IN THE MATTER OF ACADEMY FOR SOCIAL ACTION,
Respondent.

Docket No. 91-6-SP
Student Financial Assistance Proceeding

DECISION

Appearances: Leslie H. Wiesenfelder, Esq., of Dow, Lohnes & Albertson, Washington, D.C., for the Respondent

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

Before: Judge Allan C. Lewis

This is an action initiated by the United States Department of Education (ED) to recover $695,751 in Federal funds advanced to the Academy for Social Action (ASA) under the Pell Grant program. This action was proposed following a program review which concluded that ASA was erroneously determined to be eligible to participate in the student financial assistance programs under the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (to be codified at 20 U.S.C. § 1001 et seq.), as amended. ASA argues, in effect, that its program constituted a curriculum of at least a six-month program under 20 U.S.C. § 1088(c) and was, therefore, properly qualified as an eligible institution for Title IV funds. Alternatively, even if its program was less than a six-month program, ASA asserts that it need not repay the Pell Grant funds to ED since it neither knew nor should have known that the information upon which ED based its eligibility designation was inaccurate. Based upon the findings of fact and the conclusions of law, infra, the Department may recover $695,751 in Federal funds advanced to ASA.

I. FINDINGS OF FACT

The pertinent facts are set forth in the opinion. The detailed findings of fact are set forth in the appendix, infra.

II. OPINION

Under the Pell Grant Program, the Secretary provides grants to eligible, financially needy students attending eligible institutions of higher education to assist these students to pay for their postsecondary educational costs. 20 U.S.C § 1070a(a) and (b) (1987). The amount of a student's Pell Grant award is determined by statutory and regulatory formulas and depends, in part, on the length of the student's program of study. 20 U.S.C. § 1070a(b)(2)(B).

In order to receive a Pell Grant award, the student must be enrolled or accepted for enrollment in a degree or certificate program at an institution of higher education that is an eligible institution. 20 U.S.C. § 1091(a).

An institution of higher education is defined under 20 U.S.C. § 1141(a) as--

> an educational institution of any State which (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, (2) is legally authorized within such State to provide a program of education beyond secondary education, (3) provides an educational program for which it awards a bachelor's degree or provides not less than a two-year program which is acceptable for full credit toward such a degree, (4) is a public or other nonprofit institution, and (5) is accredited by a nationally recognized accrediting agency or association . . . . Such term also includes any school which provides not less than a one-year program of training to prepare students for gainful employment in a recognized occupation and which meets the provisions of clauses (1), (2), (4), and (5).

For purposes of the student financial assistance provisions, an institution of higher education also includes a postsecondary vocational institution which is defined as--

> a school (1) which provides not less than a 6-month program of training to prepare students for gainful employment in a recognized occupation, (2) which meets the requirements of clauses (1), (2), (4), and (5) of section 1141(a) of this title, and (3) which has been in existence for at least 2 years.

20 U.S.C § 1088(c).

There is no dispute between the parties that, under 20 U.S.C. § 1088(c), ASA satisfies clauses (1), (4), and (5) of 20 U.S.C. § 1141(a), that is, ASA admitted the appropriate individuals as students, was a nonprofit institution, and was accredited by a nationally recognized accrediting agency.

There is also no dispute that, under 20 U.S.C. § 1088(c), the General Office (Core) Word Processing Machine (General Office) aspect of the curriculum was legally authorized within the State of New York by the New York State Education Department (NYSED) to provide a program of education beyond secondary education as required by 20 U.S.C. § 1141(a).

The dispute between the parties is whether, under 20 U.S.C. § 1088(c), ASA's General Office curriculum alone, or in conjunction with certain elective courses, constituted at least a six-month program as required by 20 U.S.C. § 1088(c) and, therefore, constituted an eligible institution to disburse Title IV funds. A six-month program under 20 U.S.C. § 1088(c) requires a program of at least 16 semester hours or 600 clock hours. 34 C.F.R. § 668.7 (1986).See footnote 1 1/

ASA asserts two arguments in an effort to establish that it had a program of at least six-months. First, ASA argues that the elective component of the curriculum was part of the legally authorized program, and, therefore, it satisfies the six-month requirement of 20 U.S.C. § 1088(c).

