125 in Pell Grant awards and \$32,909 in Stafford loan awards during the period of audit) . We are requesting that the institution refund \$24,125 in Pell Grant awards to the Department of Education. Repayment instructions are provided later. The institution must also refund \$32,909 to the appropriate Stafford loan lenders. . . .

See Stipulation of Fact No. 35.

Similarly, regarding Finding No. 2, the FAD states the following on page 5:

The auditor indicates in the audit that his review of 201 student files revealed 12 instances [sic] who were awarded Pell Grants prior to completing the required number of clock hours. If the institution had adhered to its established attendance policy of no excused absences, these 12 students would have been ineligible for Pell Grant payments totaling \$7,332. We are requesting that the institution refund \$7,332 to the Department of Education. . . .

See Stipulation of Fact No. 41.

In both Finding Nos. 1 and 2, the FAD requests Empire to review its files to determine if the students were eligible for awards disbursed and if the files are adequately documented, as well as to determine and refund to the Department all excess Pell Grant payments made to students who never completed the required clock hours of instruction to be eligible for such payments. Only if Empire refuses to undertake such review does the FAD indicate that the estimated liabilities will be imposed. For example, the FAD states on page 6 that "in the absence of a determination of excess Pell Grants [sic] payments made to students who never completed the required clock

hours of instructions [sic] to be eligible for payment, the institution may be required to refund \$210,000 to the Department."

The Secretary of Education has held, in In the Matter of Sinclair Community College, Dkt. No. 89-21--S, U.S. Dep't of Education (September 26, 1991) (Decision of the Secretary), that an audit report can be sufficient to meet OSFA's burden of production to establish a prima facie case. However, the case does not state that an audit report will **always** or **automatically** be sufficient to meet OSFA's burden of production to establish a prima facie case. The Secretary held in Sinclair that the audit report was sufficient in that case because:

The audit report is a government document, prepared in the normal course of business. The report was challenged by [the institution] only on the basis of methodology, and not on its' [sic] substantive calculations or findings. Having found that the report uses the appropriate methodology of applying [the institution's] established and published SSP policy, r find that it is sufficient to enable a reasonable person to draw from it the inference sought to be established.

Sinclair at 7.

Thus, the Secretary did not rule on whether the audit report in that case would be sufficient to meet OSFA's burden of production if the institution challenged its **substantive** calculations or findings. Consequently, this tribunal disagrees with the general statement made by OSFA in footnote 14 of its Reply Brief that the submission of the OIG audit report itself satisfies OSFA's burden of production. It may be that an audit report could satisfy OSFA's burden of production in a specific case, but this depends upon the adequacy of the contents of the audit report. OSFA must present sufficient evidence to enable a reasonable person to draw from it the inferences sought to be established, namely that Empire's files did not contain sufficient documentation that its students had received high school diplomas or equivalents, or had other suitable documentation of secondary school completion, and that Empire improperly disbursed Pell Grant payments to certain students. The FAD is evidence to support OSFA's view, but a FAD will not be enough if it is merely conclusory and does not include supporting documents or other evidence. As Empire quotes, "A prima facie case is . . . one in which the evidence in favor of a proposition is sufficient to support a finding in its favor, if all the evidence to the contrary be disregarded"32A C.J.S. Evidence § 1016 (1964) (footnote omitted) Or, as stated in Wigmore's treatise on the law of evidence, "[L]ess than preponderance is required, but the evidence should not be so thin that it would be dangerous for the jury to consider it." 9 J. WIGMORE, EVIDENCE § 2494, at 384 (1981) (portion of footnote 13).

Nonetheless, OSFA has satisfied its burden of production to establish a prima facie case as relates to certain students but not as to all. The specific names will be discussed later in this decision. Along with its initial brief, OSFA submitted OSFA Exhibits E-1 through E-42. These exhibits include, among other things, a copy of the May 29, 1991 FAD; a Final Audit Report dated November 26, 1990; letters from the New York State Education Department; an Empire catalog; sworn statements, student questionnaires, and military discharge certificates that were used as evidence of high school graduation by Empire students; "negative confirmations" of high school graduation for Empire students; Empire documentation in student files establishing attendance records and Pell Grant disbursements for various Empire students; and copies of New

York State education laws and regulations. If these exhibits are taken as true and all evidence to the contrary is disregarded, they are adequate to establish a prima facie case as to certain students who will be discussed later in this decision. The evidence presented is sufficient to enable a reasonable person to draw the inferences sought to be established, namely that Empire's files did not contain sufficient documentation that certain of its students had received high school diplomas or equivalents, or had other suitable documentation of secondary school completion, and that Empire improperly disbursed Pell Grant payments to certain students. Consequently; the ultimate burden of persuasion would shift to Empire to prove that its files as to certain students did contain sufficient documentation that those students had received high school diplomas or equivalents, or had other suitable documentation of secondary school completion, and that it properly disbursed Pell Grant payments to certain students.

2. Evidence Needed to Document That Students Had Graduated From High School or Had Obtained Equivalency Diplomas.

As to finding No. 1, the fundamental issue is whether the student files that were the subject of the audit contained sufficient documentation that the students in question had graduated from high school or had obtained equivalency diplomas or other suitable documentation of secondary school completion.

Empire argues that it properly documented the fact that its students had a high school diploma or equivalent. Empire contends that Finding No. 1 is based on a wholly erroneous interpretation of both federal and New York State law as to what constitutes "proper documentation." Empire claims that even though the FAD says "proper documentation" requires an actual copy of a diploma or GED, and for foreign students, direct communication with the secondary school or through the embassy of the country where the foreign school is located, no statute or regulation requires this, and various Department letters indicate that schools can rely on student certifications. Nor does New York law define the quantity or quality of documentation needed, according to Empire. Moreover, Empire asserts that there cannot be a different standard for what constitutes "proper documentation" for purposes of Title IV of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. ? 1070 et seq., based on where a particular school is located. Empire points out that OSFA cannot make up and enforce its own rules as to what constitutes "proper documentation," but only those regulations duly promulgated in accordance with the requirements of GEPA1 Reply Brief at 7-15.

Empire also asserts that the record contains "proper documentation" of a high school diploma or equivalent for 20 of the 21 students on which Finding No. 1 is based. As evidence, Empire cites sworn student affidavits, student questionnaires, Department of Defense Form 214 (DD 214), and an actual copy of a GED. Finally, Empire also claims that OIG had in its files a copy of the GED for one student who OSFA nonetheless included in Finding 1, and that OIG incorrectly claimed to have received "negative confirmation" of high school graduation for one student despite the fact that the auditor's workpapers included a letter from the high school confirming that the student had graduated. Empire Initial Brief at 9-16.

OSFA argues that Empire disbursed Title IV, HEA program funds to students who did not satisfy the admission requirements mandated by its New York State operating license and therefore did not comply with the Department's eligibility requirements. OSFA Initial Brief at 8.

OSFA argues that maintenance of a State license was a prerequisite to Empire's participation in the federal financial assistance programs. OSFA contends that Empire's Computer Programming and Medical Secretary with Word Processing courses were approved by the New York State Department of Education as requiring either a high school diploma or General Equivalency Diploma (GED) for admission.^{2/} OSFA also disputes Empire's argument that enforcing New York State requirements would violate the GEPA section that states that all Department regulations shall be uniformly applied and enforced throughout the fifty states. ^{3/}

According to OSFA, the federal standard that is being enforced is that schools act consistently with their State licenses. OSFA notes that individual States can choose to apply more stringent standards to schools than are required under the federal regulations. OSFA Initial Brief at 8-9. OSFA Reply Brief at 2-5.

OSFA contends that, since the New York State Department of Education approved these courses as requiring either a high school diploma or GED for admission, Empire must receive from prospective students for these two courses, a copy of either a high school diploma or a GED certificate. OSFA also claims that Empire's own policy required documentation of a high school diploma or equivalency and that Empire admitted students with less documentation than this. OSFA cites examples of students who were admitted based on notarized statements alleging that they were graduates of a foreign high school, or on military discharge certificates, or on statements on student applications. OSFA asserts that New York State officials require schools to document high school graduation of foreign students through direct communication with the secondary school or through the embassy of the country where the foreign school is located. OSFA also argues that there is no provision in the (New York) Commissioner's Regulations that allows acceptance of military discharge certificates or unsupported statements on student applications as evidence of high school graduation. OSFA Initial Brief at 8-11, OSFA Reply Brief at 2-10.