Second, ASA argues that even if the elective aspect of the curriculum was not legally authorized within the State of New York, the General Office aspect of the curriculum constituted at least a six-month program.

Initially, ASA asserts that the elective component was part of the legally authorized curriculum. ASA argues that Mr. Craig Farley of NYSED's Bureau of Adult Program Supervision, orally represented that it was not necessary for ASA to obtain specific approval of the elective courses as part of the curriculum and that it was only necessary to obtain approval of the General Office courses which ASA did, in fact, obtain. ASA further asserts that its catalog was approved by the NYSED and indicates that the elective courses were part of the curriculum.

ED counters, on the other hand, that the elective aspect of the curriculum was not legally authorized by the New York Commissioner of Education under 8 NYCRR § 126.4(a) and, therefore, it may not be included within the curriculum. The effect of excluding the elective courses, according to ED, reduces the legally authorized curriculum to the General Office aspect which, on the basis of instructional (clock) hours, is insufficient to satisfy the minimum number of hours to constitute a six-month program.

Section 126.4(a) of the regulations of the New York Commissioner of Education (8 NYCRR) sets forth the standards and methods of instruction for licensed private schools and registered private business schools. It provides that schools "shall conduct only those curricula or courses which have been approved by the Commissioner." (emphasis added). Moreover, the regulation adds that it is the responsibility of "the director of the school [to] . . . cause to be prepared data concerning curriculum or courses of study" and "[h]e shall submit such data to the Commissioner in such form as said Commissioner shall direct, accompanied by a request for approval." 8 NYCRR § 126.4(b). Under 8 NYCRR
§ 126.4(c), the "[d]ata submitted for approval of curricula or courses . . . shall include . . . (3) [t]he minimum and/or maximum instructional hours and the allocation of time to each portion of the curriculum or course." (emphasis added).

Thus, it is clear that, under New York law, a school must obtain approval from the Commissioner for all courses which comprise its curriculum, and that a school is not legally authorized to conduct courses which are not part of its approved curriculum.

The above interpretation of New York law is consistent with In re French Fashion Academy, U.S. Dep't of Education (Sec. Dec. Mar. 30, 1990). There, the Secretary held that the eligibility of a New York institution to participate in the Pell Grant program--

> depends on whether the institution is authorized to provide postsecondary vocational education programs in the State of New York. 20 U.S.C. 1085(c), 1088(b)(2), and 1141(a)(2). Under the statutes and regulations of New York, in order for an institution, such as the Academy, to offer postsecondary vocational education programs in New York, it must be (1) licensed by the NYSED, and (2) each program it offers must be approved by NYSED.

Id. at 1 (citing In re French Fashion Academy, U.S. Dep't of Education (Initial Decision Oct. 26, 1989, at 12-14)).

While it is evident from the record that Mr. Farley may have misled ASA by representing that it was not necessary for ASA to obtain specific approval of the Commissioner for the elective courses offered at ASA,See footnote 2 2/ his advice was contrary to New York law. See 8 NYCRR §§ 126.4(a), (b), and (c)(3). In this regard, the incorrect interpretation of New York state law by a state employee provides no basis for reliance under the doctrine of equitable estoppel. See Parkview Assoc. v. City of New York, 519 N.E.2d 1372, 1374-75 (N.Y. 1988); Central Diagnostic Lab. v. Perales, 568 N.Y.S.2d 224, 226 (N.Y. App. Div. 1991); Schwartz v. Crosson, 566 N.Y.S.2d 679, 681 (N.Y. App. Div. 1991).

Since the elective courses were not approved by the New York Commissioner of Education, these courses cannot be considered for purposes of the Pell Grant program in determining whether ASA's program met the required six-month minimum program.

The second argument advanced by ASA is that, even if the elective aspect of the curriculum was not legally authorized by the State of New York, the legally authorized aspect of the curriculum, i.e. the General Office program, constituted at least a six-month program for purposes of 20 U.S.C. § 1088(c). In this regard, ASA argues that, under New York law, the General Office program was legally authorized to be measured in credit (semester) hours, and that, utilizing the credit (semester) hour system, its legally authorized curriculum was at least a six-month program. Alternatively, ASA argues that, even if the General Office program was legally authorized only under the instructional (clock) hour system under New York law rather than the credit (semester) hour system, it could, nevertheless, convert its program to credit (semester) hours for Pell Grant purposes, and that, under this approach, its legally authorized General Office program constituted at least a six-month program.