To paraphrase OSFA's description of the Title IV, HEA programs, students are authorized to receive federal student financial assistance funds only if they attend an institution that is eligible to participate in the Title IV, HEA programs. 34 C.F.R. § 668.7. For Pell Grant purposes, an eligible institution is an institution of higher education. 20 U.S.C. § 1088 (a) . A proprietary institution of higher education is one type of institution that is eligible to receive Pell Grants. 20 U.S.C. § 1088 (b) . To be eligible for participation in the GSL programs, a school such as Empire must qualify as a "vocational school". 20 U.S.C. § 1085(c). These statutory requirements of institutional eligibility include the requirement that the institution must be legally authorized to provide postsecondary education in the State in which it is physically located. 20 U.S.C. § § 1088(b), 1085(c), and 1141(a).

Empire, in complying with the law and regulations governing Title IV student financial assistance programs, must thereby comply with the State of New York law dealing with Empire's authorization to provide postsecondary education in that state.

In that regard the following stipulations of fact and law, entered into by the parties, set forth some of the actions which Empire took towards compliance with the law, as well as the State of New York approval of courses, and the agreement by the parties as to what documentation of high school graduation or equivalency is required for Title IV purposes:

Empire applied to the New York State Department of Education to receive approval to offer its particular courses of instruction. (Stipulations of Fact, Paragraph 7).

At Section 126.4(a) the Regulations of the Commissioner of Education state that "Schools shall conduct only those curricula or courses which have been approved by the commissioner." Among the data required by Section 126.4(a) to be submitted to the commissioner for approval of courses or curricula is information regarding the school's "minimum entrance requirements". (Stipulations of Law, Paragraph 1).

Empire's Computer Programming and Medical Secretary with Word Processing courses were approved by the New York State Department of Education as courses of instruction with an enrollment requirement that applicants have achieved either a high school diploma or General Education Development (GED) certificate. (Stipulations of Fact, Paragraph 10).

The New York State Education Department in the letter approving Empire's Computer Programming and Introduction To Operations Course stated that "Each applicant must have a high school diploma, equivalency or other suitable documentation of secondary school completion...". (Stipulations of Fact, Paragraph 53) .4/

Empire's 1987-1989 Bulletin states:

In cases where a high school diploma or equivalency is required for admission, documentation to confirm that this requirement is met must be brought to the school. Applicants not having such documentation in their possession will be asked to sign a form authorizing appropriate agencies or institutions to release this information to (Empire) . In cases where such contact is impractical or impossible, as with certain secondary schools in foreign countries, a sworn affidavit is acceptable as evidence of meeting entrance requirements." (Stipulations of Fact, Paragraph 11).

Incident to the approval from the New York State Department of Education to offer a particular course of instruction, an institution's enrollment requirements for admission to the particular course are also approved. (Stipulations of Law, Paragraph 12).

Proper documentation of high school diploma or GED under Title IV student financial assistance programs is as stated in a letter from Fred Sellers, Chief, Policy Section, Pell Grant Branch, Division of Policy and Program Development, OSFA:

In the case of institutions who require a high school diploma for admittance, neither the law nor the regulations governing the Title IV student financial assistance programs require that the institution obtain a copy of the student's diploma. The institution can rely on a certification which the student provided on an application or other document. (Stipulations of Law, Paragraph 3 [emphasis added]) .

OSFA's policy on "proper documentation" of high school diploma or GED for foreign students is as stated in the February 7, 1989 letter from Ms. Carney M. McCullough, Chief of OSFA's Pell Grant Policy Section:

If a student provides the institution with a written statement attesting that he or she has graduated from high school in a foreign country, the student's statement is sufficient to permit the institution to regard the student as a high school graduate for Title IV purposes . (Stipulations of Law, Paragraph 4).

New York State has the authority to determine whether Empire has acted in a fashion inconsistent with its New York State license. New York State has not formally notified Empire that it has made such a finding. (Stipulations of Law, Paragraph 4).

Empire was operating with a New York state license during the audit period and prior to the OIG audit, no issue had been raised with Empire by New York State concerning the validity of Empire's license during the period covered by the audit. To date, New York state has not formally raised the issue with Empire concerning the validity of its license during the audited period. (Stipulations of Fact, Paragraph 43).

It is clear from the above stipulations entered into by OSFA and Empire that when a high school diploma is required for admittance to an institution, in order to comply with the law and regulations governing the Title IV student financial assistance programs, the institution can rely on a certification by the student as to the existence of such diploma.

It is also clear that Empire's license from the State of New York was in effect during the period involved in this case, that the two courses in question in this case were approved by the State of New York, that Empire's enrollment requirements were approved by the State of New York, and that there is no probative evidence in the record that the State of New York has raised any question as to whether Empire has violated any state law as to the entrance requirements for the two subject courses.

It is also clear that when the parties agreed that an institution can rely on a certification by the student as to a high school diploma in order to comply with the law and regulations governing Title IV student financial assistance programs, this right of reliance applied to all circumstances relating to Title IV student financial assistance programs, including the circumstances of the present case. This is so because OSFA is in this case involved in doing no more and no less than enforcing the law and regulations governing Title IV student financial assistance programs in exactly the same terms and conditions as existed when it issued the two letters referred to above in Stipulations of Law Nos. 3 and 4. Then, as at the time of the subject audit, the requirements of compliance with the licensing procedures of the State of New York were applicable to Empire. This also included the New York State requirements for approval of courses of instruction.

OSFA appears to be attempting to distance itself from the effect of its pronouncements in the two above referenced letters by creating an impression that its earlier pronouncements and advice to institutions, such as Empire, should not now be construed to have covered all phases of OSFA's enforcement of the law and regulations governing Title IV student financial assistance programs.

This relates more specifically to OSFA's enforcement of the federal requirement that an institution must be legally authorized to provide postsecondary education in the State in which it is physically located. As stated above, that federal requirement was just as much a part of the law and regulations governing Title IV student financial assistance programs when the earlier advice was given to these institutions, as it is a part of the law and regulations governing Title IV student financial assistance programs which OSFA is endeavoring to enforce in this proceeding.

Another pronouncement by OSFA similar to its statement in the above referenced letters was set forth in a September 1990 "Dear Colleague" letter, GEN 90-33, which stated, in part, as follows:

Q-10. Must an institution document a student's receipt of a high school diploma or GED or may it rely on a student's certification that he or she has a high school diploma or GED?

A-10. For purposes of Title IV eligibility, the institution may rely upon the student's certification unless it has conflicting information in its files. However, the institution must ensure that it retains in its files a copy of the certification by which the student claimed to have a high school diploma or GED. An institution may require that the student provide supporting documentation. The Department strongly encourages, but does not require, an institution to collect such documentation.

Exhibit R-10-2 (emphasis added).

In neither of the two above mentioned letters nor in the "Dear Colleague" letter did OSFA give any indication that there were or could be separate State law requirements as to how an institution documents that its students are high school graduates. It would be totally unfair and inequitable for OSFA to render official advice as to the procedure an institution may follow in order to comply with the law and regulations governing Title IV student financial assistance programs and then later, after that institution followed that advice, declare that the procedure followed constitutes a noncompliance with a specific part of the law and regulations governing Title IV student financial assistance programs 5/ which results in a substantial liability exceeding one million dollars. 6/

The effect of OSFA's arguments is that the act of following its advice in the above referenced letters results in a violation of the requirements of the State of New York. A discussion of this type is actually irrelevant to the final determination in this case since OSFA is bound by its prior advice and there is no probative evidence in the record that the State of New York has ever questioned whether Empire complied with the New York requirements. Empire has satisfied the federal requirement that it be legally authorized to provide postsecondary education in the State in which it is physically located.

Consequently, OSFA, while it is, in this case, in the process of enforcing the law and regulations governing Title IV student financial assistance programs, cannot require Empire to do more than is required in the advice it gave in the three referenced letters. And any further discussion in an attempt to interpret New York's requirements is irrelevant to the determination of this case .

Aside from the above mentioned limitations as to the parameters of OSFA's enforcement in this case, it can be argued that the procedures approved by OSFA in the three letters do comply with the New York requirements.

a. The entrance requirements here as prescribed by New York in the latest course approval letter are that the applicant must have a high school diploma, equivalency, or other suitable documentation of secondary school completion.

b. The above describes only the requirement placed upon the applicant. § 126.11 of the New York regulations contains the requirement as to what the records and files of the school shall include. There it states:

(8)documentation that each student has met the entrance requirements of each course or curriculum for which the student has enrolled;

N.Y. Comp. Codes R. & Regs. tit. 8, § 126.11(8) (1990). [7/](#)

c. The State of New York has not specifically prescribed what that documentation is to be. It can therefore be argued that the documentation which OSFA has approved, namely the student's certification, is adequate documentation under the New York regulation as well.