Initially, ASA contends that, as a registered private business school under New York law, it had a choice to offer its General Office program under the credit (semester) hour system or under the instructional (clock) hour system and that its usage of the credit (semester) hour system was approved by virtue of various actions and representations by New York officials. In this regard, ASA asserts that, by virtue of the oral representations by Mr. Craig Farley of the NYSED, NYSED assented to ASA's utilization of semester hours, so long as the courses were also measured in instructional hours as required by the State of New York.See footnote 3 3/

ED conversely argues that New York law permits the curriculum of a registered private business school to be measured only in instructional hours and that, under this measurement system, ASA's General Office program did not meet the minimum requirements for a six-month program. In this regard, it relies primarily upon the Secretary's allusion to New York law in In re French Fashion, U.S. Dep't of Education (Mar. 30, 1990) and on two statements by NYSED officials who were purportedly charged with the administration of education law in New York.

Under New York law, a private business school, such as ASA, may not operate in the State of New York "unless it is registered by the education department" which enjoys jurisdiction "exclusively" over virtually all matters dealing with such schools. **N.Y. Educ. Law** §§ 5002.1 and 5003. Each school is required to "comply with standards for approval set forth in regulations of the commissioner." **N.Y. Educ. Law** § 5003.1.

Under the regulations promulgated by the Commissioner of Education, each private business school may conduct only curricula or courses approved by the Commissioner and, as required by 8 NYCRR § 126.4(c), "[d]ata submitted for approval of curricula or courses . . . shall include: . . . (3) [t]he minimum and/or maximum instructional hours and the allocation of time to each portion of the curriculum or course."See footnote 4 4/ (emphasis added). Therefore, ASA's curriculum may only employ the instructional (clock) hour system and may not utilize the credit (semester) hour system.

The instructional (clock) hour system is required in other areas. For example, the school's catalog must measure the courses in instructional (clock) hours--

> (e) Each . . . registered private business school shall publish a catalog or bulletin . . . including ...
> (11) a brief description of each course showing subjects or units and the approximate time and clock hours to be spent on each subject or unit.

8 NYCRR § 126.3(e).

The student's enrollment contact must state the length of the curriculum in instructional (clock) hours as the enrollment contract must provide, inter alia,--

> (2) the title of the curriculum, course or courses as approved; [and]
> (3) the length of the curriculum, course or courses in instructional hours.

8 NYCRR § 126.7(b).

Therefore, it is clear that New York law requires a registered private business school to measure its academic curriculum in terms of instructional (clock) hours.

In addition, a registered private business school, such as ASA, awards a certificate for the successful completion of its program. As of 1980, New York reserved the credit (semester) hour system to an institution which awards a degree for the successful completion of its program--

> [a credit is defined as] a unit of academic award applicable towards a degree offered by an institution [and represents a semester hour.]

8 NYCRR §§ 50.1(n) and (o).

Thus, a college or university which awards a degree may utilize the semester (credit) hour system, while a registered private business school, such as ASA, which offers a certificate, may not use this system.

The conclusion that ASA is legally authorized to utilize only the institutional (clock) hour system is also consistent with a public pronouncement by the Office of the Assistant Commissioner for Occupational and Continuing Education of NYSED in a memorandum dated August 6, 1980. This public notice informed all licensed private schools and registered private business schools

that "institutions which do not have degree granting powers, including all licensed private schools and registered private business schools, cannot award credit or credit hours to students."See footnote 5 5/

Lastly, this conclusion regarding New York law comports with the Secretary's statement of New York law in In re French Fashion Academy, U.S. Dep't of Education (Mar. 30, 1990) that the use of "clock hours . . . is required by New York law for vocational schools."See footnote 6 6/ Id. at 3.