However, as stated above, discussion of that issue is irrelevant to this case since it is OSFA that has raised the issue and OSFA is bound by its advice given in the three letters referenced above, and the record contains no probative evidence that New York has found any violation of its regulations.

Aside from OSFA's advice as to what documentation needs to be contained in the institution's records, Empire, in its 1987-1989 Bulletin, prescribed for itself even greater requirements than OSFA approved. In the Bulletin it stated that:

"In cases where a high school diploma or equivalency is required for admission, documentation to confirm that this requirement is met must be brought to the school. Applicants not having such documentation in their possession will be asked to sign a form authorizing appropriate agencies or institutions to release this information to (Empire) . In cases where such contact is impractical or impossible, as with certain secondary schools in foreign countries, a sworn affidavit is acceptable as evidence of meeting entrance requirements. "

Thus, Empire, by this statement, indicated that the term "documentation, " as interpreted and enforced by it, would be more than a certification by a student, except in the case of a foreign school where contact is impractical and an affidavit of the student would be accepted. More specifically, Empire, in saying that "documentation to confirm" the requirement of a high school diploma or equivalency "must be brought to the school" and that where applicants did not have such "documentation" in their possession they would be asked to sign a form authorizing appropriate agencies or institutions to release this information to Empire, indicated that the documentation had be at a higher level of reliability than just a student's certification. Otherwise, Empire would not have used terminology such as documentation "must be brought to the school"

or that if the documentation was not in the student's possession an authorization form would be sent to the agency or institution to release the documentation to Empire.

It is clear that, with the exception which Empire specified, permitting a sworn affidavit by the student where contact with certain secondary schools in foreign countries was impractical, Empire was requiring documentation which would be of the same level of reliability as copies of diplomas or GEDs, except in the case of certain foreign schools. This would include such things as high school transcripts and confirmations from school officials and other documentation of the same level of reliability.

It appears that the procedure set forth by Empire in its Bulletin permitting a sworn affidavit by the applicant where contact with a foreign secondary school is impractical, constitutes a reasonable compliance with the New York requirements. These affidavits will be discussed later in this decision. However, Empire, in following its own requirements, should not have relied upon student certifications alone as "suitable documentation." The same is true as to the Department of Defense (DD) Form 214, entitled "Certification of Release or Discharge from Active Duty," which is signed by the student and an authorized government official.

Section 16 of Form DD 214 is entitled "High School Graduate or Equivalent." This section then contains a "Yes" box and a "No" box to indicate whether or not that student has received a high school diploma or equivalent.

Empire claims that Form DD 214 is reliable evidence of high school graduation for two reasons. First, Empire points out that 18 U.S.C. § 1001 makes it a federal offense to make a false statement on such a document. Second, Empire cites various portions of the Department of Defense Instruction for Form DD 214, including the language: "DD Forms 214 and 215 (or other substitutes) will provide . . . [a]ppropriate governmental agencies with an authoritative source of information which they require in the administration of Federal and State laws applying to personnel who have been discharged" Empire also highlights the following language: "The DD Forms 214 and 215 are a source of significant and authoritative information used by civilian and governmental agencies to validate veteran eligibility for benefits. . . ." Empire Initial Brief at 11-13.

However, the language quoted by Empire indicates the reliability of Form DD 214 as evidence of an individual's military discharge, which is the primary purpose of Form DD 214. The quoted language discusses the "administration of Federal and State laws applying to personnel who have been discharged" and indicates that "DD Forms 214 and 215 are a source of significant and authoritative information used by civilian and governmental agencies to validate veteran eligibility for benefits." However, there is no indication in the instructions for the form as to the source of the information in Section 16 as to high school graduation or equivalency. Therefore, one cannot assess the reliability of such information. Consequently, these forms will not be accepted as "documentation" of high school graduation or equivalency .

In addition to the above, the Form DD 214 for one student, {student name}, indicates on its face in Box 16 that this student did not graduate from high school. See Exhibit E-16. In addition, the Veteran's Application For Education Benefits contained in Exhibit E-16 contains a box entitled

"Give Highest Grade Completed". The words "10th year" appear in this box, indicating that {student name} only completed the tenth grade in high school and did not graduate. Empire has admitted that it "could not locate documentation on {student name}, one of the 21 students reviewed by the OIG." Empire Initial Brief at 10 (note 3). See also Empire Initial Brief at 3 (note 1). [8/](#)

In view of the determination as to the reliability as to student certifications and DD 214s as well as an admission by Empire, it is considered that the student files of the following students did not contain sufficient documentation that the students had graduated from high school or had obtained equivalency diplomas or other suitable documentation of secondary school completion:

1. {student name},
2. {student name},
3. name},
4. {student name},
5. {student name},
6. {student name}, and
7. {student name}.

Notarized Affidavits

As stated earlier, it appears that the procedure set forth by Empire in its Bulletin permitting a sworn affidavit by the applicant where contact with a foreign secondary school is impractical, constitutes a reasonable compliance with the New York requirements .

Initially, OSFA objected to the notarized statements contained in Exhibits E-6 through E-15. OSFA raises two objections. First, OSFA claims that New York State officials require schools to document high school graduation of foreign students through direct communication with the secondary school or through the embassy of the country where the foreign school is located. OSFA Initial Brief at 10. Yet OSFA points to no New York statute or regulation in support of this proposition. In fact, OSFA points to no evidence at all except for the handwritten memo contained in Exhibit E-41, in which a Department official (the signature appears to be of a Tom Whiting) claims to have spoken with a Mr. Ron Long, who is alleged in the memo to be the Coordinator of Audit and Investigative Services, New York State Department of Education. In the handwritten "Memo to File", Mr. Whiting says that Mr. Long says that New York law says that:

[S]uch certifications are not acceptable as evidence that a student is a high school graduate and . . . New York State would require the student to obtain the necessary documentation by contacting the appropriate embassy of a foreign school and requesting the embassy to obtain the necessary diplomas. If the diplomas can not be obtained the student is considered ineligible for the program requiring that the student be a high school graduate.

Exhibit E-41.

This triple hearsay is completely unreliable and therefore of no probative value. If New York State really does require this, why did OSFA not obtain a copy of the regulation where this requirement is located? Or, at the very least, OSFA should have obtained an affidavit from Mr. Long or some other New York official stating New York's official interpretation of its laws, although the applicable New York laws would still need to be cited. Instead, OSFA offers an unsubstantiated handwritten memo of one of its own employees, a memo that contains three out-of-court statements that are being offered for the truth of the matters asserted therein. 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.

The fact that no actual New York statute or regulation or affidavit from a New York State official was presented renders OSFA's arguments unpersuasive.

Moreover, as Empire argues at pages 11-15 of its Reply Brief, even assuming arguendo that Exhibit E-41 is true despite the hearsay problems, the mere statement of one New York State official would not, by itself, impose these requirements on institutions such as Empire. Empire cites Morton v. Ruiz, 415 U.S. 199, 231 (1974), for the proposition that Due Process requires administrative agencies to make their standards known and that agencies cannot make unpublished ad hoc determinations. Empire also points out that New York also has an Administrative Procedure Act (APA) similar to the federal APA. In Robinson v. Perales, 560 N.Y.S.2d 881, 883 (App. Div., 2d Dep't, 1990), the court held that the New York APA and New York case law required administrative rules to be published in the New York State Register prior to their implementation.

In Timber Point Homes, Inc. v. County of Suffolk, 548 N.Y.S.2d 250, (App. Div., 2d Dep't, 1989), the court stated:

In exercising the authority granted an administrative agency pursuant to enabling legislation, the Court of Appeals has stated that the agency "must articulate objective standards against which an ultimate determination could be measured" (Matter of Nicholas v. Kahn, 47 N.Y.2d 24, 33, 416 N.Y.S.2d 565, 389 N.E.2d 1086: see also, Matter of Levine v. Whalen, 39 N.Y.2d 510, 518-519, 384 N.Y.S.2d 721, 349 N.E.2d 820). . . .

Timber Point Homes at 253.

The lack of citation of any New York statute or regulation, the unreliability of Exhibit E-41, and the notice problems that would ensue even if Exhibit E-41 were probative evidence, render OSFA's arguments concerning New York's alleged position on this issue unpersuasive .

OSFA also objects to the notarized statements because it claims that these were preprinted forms that were notarized by sales representatives of the school who were given monetary incentives to enroll students at Empire. OSFA Initial Brief at 5. OSFA Reply Brief at 8. Empire disputes OSFA's assertion that the notaries who notarized the sworn statements given by certain students were given monetary incentives by Empire to enroll students. Empire Reply Brief at 9. In support of this argument, Empire points out that OSFA has submitted no evidence to confirm its

claim. Moreover, Empire asserts, even if OSFA's claim was true, it would be irrelevant because these would still be valid affidavits, and OSFA does not require statements to be notarized.

However, the only evidence offered by OSFA in support of these allegations is a pair of statements at the bottom of Exhibits E-8 and E-10, which are two of the notarized statements at issue. The statement on Exhibit E-8 reads: "Per Ms. Germer, Registrar, at this time she still worked in the admissions area and was reimbursed on a salary plus incentive basis." This statement is followed by an illegible signature and the date 3/8/90 (presumably, March 8, 1990). The statement on Exhibit E-10 reads: "Per Carlos Zevallos (Bookkeeping) Mr. Lugo was a sales rep[resentative] for Empire on straight commission". This statement also is followed by an illegible signature.

There is no indication as to who wrote these handwritten statements, whether it was someone from the Department or someone from Empire. Nor is there any indication as to why they were written. As a result, the reliability of these statements is questionable. [9/](#) Accordingly, the tribunal cannot afford much weight to these handwritten statements of unknown origin.

Nonetheless, Empire has stipulated that "[t]he Empire form which students signed to state that they were graduated from high school was notarized by one of two notaries who were also ETS admissions representatives. ETS admissions representatives received remuneration based on either a straight commission contingent upon admissions, or on a salary that included incentives involving admissions." Stipulation of Fact No. 34.

The parties have also stipulated that no statute or regulation of the U.S. Department of Education or New York State prohibits an institution's employees or admissions representatives, even if remunerated based on commissions, from acting as notaries if they are in fact notaries. Stipulation of Law No. 7.

Consequently in the absence of evidence directly attacking the credibility of the actual statements made by the students, those documents will be accepted as sworn affidavits by the individual students .

To summarize, the notarized statements contained in Exhibits E-6 through E-14, in which 9 Empire students stated that they had graduated from various high schools located in foreign countries, are acceptable documentation of high school graduation under this standard. [10/](#) E-15 relating to {student name} states that it involved graduation from a junior high school and therefore does not qualify for high school purposes.

The record contains copies of two New York State High school Equivalency Diplomas for {student name} and {student name}, Exhibits R-12-6 and R-3-36, which appear valid "on their face". In a letter to the Department's Assistant Regional Inspector General for Audit dated March 16, 1990, Ms. Carolyn D. Byrne, the Director of the Division of Educational Testing for the State Education Department of The University of the State of New York could not verify the awarding of the diploma for these two students. Ms. Byrne stated:

The awarding of the diploma was verified for all persons on the list except for {student name} and {student name}. We were not able to locate any information in our records for them. If you can supply us with the test center where the GED tests were taken and the test date for each of them, we will be able to check our records further.

Exhibit E-20.

This language indicates that Ms. Byrne could not find any information on these two students. It does not state that they did not in fact receive diplomas from The University of the State of New York ("If you can supply us with the test center where the GED tests were taken and the test date for each of them, we will be able to check our records further"). Consequently, there is no probative evidence in the record which actually challenges the validity of the copies of equivalency diplomas. Therefore, the tribunal holds that Empire has satisfied its burden of persuasion as to these two students in that Empire properly documented their high school graduation or equivalency.

The file of student {student name} contained a "diploma" purporting to certify that he graduated from Andrew Jackson High School. See Exhibit E-21. Yet the diploma on its face contains discrepancies serious enough to raise questions in the mind of a reasonably objective observer. For example, some of the handwritten information is supplied in the wrong blank spaces. The month is handwritten in the space reserved for the date (the last line reads "this June 23 day of [illegible] 1982", whereas it should have read "this 23rd day of June 1982", with underlining denoting the words placed in the blank spaces). Moreover, the document appears to be a generic pre-printed form in that it is entitled "Senior High School Diploma", with the name of the high school appearing only as a handwritten addition to one of the blank spaces, and even then appearing as "Andrew Jackson" rather than as "Andrew Jackson High School" (the diploma states: "This Certifies that {student name} has been a student in Andrew Jackson and . . .").

The readily apparent questionable status of the diploma contained in the file of {student name} renders it unacceptable evidence of high school graduation.

As to {student name} there was a student certification in his file at Empire certifying that in 1982 he had received a GED or High School Equivalency Certificate in Kansas. In addition paragraph 52 of the Joint Memorandum of Stipulations of Fact and Law provides as follows:

52. The 1983-85 Undergraduate Bulletin for John Jay College states that "an applicant for admission must present evidence of having received a high school diploma. . . or having passed a (GED) Examination." Empire had {student name} John Jay College student identification card in its files. Student identification cards are issued to students at an institution as a means of identifying those individuals as students of the institution.

It is considered that the documentation in {student name} file was adequate to comply with the pertinent law and regulations and also with Empire's own requirements in its Bulletin. The John Jay College student identification card in Empire's files, which would only have been issued at John Jay College if evidence of having received a high school diploma had been presented for admission at that college, was suitable documentation of secondary school completion.

As to {student name} R-12-5 is a copy of a letter from the principal of Boys and Girls High School, dated November 17, 1980, in which the principal certifies that {student name} did in fact graduate from Boys and Girls High School in June 1971. There is also an alleged copy of a form dated March 13, 1990, which is entitled "Confirmation of High School Attendance/Graduation" which was allegedly signed by a person from the Boys and Girls High School. This form contains a column entitled "Date Dropped Out of Your High School" with an entry of "2/72" Also it contained a column entitled "Name of Principal of Your High School When Student Graduated" with an entry of "Delins Wilson".

Empire has made an objection to the receipt in evidence of this document as follows:

Empire objects to E-26-4 in its entirety. The grounds claimed are that: this document is of unknown origin; is not self-authenticating since it is a form created by OSFA; contains at least two different sets of handwriting and is legally irrelevant to any issue in this case; that it is also internally inconsistent, and thus, meaningless, because it both states the date when {student name} supposedly "Dropped Out" and who, was principal when he "Graduated;" that in his Student Questionnaire (Exhibit R-3-21-22), {student name} certifies that he graduated from Boys and Girls High School, as does the letter from the high school itself, which is Exhibit R-3-23; that even assuming Exhibit E-26-4 is authentic and admissible for the truth of the statements made therein, which Empire denies, there is no evidence anywhere in the record that Empire ever had E-26-4; what Empire had was R-3-21-23, which are more than sufficient as a matter of law, and, in any event, Empire is not a guarantor of the information its students provide.

Although the objection has been overruled because hearsay evidence of this nature is admissible, the evidence is of little probative value in view of its infirmities. There has been no agreement by the parties as to the authenticity of the document and the format of the document is confusing in that there are two columns which can create some confusion. One calls for an entry for "Date Dropped Out of Your High School" and the next column is entitled "Name of Principal of Your High School When Student Graduated." Both columns contained entries by whoever prepared it, which completely confuses the net result of its effect. The confusion of this document does not overcome Exhibit R-12-5, which on its face is documentation as to high school graduation prepared by the school principal.

In the FAD, OSFA determined that 21 out of 201 files of students who were audited did not have sufficient documentation to show that the students met the admission requirements. OSFA also determined that the 21 students received \$24,125 in Pell Grant awards which OSFA requested Empire to refund to the Department. OSFA then determined that the 21 students received \$32,909 in Stafford loan awards and that Empire must refund this amount to the appropriate Stafford loan lenders. Also OSFA determined that Empire must contact the appropriate Stafford loan lenders to determine the amount of interest and special allowance the Department paid on these loans unnecessarily and reimburse the Department for these unnecessary payments.

Then Empire was requested to review the files of all of its students during the award years 1985-86 through 1988-89 to determine if the students were eligible for awards disbursed and if the files were adequately documented. The results of such efforts were to be forwarded to OSFA within 45 days of the request. Empire was informed by OSFA, in the FAD, that based upon the

auditor's sample results, the auditor estimated that Pell Grant awards and Stafford loan payments totaling \$742,000 and \$959,000 respectively, were made to ineligible students and that if Empire did not provide OSFA such information (the results of the review) within a timely manner, it would request that Empire refund \$742,000 in Pell Grant awards to the Department. Also, OSFA stated that Empire, in that event, must identify and purchase from lenders all Stafford loans for students whose entrance requirements were not sufficiently documented (estimated to be \$959,000); further that Empire, in those cases where the Department paid default claims, should reimburse the Department in the amount of the default claims. Additionally, OSFA determined that Empire must contact its guarantee agencies and determine the total amount of interest and special allowance paid by the Department as to Stafford loans awarded to students whose entrance requirements were not sufficiently documented and that any interest and special allowance paid unnecessarily must be reimbursed to the Department.