Alternatively, ASA argues that, even if it was legally authorized only to use instructional (clock) hours in its curriculum, it could, nevertheless, convert to the credit (semester) hour system for purposes of the Pell Grant program. Based on the credit (semester) hours adopted by ASA in its General Office curriculum, ASA asserts that its program was at least a six-month program.

ED argues that the inconsistent employment of a course measurement system is prohibited under French Fashion. ASA challenges the French Fashion decision urging that it was erroneously decided.

The facts in French Fashion are similar to the facts in the present case. Like ASA, French Fashion Academy sought legal authorization to conduct business in New York as a vocational school using instructional (clock) hours. Further, as in this proceeding, French Fashion Academy applied to ED for Title IV eligibility and measured its program in credit (semester) hours. On this basis, ED approved the French Fashion Academy as an eligible institution. French Fashion Academy then calculated and awarded Pell Grant funds on a credit (semester) system. Subsequently, ED sought to recover from French Fashion the difference between the amount of the awards under the credit (semester) system and the amount of the awards that would have been made under the instructional (clock) hour system which it was required to use under New York law.

In French Fashion, the Secretary held that the New York school could not convert to another measurement system for purposes of the Pell Grant program--

> [i]t has been the policy of the Secretary and of ED that a school apply to ED in the same terms that it used when providing applications to the state authorities. See e.g., 34 C.F.R. § 600.3.

French Fashion Academy, at 3.

Therefore. the Secretary held that the school was liable for the difference in the amount of funds awarded.

ASA challenges the Secretary's conclusive statement in French Fashion that ED had a policy in effect for years prior to 1990 which prohibited the inconsistent usage of the measurement systems. In its view, there was no such policy in existence during the years pertinent herein. As support for its position, ASA relies upon a series of internal Departmental documents and a House Committee Report.

While there may be merit to ASA's contention that the Secretary lacked a "policy" which prohibited the conversion between clock hours and semester hours by an otherwise eligible institution, it is not necessary to address this issue in the present proceeding. The General Office curriculum was approved by New York as a 570 instructional (clock) hour program. A program of this length does not satisfy the minimum number of hours required for eligibility under 34 C.F.R. § 668.8(a).

Where the effect of an inconsistent usage of the measurement system recasts an ineligible institution into an eligible institution for purposes of the Pell Grant program, such a conversion will not be approved by this tribunal. Therefore, ASA's argument -- that even if it was legally authorized by the NYSED in instructional (clock) hours, it could, nevertheless, apply to ED for Pell purposes in credit (semester) hours -- is rejected. Accordingly, ASA's curriculum does not constitute a program of at six-months under 20 U.S.C. § 1088(c)(1), and therefore, its program was ineligible for Pell Grant funds.

Lastly, ED asserts that the Secretary adheres to a policy which does not require an institution, erroneously designated as an eligible institution, to repay Federal student financial assistance funds if the institution neither knew nor should have known that the information upon which ED based its eligibility designation was inaccurate. This position is premised on the fact that if the institution knew or should have known that the designation was inaccurate, the institution was, in effect, the cause of the improper distribution of Federal funds and, therefore, is liable for the repayment thereof.

This policy has been applied in the three institutional certificate cases when, subsequent to the initial eligibility designation, a third party institution notifies the Department that its original representation to the Department--that the third party institution gave credit for courses taken by its students while they were attending the applicant institution--was incorrect.See footnote 7 7/

In this proceeding, the initial eligibility designation was based on ASA's application for eligibility and its catalog which collectively reflect that the curriculum constituted 64 credit (semester) hours. Subsequently, ED determined that ASA was an ineligible institution because it had been legally authorized to conduct only the General Office program and it was legally authorized to measure this program only in institutional (clock) hours. As such, the General Office curriculum, when measured in instructional (clock) hours, did not meet the minimum number of hours required to constitute an eligible institution.

ASA contends that Mr. Farley represented that NYSED's approval of the non-business (elective) courses was not required and that it was permissible, under New York law, for ASA to offer the non- approved courses along with the approved General Office program. ASA also asserts that Mr. Farley indicated that ASA could use credit (semester) hours in its catalog so long as it also used the instructional (clock) hour measurement in the catalog and therefore, NYSED approved, at least implicitly, a dual system for the measurement of academic progress. ASA further argues that it relied upon its counsel's view that--

> [i]n our opinion, NYED has clearly approved your use of credits as a measurement of enrollment status and course weight.

Accordingly, ASA urges that it did not know nor should it have known that the elective courses should have been excluded and that it could not use the credit (semester) hour system for purposes of eligibility designation.

The nature of these representations must be considered in light of the overall circumstances. The oral representations by Mr. Farley are inconsistent with the regulations promulgated by the NYSED. Although individuals are presumed to know the law, ASA had a copy of the regulations as well as actual notice, in writing, by NYSED regarding these matters. In February 1986, ASA was given authority to operate in New York and was told "[t]he school is hereby authorized to give only such courses of study as have been properly approved in writing by the Commissioner of Education." (ASA Ex. 21 at 1) ASA was also notified in writing in February 1986 by the Commissioner of Education that approval was granted for the General Office curriculum which consisted of 570 instructional (clock) hours. (ASA Ex. 23 at 1) In addition, it is not reasonable for an institution to conclude that a mere change in its system of measurement for its courses without any change in their actual length would permit an otherwise ineligible institution to convert itself into an eligible institution. Thus, ASA's final argument is without merit. Accordingly, the Department is entitled to recover funds in the amount of $695,751.

III. ORDER

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is hereby--

ORDERED, that the Academy for Social Action immediately and in the manner provided by law pay the United States Department of Education the sum of $695,751.

Allan C. Lewis
Administrative Law Judge

Issued: March 9, 1993
Washington, D.C.

APPENDIX -- FINDINGS OF FACT

1. At all times relevant hereto, the Academy for Social Action was a non-profit postsecondary institution authorized by the New York State Education Department to operate as a registered private business school. (Affidavit of Naftali M. Langsam, ASA Exhibit 41-1) [hereinafter referred to as "Langsam Aff."].

2. The Academy for Social Action ("ASA") was founded to provide educational services to a population of recent migrants to the United States with limited English language skills and in need of retraining in order to adjust to America, to obtain jobs, and to become economically self-sufficient. By the Spring 1988 term, approximately 175 students attended ASA. The age of those students ranged from 20 to 80 years of age.See footnote 8 8/ (Langsam Aff., at 41-2-3).

3. At all times relevant hereto, the President of ASA was Naftali M. Langsam, who was also a member of ASA's Board of Directors. (Langsam Aff., at 41-1-2).

4. In 1984, ASA began to prepare the application materials to obtain a license from the New York State Education Department to operate in New York as a registered private business school. (Langsam Aff., at 41-3; Affidavit of Shoshana Grun, ASA Exhibit 42, at 42-1-2) [hereinafter referred to as "Grun Aff."]. Beginning in 1984, ASA hired Shoshana Grun as an educational consultant and curriculum writer. Mrs. Grun was licensed by New York City as an Education Administrator with specialization as a Curriculum Development/Coordination Instruction Specialist and Staff Development/Training Instruction Specialist. (Grun Aff., at 42-1).

5. ASA, through its attorneys in Washington D.C., Michael B. Goldstein and Blain B. Butner of the law firm of Dow, Lohnes & Albertson, obtained for ASA the complete rules, regulations, handbook, and forms necessary to apply to the New York State Education Department (NYSED) as a registered private business school. (Langsam Aff., at 41-3; Grun Aff., at 42-1-2).

6. In its Curriculum Application I, ASA described, in addition to business courses such as Typing II, Office Procedures III, Business Communications I, and Computer Literacy, a number of ESL (English as a Second Language) courses, as well as courses in citizenship. (Langsam Aff., at 41-3-4).

7. After submitting Curriculum Application I to the NYSED, ASA was informed that Mr. Craig Farley of NYSED's Bureau of Adult Program Supervision had been assigned to review ASA's Application. The record does not disclose the NYSED official who assigned Mr. Farley to ASA. ASA was also told that Mr. Farley would be ASA's primary contact person with the NYSED, that he had the authority to review and approve ASA's materials, that he was to provide guidance to ASA during the application process, and that he would be NYSED's supervisor for ASA if ASA's Application received approval. (Langsam Aff., at 41-5).