There is no evidence in the record to show that Empire made such a review as to specific students, except as relates to the approximately 21 files previously identified by OSFA.

Although Empire generally has objected to Finding No. 1 because the auditors set forth an estimated liability, there is no indication that Empire has challenged the sampling procedures or the specific formula for computing estimated liability used by the auditors .

After consideration of all of the specific student files set forth in the record this tribunal has determined that 8 out of the 201 files of students which were reviewed by the auditors did not have sufficient documentation to show that these 8 students met the admission requirements.

Based upon the computation methods for estimating liability found in the audit working papers (Exhibit R-12-1 to 4) the revised liability against Empire relating to the 8 students whose files did not contain sufficient documentation that they had graduated from high school or had obtained equivalency diplomas is \$8577 for Pell program purposes and \$8932 for GSL program purposes .

Based upon the methods of computation set forth in Exhibit R 12-1 to 4 this converts into an overall estimated liability of \$256,343 for Pell program purposes and \$255,442 for GSL program purposes .

Since Empire has not responded to OSFA's request for a review of all of the student files for the audit period as relates to the subject of Finding No. 1, it will be given 45 days after receipt of this decision by its attorney to make a review of the files of all of its students during the award years involved herein to determine if the students were eligible for awards disbursed and if the files were adequately documented and any liability owed. The results of that review will be forwarded to OSFA within the above mentioned 45 day period. If such review results are not forwarded to OSFA as prescribed or within any revised deadline as mutually agreed to with OSFA then it is determined that the liability for Pell Grant awards will be \$256,343 and the liability for Stafford loan awards will be \$255,442. [11/](#)

3. Second Disbursements of Pell Grant Payments.

OSFA claims that Empire made Pell Grant payments to students who failed to complete the required clock hours of instruction.

Empire argues that Finding No. 2 of the FAD, relating to the school's second disbursements of Pell Grant payments, is based entirely on OSFA's misinterpretation of Empire's attendance policy. Empire further contends that the administrative law judge must summarily reject OSFA's "new" theory concerning the school's alleged miscalculation of the midpoint of the course, because this theory was not contained in the FAD.

34 C.F.R. § 690.75(a) (3) states, in pertinent part:

(a) For each payment period, an institution may pay a Pell Grant to an eligible student only after it determines that .. the student--

(3) Has completed required clock hours for which he or she has been paid a Pell Grant, if the student is enrolled in an eligible program that is measured in clock hours. 34 C.F.R. § 690.3(b) defines a payment period for an institution that does not have academic terms as follows:

(1)For a student whose educational program is one academic year- -

(i) The first payment period is the period of time in which the student completes the first half of his or her academic year (in credit or clock hours) ; and

(ii)The second payment period is the period of time in which the student completes the second half of that academic year .

(2)-For a student whose educational program is more than one academic year, the first and second payment periods must be calculated under paragraph (b) (1) of this section. For subsequent academic years, or fractions of academic years, each payment period must be the period of time in which a student completes - -

(i)One-half of the academic year; or

(ii)The remaining hours in the student's educational program, which ever is to be completed first.

The Department's Student Financial Assistance Handbook, 1990- 1991, states as follows:

In a program without academic terms, the payment period does not end until the student has completed all of the work paid for in the first payment period. Each subsequent payment period begins only when the previous one ends. However, a school may take into consideration "excused absences". . . . However, the absences must be excused--that is, the student will not be required to make up the . . . absences to receive the degree or certificate for the program.

Exhibit E-42 at 15 (emphasis added) .

34 C.F.R. § 690.3 defines the payment periods when institutions can disburse Pell Grants. Empire measured its instruction in clock hours. Stipulation of Fact No. 36. Empire offered courses of 600 clock hours in length. Stipulation of Fact No. 37. The second of two payment periods at Empire began after completion of 300 hours. See Exhibit E-2 at 23; 34 C.F.R. § 690.63.

Regarding attendance, Empire's 1987-89 Bulletin stated:

The technical nature of (Empire) training makes it essential that a student be present for all class hours each instructional day. If a student must be absent, he is expected to notify the school in advance.

A student who is not maintaining Satisfactory Academic Progress (SAP) is not allowed to be absent for more than 20% of the total course hours for which he/she is registered. There are no excused absences.

Stipulation of Fact No. 38; Exhibit E-5 at 4 (emphasis added) .

The primary dispute between the parties concerns the issue of whether the language "There are no excused absences" applied to all Empire students or whether it applied only to those students who were not maintaining satisfactory academic progress.

OSFA argues that the phrase "There are no excused absences" is clear and applied to all Empire students. Empire argues that this phrase applied only to students who were not maintaining satisfactory academic progress.

In support of its interpretation, Empire argues that "[d]uring each of the award years 1985-86 through and including 1988-89, Empire's catalogs contained separately stated policies on a variety of matters, including but not limited to Standards of Satisfactory Academic Progress, Attendance, and Make-Up classes" and that "[n]either [Empire's] Attendance Policy nor its Make-up Policy was an element of Empire's Standards of Satisfactory Progress." Empire Initial Brief at 16. M examination of Empire's 1987-1989 Bulletin indicates that this is true. See Exhibit E-5 at 4.^{12/} This observation, however, only strengthens the argument that the phrase "There are no excused absences", which appears only under the section entitled "Attendance", is a part of the school's attendance policy, and not part of the school's policy concerning standards of satisfactory academic progress .

It is true that the section entitled "Attendance" includes the requirement that a student who is not maintaining satisfactory academic progress cannot be absent for more than 20% of the total course hours for which he or she is registered, but the phrase "There are no excused absences" does not contain any such qualifier indicating that it is limited to students who are not maintaining satisfactory academic progress. Instead, a fair reading of the sentence, albeit subject to debate, is that there are no excused absences for any students, whether or not they are maintaining satisfactory academic progress. This interpretation is bolstered by the language in the preceding paragraph, which states: "The technical nature of (Empire) training makes it essential that a student be present for all class hours each instructional day." The very next

sentence admonishes: "If a student must be absent, he is expected to notify the school in advance." These sentences make it very clear that attendance at all classes each instructional day was of the utmost importance. The phrase "There are no excused absences" comports well with the spirit of these other sentences.

The very next sentence, which is the sentence immediately preceding the phrase "There are no excused absences", states: "A student who is not maintaining Satisfactory Academic Progress (SAP) is not allowed to be absent for more than 20% of the total course hours for which he/she registered." It is quite plausible that the phrase "There are no excused absences", which follows this sentence, was intended to apply only to students who are not maintaining satisfactory academic progress. However, it is equally plausible that the phrase "There are no excused absences" was a general rule that applied to all students, whether or not they were maintaining satisfactory academic progress, especially since Empire could easily have qualified this sentence by stating: "There are no excused absences for such students." Yet it did not. Nor did the school include this limitation in the section entitled "Standards of Satisfactory Academic Progress".

It can be argued that the sentence "A student who is not maintaining Satisfactory Academic Progress (SAP) is not allowed to be absent for more than 20% of the total course hours for which he/she is registered" indicates that students who are maintaining satisfactory academic progress are allowed to be absent for more than 20% of the total course hours for which they are registered. However, this sentence may simply mean that students who are not maintaining satisfactory academic progress and who are absent for more than 20% of their total course hours will be disciplined in some way, whereas students who are maintaining satisfactory academic progress and who are absent for more than 20% of their total course hours will not be disciplined, but that in either case, there are no excused absences. The statements in the first paragraph of the section entitled "Attendance" comport well with such a reading of the second paragraph.

Statements in other sections of the Bulletin also harmonize with this interpretation. For example, under the section entitled "Leave of Absence", the Bulletin states: "Upon returning from a leave [of absence], the student may be transferred to another class to insure that all instruction missed while on leave is made up. A leave of absence may result in rescheduling the graduation date." Exhibit E-5 at 4 (emphasis added). Thus it appears all missed instruction had to be made up, and that students were required to make up the absences to receive the degree or certificate for the program, excluding them from the definition of excused absences contained in The Department's Student Financial Assistance Handbook. See Exhibit E-42 at 15.