8. After a series of communications between Mr. Farley and Rabbi Langsam concerning the deficiencies in Curriculum Application I, ASA submitted Curriculum Application II to the NYSED for approval. (ASA Exhibit 2-1; Langsam Aff., at 41-6; Grun Aff., at 42-2).

9. Mr. Farley informed Rabbi Langsam that NYSED's approval of ASA's revised Curriculum Application II in the form submitted which included courses in English, Civics, and Citizenship would mean that the State would require every student to complete every one of those courses before a student could receive a certificate of completion from the school. Mr. Farley also informed Rabbi Langsam that such approval was not required as far as the NYSED was concerned. Accordingly, Mr. Farley not only recommended to Rabbi Langsam that ASA separate non-business courses from business courses, thereby making the required courses for the certificate of completion reflect only the business courses, but also stated that it was perfectly permissible for ASA to offer those non-business courses (electives).See footnote 9 9/ (Langsam Aff., at 41- 7-8).

10. Rabbi Langsam also asked Mr. Farley about the requirement of specifying course measurement. Mr. Farley stated that, for purposes of the State's review of ASA's Application, all courses must be identified in terms of "instructional hours," defined as consisting of 50 to 60 minutes of classroom training. (Langsam Aff., at 41-7-8).

11. Rabbi Langsam had understood this requirement from the application materials and had identified each course in instructional hours on ASA's Curriculum Application. Rabbi Langsam also asked Mr. Farley whether, in addition to the instructional hour measurement, ASA could also assign credit values to each course. Mr. Farley responded to Rabbi Langsam by informing him that, as long as ASA used the instructional hour measurement as required by the State, the State did not object to ASA also measuring each course by credits and describing the courses listed in the Curriculum Application in that manner in its materials. (Langsam Aff., at 41-9).

12. Each version of ASA's catalog that was submitted to the NYSED described all of ASA's courses in terms of instructional hours and credit hours. (ASA Exhibits 24-10 et seq., 27-15 et seq., 36-60 et seq., and 41-10).

13. ASA's catalog, in revised form in accordance with the suggestions of Mr. Farley, contained a statement on "Requirements for Graduation" as follows:

Satisfactory completion of all core subjects in the student's area of specialization (i.e. "C"), and proficiency in the English language as required by the student's area of specialization and P in all electives (less one). The students shall have at least the equivalent of 38 credits in the core subjects and additional 26 credits in electives and language.

(ASA Exhibits 24-25 and 36-75).

14. ASA's catalog, in revised form in accordance with the suggestions of Mr. Farley, contained a statement on "Satisfactory Academic Progress"--

A full-time student must earn a grade of "C" or better (graded courses) or a grade of "Pass" (pass/fail course) in courses totaling at least nine credits each semester in order to maintain satisfactory academic progress.

(ASA Exhibits 24-23 and 36-73).

15. ASA submitted a revised Curriculum Application (Curriculum Application III) to NYSED in July 1985. (Langsam Aff., at 41-11; ASA Exhibit 4). ASA removed the specific descriptions of the English and Civics courses from the list of required courses in Part II, Section D, Subsections I and II and excluded the detailed descriptions of those courses in Part II, Section E. ASA also added an additional course in Business Math as a required course. (Id.).

16. Through a series of exchanges between ASA and Mr. Farley, ASA learned of additional items that were necessary to complete the application package. (ASA Exhibits 4-1, 5, 6, 7, 8, 10-2, 11, 12-1, and 12-4; Langsam Aff., at 41-11-16; Grun Aff., 42-3).

17. On October 23, 1985, Rabbi Langsam sent the revised Curriculum Application (Curriculum Application IV) to the NYSED which was dated stamped by NYSED's Bureau of Adult Program Supervision as received on October 29, 1985. (ASA Exhibit 13-1).

18. After the issuance of H. Rep. No. 99-383, 99th Cong., 1st Sess. by the House Committee on Education and Labor, Rabbi Langsam wrote on November 25, 1985 to ASA's legal counsel, Mr. Goldstein, concerning ASA's operation in terms of clock hours as opposed to credits. (ASA Exhibit 15; Langsam Aff., at 41-18). On January 9, 1986, Mr. Goldstein advised ASA that--

[w]hile the Commissioner's regulations require that enrollment agreements describe the length of courses and curricula in terms of instructional hours, measurement by credits is also permitted. In approving ASA's application, the New York Education Department approved your use of credits to measure course weight.

Equally important, and also approved by NYED, is your catalog statement on satisfactory academic progress, which provides that a full-time student must earn a passing grade in courses totaling at least nine credits each term to maintain satisfactory academic progress. This provision is also important in awarding federal student financial assistance.

In our opinion, NYED has clearly approved your use of credits as a measurement of enrollment status and course weight. However, as the Commissioner's regulations also require the enrollment agreement to measure courses by instructional hours, we recommend [certain changes in course announcements].

(ASA Exhibit 20; Langsam Aff., at 41-20).

19. After further consultation with NYSED and updating the application package, ASA received four separate letters from Mr. Farley. In these letters, all dated December 26, 1985, Mr. Farley stated on behalf of NYSED that ASA'S application had been approved, which included, inter alia, ASA's catalog. (ASA Exhibits 15, 16, 17, 18 and 19; Langsam Aff., at 41-17-19). However, Mr. Farley indicated that while he had the authority to send the December 26, 1985 letters approving these items, the official letter approving the registration for the school must come from Mr. Farley's Bureau Chief. (Langsam Aff., at 41-19).

20. By letter dated February 4, 1986, Mr. Peter B. Riley, Chief of NYSED's Bureau of Adult Program Supervision, informed ASA that it was authorized to operate as a registered private business school. The letter provided that the school is authorized to give only such courses as have been properly approved in writing by the Commissioner of Education and that approval of courses of study are approved separately from this registration. (ASA Exhibit 21).

21. ASA also received a letter from Mr. Leonard Bozza of NYSED's Bureau of Adult Program Supervision dated February 3, 1986 which stated that ASA's curriculum of General Office (Core) Word Processing Machine in the amount of 570 instructional hours had been approved and that a certificate may be issued upon completion. (ASA Exhibit 23).

22. After ASA received the official approval of the State of New York to operate as a private business school, it then submitted on April 23, 1986, its application for Pre-Accreditation Status with the Council for Noncollegiate Continuing Education ("CNCE"). CNCE (now known as the Accrediting Council for Continuing Education and Training) is a national accrediting body recognized by the Secretary of Education. (Langsam Aff., at 41-1 and 41-21; ASA Exhibit 24).

23. On June 24, 1986, ASA submitted to CNCE an Addendum, portions of which clarified ASA's catalog and the Pre-Accreditation Report that ASA had previously submitted to CNCE in support of its application for Pre-Accreditation status. (Langsam Aff., at 41- 21; ASA Exhibit 25-2-6). The proposed clarification to the catalog included listing each of the designated "required courses" (which totaled 38 credits) in terms of the number of credit hours and instructional hours for each course. For instance, Typing I was 60 instructional hours and 4 credits. In addition, ASA proposed a clarification that "[a] certificate of completion will be granted to student earning 38 credits of Core Courses." The record does not reflect whether these proposed changes to the catalog were submitted to NYSED for approval.

24. Effective August 6, 1986, ASA was granted Pre-Accreditation Status by CNCE. A letter granting Pre-Accreditation Status was forwarded to ED on August 12, 1985. (ASA Exhibits 26, 28-1-2).

25. Pre-Accreditation Status allowed ASA to apply to the United States Department of Education ("ED") for institutional eligibility to participate in Title IV federal student financial assistance programs. (Langsam Aff., at 41-21-22). In anticipation of the CNCE decision, ASA, through its counsel, submitted on July 30, 1986, its application to ED for institutional eligibility as an institution pre-accredited by a national accrediting agency recognized by the United States Secretary of Education, namely, CNCE. (Langsam Aff., at 41-22; ASA Exhibit 27). In its application to ED, the school included the addendum to its catalog purportedly to clarify items raised by the accrediting agency. The addendum to the catalog clarifying items raised by the accrediting agency contained only the first page and one-half of the second page of the five page addendum submitted to CNCE. The material submitted to ED (points 1 through 4) is identical to the material submitted to CNCE in all respects including the misspelled word "advisement" on page one at line 36 except that the page number notations -- "1 of 5" and "2 of 5" -- are missing. The material omitted represented points 5 through 11 which appeared on the last half of page 2, and pages 3 through 5 and, included the following--