Empire's 1987-89 Bulletin further states, under the section entitled "Make-Up": "Classroom work missed while absent can be made up through arrangement with the instructor." Exhibit E-5 at 4. Standing alone, this statement does not necessarily indicate that there are no excused absences, since it says that classroom work missed while absent can be made up, not that it must be made up. Nonetheless, in conjunction with the other statements previously examined, this sentence does indicate a strong policy, and possibly a requirement, that classroom work should be made up. Moreover, the Bulletin also contains a section entitled "Tardiness", which contains the warning that "Excessive lateness will result in a conference with the department head or School Director to determine if disciplinary action is necessary." Exhibit E-5 at 4. Again, while it

is possible that even a school that allowed excused absences would want to discourage tardiness through the use of disciplinary measures, it appears more likely that this is a part of Empire's policy requiring mandatory attendance and allowing no excused absences. It would be strange indeed for a school to punish students who are late to class but to excuse students who fail to attend the class at all.

Other factors also indicate that the phrase "There are no excused absences" applied to all students. For example, in Empire's OIG Program Review Response, the school contends that:

The statement "There are no excused absences", applied to students who were absent, brought in a medical or other types of documented excuse and would expect to be marked present for the time missed. This statement in no way implied that the time missed by the students would not be calculated as part of hours offered. This policy as stated in the catalog, was applied evenly through out the school when determining the midpoint for the purpose of disbursing federal student aid.

When the reviewer brought this issue to our attention, we indicated that the new catalog would express clearly our attendance policy.

Exhibit E-2 at 29.

This statement, although not entirely logical, only tends to confirm that at Empire, there were no excused absences. In Empire's own words, "The statement 'There are no excused absences', applied to students who were absent, brought in a medical or other types of documented excuse . . ." If there were no excused absences for students who had legitimate, documented reasons for missing a class, then surely there were no excused absences for other students who did not have a legitimate, documented reason for missing class. Empire acknowledges as much when it goes on to state that "This policy . . . was applied " evenly throughout the school

Furthermore, the statements of other Empire employees contradict the explanation of the phrase "There are no excused absences" given by the school in its response to the program review. These statements offer different explanations of the phrase at issue. For example, Christopher Hall, a member of the Corporate Financial Aid Staff at North American Training Services, Inc. (the parent company of Empire), states: "The statement in Empire's catalog that 'There are no excused absences' applied only to students who were not maintaining satisfactory academic progress and meant that Empire would not excuse any absences above 20% for those students." See Resp. Ex. 7 (paragraph 7). Thus, Mr. Hall claims that the phrase "There are no excused absences" applied only to students who were not maintaining satisfactory academic progress, yet Empire's response to the OIG program review claims that this same phrase actually applied to all students (whether or not they were maintaining satisfactory academic progress), who were absent, brought in a medical or other type of documented excuse, and would expect to be marked present for the time missed; and went on to state "This policy . . . was applied evenly throughout the school."

These inherently contradictory interpretations of the phrase "There are no excused absences" by different Empire personnel strengthen the argument that this phrase actually applied to all

Empire students, whether or not they were maintaining satisfactory academic progress. This is especially true because the self-serving statements contained in the affidavits of Christopher Hall and Daniel G. Klock (Resp. Ex. 6 & 7) were prepared specifically for this hearing, whereas Empire had a greater incentive to be accurate in its response to the OIG program review.

Furthermore, Mr. Hall stated that "Empire never required any student to attend all classes. Students maintaining satisfactory academic progress were not required to attend any minimum amount of classes." This statement is incredible, in that if it was true, an Empire student who was maintaining satisfactory academic progress (by maintaining a D average or better) would not be required to attend any hours of instruction at all. If that was the case, then the statements in Empire's Bulletin that the technical nature of ETSI training makes it essential that a student be present for all class hours each instructional day and that if a student must be absent, he is expected to notify the school in advance, would be meaningless. There would be no reason for a student to notify the school in advance when he expected to be absent if that student was not required to attend any classes at all. Furthermore, the school's policy on tardiness, including the threat of disciplinary action for excessive lateness, would also be rendered moot if a student did not have to attend any minimum amount of classes. Finally, if students did not have to attend class at all, there would be no need for the language in Empire's leave of absence policy concerning the fact that a returning student may be transferred to another class to insure that all instruction missed while on leave is made up.

In sum, while the phrase "There are no excused absences" as it appears in Empire's 1987-89 Bulletin is open to several possible interpretations, the better reasoned interpretation is that this phrase means that there are no excused absences for students at Empire. The phrase is not conditional and does not limit the application of this rule in any way, such as it would if it had stated: "There are no excused absences for students who are not maintaining satisfactory academic progress." In any case, Empire has not satisfied its burden of persuading this tribunal that this phrase actually was intended to apply only to students who were not maintaining satisfactory academic progress. Therefore, the policy of no excused absences applied to all students at Empire. Accordingly, the school could not properly take into account absences by students in determining when those students had received 300 clock hours of instruction and thus would be eligible for their second Pell Grant disbursements.

As a result, Empire improperly disbursed second Pell Grant payments to 12 students as identified in the FAD and documented in Exhibits E-27-38, and must repay to the Department \$7332 for these improper Pell Grant disbursements. Empire had the option of either reviewing its files to determine the actual amount of improper Pell Grant payments under the standards enunciated above, or it could immediately repay to the Department \$210,000 as estimated by the OIG auditors.

Finally, Empire contends that OSFA included in its Initial Brief an argument concerning Finding No. 2 that was a different argument than the one contained in the Final Audit Determination. See Empire Reply Brief at 16-18. Empire points out that the FAD stated the following:

The auditor indicates in his audit that his review of 201 student files revealed 12 instances who were awarded Pell Grants prior to completing the required number of clock hours. If the

institution had adhered to its established attendance policy of no excused absences, these 12 students would have been ineligible for Pell Grant payments totalling \$7,332.

See Exhibit E-1-7; Exhibit R-1-7.

Empire notes that in its Initial Brief, OSFA described the FAD as follows:

[T]he OIG audit found that in twelve instances, ETS used an allowance of 20% of excused absences, or otherwise miscalculated the midpoint of the course, in determining eligibility for second Pell Grant disbursements.

OSFA Initial Brief at 7.

Empire then argues that OSFA "materially altered the premise of Finding No. 2 from the one and only question of which Empire had notice, namely, what was Empire's attendance policy, to defending second Pell disbursements that OSFA now claims were 'otherwise miscalculated' even if Empire's attendance policy was as Empire asserts." Empire then urges this tribunal to summarily reject OSFA's "new" theory. Empire Reply Brief at 17.

As Empire points out, the regulations define a "final audit determination" as "the written notice of a determination issued by a designated ED official based on an audit of an institution's participation in any or all of the Title IV, HEA programs covered under this subpart." 34 C.F.R. § 668.112 (emphasis added) . Both Exhibit E-1 and Exhibit R-1 contain that determination. 34 C.F.R. § 668.118(b) requires the administrative law judge's decision to state and explain "whether the final audit determination . . . was supportable, in whole or in part." Thus the final audit determination is not required to contain all of the facts or evidence contained in the audit that it is based upon. Instead, the tribunal must decide whether the FAD was supportable, in whole or in part.

Here, for the reasons described supra, Finding No. 2 of the FAD was supportable. Empire's claim that the FAD did not give it notice of OSFA's argument that the school disbursed second Pell Grant payments to students who did not complete the required number of clock hours is misplaced. First, the audit report that the FAD is based upon used almost the exact same language that Empire now objects to in OSFA's Initial Brief. The audit report stated that:

However, our audit disclosed that, in our review of 201 randomly selected students (out of a total student population of 5,641), ETSI used an allowance of 20 percent of total course hours for excused absences, or otherwise miscalculated the midpoint of the course, in determining eligibility for .Pell Grant payments for 12 students. If ETSI had adhered to its attendance policy of no excused absences, these 12 students would have been ineligible for Pell Grant payments totalling \$7,332.

Exhibit E-2-23 (emphasis added) .

Based upon the above-quoted language and the other findings contained at pages 13-15 of the audit report (Exhibit E-2-31 to 23) , the FAD stated as follows

The auditor indicates in his audit that his review of 201 student files revealed 12 instances who were awarded Pell Grants prior to completing the required number of clock hours. If the institution had adhered to its established attendance policy of no excused absences, these 12 students would have been ineligible for Pell Grant payments totalling \$7,332.

See Exhibit E-7; Exhibit R-1-7.

Relying upon the FAD and the audit report that was the basis for the FAD, OSFA stated in its Initial Brief that:

[T]he OIG audit found that in twelve instances, ETS used an allowance of 20% of excused absences, or otherwise miscalculated the midpoint of the course, in determining eligibility for second Pell Grant disbursements.

OSFA Initial Brief at 7.

Therefore, OSFA's Initial Brief did not introduce a different argument from the one contained in the FAD and the audit report upon which the FAD was based. The fact that the FAD did not include all evidence contained in the audit report upon which it was based, or that OSFA in its Initial Brief repeated some of the language from the audit report, does not indicate that OSFA included in its Initial Brief an argument concerning Finding No. 2 that was different from the argument contained in the FAD. Accordingly, Empire's argument to the contrary must be rejected.

As stated above, in the FAD, OSFA stated that Empire must repay to the Department \$7332 for improper Pell Grant disbursements. The FAD also stated that based on the auditors sample results the auditor estimated that \$210,000 (actually \$209,689) in excess Pell Grant awards were made to students. Exhibit R-12-4. The FAD also required Empire to recompute the Pell Grant awards made to all students who received Pell Grant payments for award years 1985-86 through 1988-89 to determine and refund to the Department all excess Pell Grant payments made to students who never completed the required clock hours of instruction to be eligible for such payments and forward the results to OSFA within 45 days.

The FAD then provided that in the absence of such a report of a review by Empire as to the amount of excess Pell Grant payments made to ineligible students, the institution may be required to refund \$210,000 (\$209,689) to the Department.

There is no evidence in the record that Empire made such a review. Although Empire generally has objected to Finding No. 2. because the auditors set forth an estimated liability, there is no indication that Empire has challenged the sampling procedures or the specific formula used by the auditors for computing estimated liability.

Since Empire has not responded to OSFA's request for a review of all of the student files for the audit period as relates to the subject of Finding No. 2, it will be given 45 days after receipt of this decision by its attorney to make a review of the files of all of its students during the award years involved herein to determine if the students were eligible for awards disbursed and if the files

were adequately documented and any liability owed. The results of that review will be forwarded to OSFA within the above mentioned 45 day period. If such review results are not forwarded to OSFA as prescribed or within any revised deadline as mutually agreed to with OSFA then it is determined that Empire's liability for excess Pell Grant payments, made to students who never completed the required clock hours of instruction to be eligible for payment, will be \$209,689.[13/](#)

VI. CONCLUSIONS OF LAW.

A. The Final Audit Determination issued by the designated Department official is supportable in part.

B. OSFA has met its burden of production to establish a prima facie case as to a portion of the repayment liabilities asserted against Empire under Finding No. 1.

C. OSFA in three letters it issued has stated that when a high school diploma is required for admittance to an institution, in order to comply with the law and regulations governing the Title IV student financial assistance programs, the institution can rely on a certification by the student as to the existence of such diploma.

D. This right of reliance applies to all circumstances relating to the enforcement of laws and regulations governing Title IV student financial assistance programs, including the duty of compliance with the federal requirement that an institution must be legally authorized to provide postsecondary education in the State in which it is physically located.

E. OSFA in bringing this proceeding is bound by its prior advice as to what an institution may rely upon in the way of documentation of compliance with entrance requirements in order to comply with the laws and regulations governing Title IV student financial assistance programs, including the federal requirement that an institution must be legally authorized to provide postsecondary education in the State in which it is physically located.

F. Empire operated with a New York state license during the audit period and prior to the OIG audit in this case.

G. Empire's Computer Programming, and Medical Secretary with Word Processing courses were approved as courses of instruction by the New York State Department of Education.

H. There is no probative evidence in the record that the State of New York has raised any question as to whether Empire has violated any state law as to the admission requirements for the two subject courses.

I. Although it appears that the advice given by OSFA concerning documentation of admission requirements, as set forth in paragraph C. above, would also comply with New York's requirements, such would be irrelevant to this proceeding brought by OSFA since it is bound by its own advice.

J. Empire has prescribed even greater requirements for admission to its courses of instruction than have been deemed to be adequate by OSFA as set forth in paragraph C. above. Empire will be required to comply with its own requirements as set forth in its Bulletin.

K. Under the procedure prescribed in Empire's Bulletin student self-certifications and U.S. military discharge papers are not acceptable documentation that the students had high school or equivalency diplomas.

L. The procedure set forth by Empire in its bulletin permitting a sworn affidavit by an applicant where contact with a foreign secondary school is impractical constitutes a reasonable compliance with a requirement of documentation that the student has met the entrance requirements of the course.

M. Thirteen of the 21 student files that were the subject of the audit and which the auditors found did not have adequate documentation, in fact, contained sufficient documentation that the students in question had high school diplomas, equivalency diplomas, or other suitable documentation of secondary school completion as is required to comply with the law and regulations governing Title IV student financial assistance programs and Empire's own admission requirements. The other 8 student files did not contain sufficient documentation.

N. Eight of 201 files of students that were the subject of the audit did not have sufficient documentation to show that the 8 students met admission requirements.

1. These 8 ineligible students received \$8577 in Pell Grant awards and \$8932 in Stafford loan awards during the period of the audit.

2. Based upon the methodology set forth in Exhibit R-12-1 to 4, and if Empire does not, after receiving this decision, submit a report, as required by paragraph 3. of the Order set forth below, as to a review of the files of all students enrolled during the audit period to determine if the students were eligible for the awards disbursed and if the files were adequately documented, it is determined that \$256,343 in Pell Grant awards and \$255,442 in Stafford loan payments were made to ineligible students enrolled in courses during the award years 1985-86 through 1988-89.

O. CSFA has met its burden of production to establish a prima facie case as to the repayment liabilities asserted against Empire under Finding No. 2.

P. The statement in Empire's catalog that "There are no excused absences" applied to all Empire students.

Q. OSFA's Initial Brief did not introduce a different argument concerning Finding No. 2 from the one contained in the final audit determination. R. Empire improperly disbursed second Pell Grant payments to 12 students who had not completed the required number of clock hours.

1. These 12 ineligible students received \$7332 in Pell Grant Awards during the period of the audit.

2. Based upon the methodology set forth in Exhibit R-12-4 and if Empire does not, after receiving this decision, submit a report, as required by paragraph 6 of the Order set forth below, as to a review of the files of all students enrolled during the audit period to determine if students received excess Pell Grant payments because they had not completed the required clock hours of instruction to be eligible for payment, it is determined that \$209,689 in excess second Pell Grant payments were made to ineligible students during the award years 1985-86 through 1988- 89.

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

OSFA and Empire filed their posthearing briefs and a joint statement. Such briefs and statement, 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, It is ORDERED that, as relates to the award years 1985-86 through 1988-89:

1. Empire shall refund to the U.S. Department of Education \$8577 in Pell Grant awards made to students whose entrance requirements were not sufficiently documented.
 2. Empire shall identify and purchase from lenders all Stafford loans for students whose entrance requirements were not sufficiently documented in the amount of \$8932. In those cases where the Department paid default claims, reimbursement should be made to the Department in the amount of the default claims.
 3. As relates to the issue as to whether entrance requirements of students were sufficiently documented, Empire will be given 45 days after receipt of this decision by its attorney to make a review of the files of all of its students during the award years involved herein to determine if the students were eligible for awards disbursed and if the files were adequately documented and any liability owed. The results of that review will be forwarded to OSFA within the above mentioned 45 day period. If such review results are not forwarded to OSFA as prescribed or within any revised deadline as mutually agreed to with OSFA then: (a) Empire shall refund to the U.S. Department of Education \$247,766 for Pell Grant awards and, (b.) Empire shall identify and purchase from lenders all Stafford loans whose entrance requirements were not sufficiently documented in the amount of \$246,510. In those cases where the Department paid default claims, reimbursement should be made to the Department in the amount of the default claims.
- [14/](#)
4. Empire shall contact its guarantee agencies and determine the total amount of interest and special allowances paid by the Department for Stafford loans awarded to students whose entrance requirements were not sufficiently documented. Interest and special allowance paid unnecessarily must be reimbursed to the Department.

5. Empire shall refund to the U.S. Department of Education \$7332 in excess second Pell Grant payments made to students who had not completed its required clock hours of instruction to be eligible for payment.

6. As relates to the issue as to whether students completed the required clock hours of instruction to be eligible for payment of a second Pell Grant payment, Empire will be given 45 days after receipt of this decision by its attorney to make a review of the files of all of its students during the award years involved herein to determine if the students were eligible for awards disbursed and if the files were adequately documented and any liability owed. The results of that review will be forwarded to OSFA within the above mentioned 45 day period. If such review results are not forwarded to OSFA as prescribed or within any revised deadline as mutually agreed to with OSFA then Empire shall refund to the U.S. Department of Education \$202,357 in excess second Pell Grant payments made to students who had not completed the required clock hours of instruction to be eligible for payment. [15/](#)

John F. Cook
Chief Administrative Law Judge

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

APPENDIX A

Further Discussion As To The Comparison of § 126.11 and § 2108(3) OF THE COMMISSIONERS REGULATIONS

In footnote 7 it was pointed out that § 126.11 of the Commissioners Regulations prescribes what the files of the school shall include, particularly "documentation that each student has met the entrance requirements," while § 2108.3(e) sets forth the kinds of records to which auditors shall be given access as follows:

Part 2108 of Title 8 provides in relevant part:

2108.3 Audits of schools. Auditors shall be given access to all records relative to student loans and the status of students who have student loans or who have applied for student loans, including the following records and such other similar records as are pertinent:

* * *

(e) evidence of high school diploma or equivalent;

N.Y. Comp. Codes R. & Regs. tit. 8, § 2108.3(c) (1990)

QSFA argues at pages 6-7 of its Reply Brief that the New York regulatory language, "evidence of [a] high school diploma or [its] equivalent" is unambiguous and requires actual copies of these certificates. OSFA equates the language "evidence of high school diploma or equivalent" with

"copies of high school diploma or equivalent." As mentioned in the text of the decision, discussion of this regulation is unnecessary because it does not relate to the question as to what is required in the schools files, however, apart from that point it is of value to discuss the terminology of ? 2108.3(c). That regulation explicitly uses the term "evidence" of a high school diploma or equivalency, not "copy" of these items. The word "evidence" has a distinct meaning from that of the word "copy." Black's Law Dictionary includes in its definition of "evidence" the following:

Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.
[citation omitted]

Testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact. [citation omitted]

BLACK'S LAW DICTIONARY 498 (5th ed. 1979).

Webster's New World Dictionary includes in its definition of "evidence" the following: "2. something that makes another thing evident; indication; sign 3. something that tends to prove; ground for belief 'I WEBSTER'S NEW WORLD DICTIONARY 486 (2nd College ed. 1970).

These definitions of the word "evidence" indicate that it is very inclusive and applies to virtually any thing that would tend to make the truth of the matter asserted more likely than it would otherwise have been. Moreover, the New York regulation does not define the quality or quantity of evidence in any way. It does not state "strong evidence," but merely "evidence". Consequently, "evidence" of high school graduation or equivalency is not necessarily limited to actual copies of high school diplomas or GED certificates, but can include other documentation that would tend to establish that the student in fact graduated from high school or received a GED.

As stated above, § 2108.3 is only a listing of the types of records to which auditors must be given access if they exist. It is § 126.11 which sets forth what the records and files of the school shall include, namely "documentation that each student has met the entrance requirements." This requirement fits in with the New York State approval letter for the Computer Programming course, under the section labelled "Entrance Requirements," which required "high school diploma, equivalency, or other suitable documentation". 16/ words "other suitable documentation" would be superfluous and without meaning if "evidence" was limited solely to a copy of a high school diploma or GED certificate, which are already mentioned immediately prior to this phrase. Unfortunately, neither party here has offered any statutory or regulatory definition as to what constitutes "suitable documentation." Therefore, this tribunal must interpret the phrase as including material that would reasonably tend to indicate that the student did in fact graduate from high school.

SERVICE

A copy of the attached initial decision was sent to:

The Honorable Richard W. Riley
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

A copy of the attached document was also sent by **CERTIFIED MAIL RETURN RECEIPT REQUESTED** to the following:

Leslie H. Wiesenfelder, Esq.
Kelli J. Crummer, Esq.
Dow, Lohnes & Albertson
1255 Twenty-Third Street
Washington, D.C. 20037-1194

Russell B. Wolff, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Room 4083, FOB-6
Washington, D.C. 20202-2110

Jack Reynolds
Director, Institutional Monitoring Division
Office of Student Financial Assistance
U.S. Department of Education
7th & D Streets, S.W.
ROB-3, Room 3919
Washington, D.C. 20202

[1/](#) This part of the findings of fact is based upon stipulations contained in the Joint Memorandum of Stipulations of Fact and Law.

[2/](#) Counsel for OSFA alleges on page 3 of OSFA's Reply Brief that, "Both OSFA and ETS agree that the New York State admission requirements establish that a student must present a 'high school diploma or equivalent' to a prospective institution prior to enrollment in certain courses approved by the New York Department of Education." OSFA cites Empire's Initial Brief at 2, 7-8. Yet OSFA's statement directly contradicts what Empire actually says at those pages. At page 2 of its Initial Brief, Empire states, "resolution of the issue of what constitutes 'proper documentation' for Title IV purposes that a particular student graduated from high school or obtained an equivalency diploma is central to Finding No. 1." Empire is directly disputing that there is a requirement in any statute or regulation that a student must present a high school

diploma or equivalent. On page 7 of its Initial Brief, Empire asserts, "there is no requirement under New York statute or regulations that defines what quality or quantity of documentation is necessary in order for an institution licensed in the State of New York to demonstrate that a student has met the entrance requirement of having a high school diploma or its equivalent."

3/ The relevant GEPA section at issue is codified at 20 U.S.C. § 1232(c).

4/ Empire's 1987-1989 Bulletin also states at pages 7 and 8 that the admissions requirements for these two courses included a "High School Diploma, GED Certificate, or other suitable documentation of secondary school completion." Exhibit E-5 at 7, 8.

5/ As stated above, in this instance it is that part of the law and regulations governing Title IV student financial assistance programs requiring an institution to be legally authorized to provide postsecondary education in the state in which it is physically located: 20 U.S.C. § § 1088(b), 1085(c), and 1141 (a)

6/ It is arguable that the doctrine of equitable estoppel would apply here if it were determined that a violation of the law governing Title IV student financial assistance programs resulted from following OSFA's advice in the three referenced letters. See In the Matter of Platt Junior College, Docket No. 90-2-SA, U.S. Dep't of Education, October 31, 1991 (Decision), at 11-13, for a discussion of the cases and the rulings of the Secretary of Education indicating that tribunals of the Department of Education have the authority to grant equitable relief in certain situations.

7/ Although § 126.11 of the New York Commissioners Regulations prescribes what the files of the school shall include, § 2108.3(e) relates to the kinds of records to which auditors shall be given access. This regulation only provides a listing of the types of records to which auditors must be given access if they are in the school's files. It is not a listing as to what the school is required to keep in its files. Reference must be made to § 126.11 in order to determine what the files of the school shall include. A more complete discussion as to this is contained in Appendix A.

8/ The student is listed as "{the student}" on the Veteran's Application For Educational Benefits, whereas he was listed as "{the student}" on the Form DD 214. As noted in the text, Empire identified him as "{student name}."

9/ This is especially true given the fact that Exhibits R-3-5 and R-3-10 appear to be the same documents, identical to Exhibits E-8 and E-10 in all respects, except that Exhibits R-3-5 and R-3-10 do not contain the additional handwriting at the bottom.

10/ The 9 students are: 1. {student name}, 2. {student name}, 3. {student name}, 4. student name}, 5. student name, 6. {student}, 7. {student name}, 8. {student name, and 9.(student name } .

11/ 34 C.F.R. § 668.116 (d) provides:

(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 .

12/ The Bulletin contains separate sections entitled "Standards of Satisfactory Academic Progress"; "Attendance"; and "Make-Up" .

13/ See note 11.

14/ These figures were derived by taking OSFA's estimated liabilities (\$256,343 for Pell Grant awards and \$255,442 for Stafford loan awards) and subtracting the revised liabilities (\$8577 for Pell Grant awards and \$8932 for Stafford loan awards) relating to the 8 specified students whose files did not contain sufficient documentation that they had graduated from high school or had obtained equivalency diplomas, the payment of which is provided for in paragraphs 1 and 2 of this order.

15/ These figures were derived by taking OSFA's estimated liabilities of 209,689 for Pell Grant awards and subtracting the liabilities of \$7332 for Pell Grant awards relating to the 12 specified students who had not completed the required clock hours of instruction to be eligible for payment, the payment of which is provided for in paragraph 5 of this order.

16/ It is true that the New York State approval for the Medical Secretary with Word Processing course did not contain the words "or other suitable documentation", but stated only that "each applicant must have a high school diploma or equivalent" While this language was used in the February 19, 1987 approval letter for the Medical Secretary with Word Processing course, the May 20, 1987, New York State approval letter for Empire's Computer Programming course added the phrase "or other suitable documentation." Since this letter came after the first approval letter, this language appears to be a clarification of the position of New York State regarding the level of documentation necessary, a clarification upon which Empire was entitled to rely.