5. Catalog Pgs. 12-17 - Curriculum - General Office Core
Required Courses (38 Credits)

	Credits	Hours
Typing 1	4	60
Typing II	4	60
Typing III	4	60
Office Procedures I	4	60
Office Procedures II	3	45
Office Procedures III	3	45

Business Comm. I 2 30
Business Comm. II 2 30

Computer Literacy 2 30

Word Processing 6 90

Business Math 2 30

Machine Transcript 2 30

TOTAL 38 560

Electives: (26 Credits)
Credits Hours
Introductory English I 3 45
Introductory English II 3 45
Beginners English I 3 45
Beginners English II 3 45
Intermediate English I 3 45
Intermediate English II 3 45
Advanced English I 3 45
Advanced English II 3 45
Introduction to Citizenship I 3 45
Introduction to Citizenship II 3 45
Beginners Citizenship I 3 45
Beginners Citizenship II 3 45
Intermediate Citizenship I 3 45
Intermediate Citizenship II 3 45
Advanced Citizenship I 3 45
Advanced Citizenship II 3 45

Introductory:

Judaic Culture 3 45
Beginners Culture 3 45
Intermediate Judaic Culture 3 45
Advanced Judaic Culture 3 45

The total hours of required courses reported on catalog pages 12- 17 is 560. This appears to be a typographical error as the sum total of hours represented in that column is 570 hours. (ASA Exhibit 25-3).

26. ASA completed ED Form 1059 entitled "Request for Institutional Eligibility for Programs" on July 28, 1986. (ASA Exhibit 27-5). ASA's counsel forwarded this form to ED's Division of Eligibility and Agency Evaluation on July 30, 1986. (ASA Exhibit 27-1).

27. On Form 1059, ASA measured its academic progress exclusively in terms of credits. ASA also submitted, at this time, the catalog approved by NYSED. (ASA Exhibit 24-4, Items 16 and 18d; ASA Exhibit 27-22, 27-28, and 27-30).

28. Although NYSED required revisions to be made to ASA's catalog (ASA Exhibit 8), those revisions did not include removing any of the references to credits. (ASA Exhibit 27-15 et seq.).

29. The 1985-86 and 1986-87 versions of the Federal Student Financial Aid Handbook, published by ED, provided in Chapter 2, entitled "Eligibility and Program Participation Agreements," a definition of a six-month training program which emulated the criteria under 34 C.F.R. § 668.8. Likewise, Part IV of ED Form 1059 entitled "Special Terms of the Instruction" adopted the 34 C.F.R. § 668.8 definition of a six-month program to determine whether an institution constituted an eligible institution. (ASA Exhibit 52-12).

30. On September 4, 1986, ED determined that ASA met the definition of an eligible institution and that ASA could apply to participate in Title IV student aid programs. (ASA Exhibit 29-1- 2). This determination was based on ASA's submission to ED that its program consisted of 64 credits. (ASA Exhibit 27-4, 27-30).

31. On September 9, 1986, ASA, through its counsel, submitted its application to ED for certification to participate in Title IV student aid programs, ED Form 633. (ASA Exhibit 30, 31; Langsam Aff., at 41-22).

32. On October 1, 1986, ED approved ASA's request for certification to participate in Title IV student aid programs.

(ASA Exhibit 32-1).

33. On April 21, 1988, Mr. William Swift and Mr. Robert McKiernan from the Ed's Regional Office in New York came to ASA for the stated purpose of conducting a routine program review for the 1986-87 and 1987-88 award years. (Langsam Aff., at 41-23-24).

34. On April 25, 1988, ASA received a letter from Mr. McKiernan dated April 22, 1988 (ASA Exhibit 34) advising that ASA was being placed on a system of payment by reimbursement, and that future federal student aid funds could only be received from ED after additional documentation had been submitted to ED. (Langsam Aff., at 41-26; ASA Exhibit 34-1-2). The letter also stated--

> During that review we determined that the Academy had disbursed Pell Grant funds to students enrolled in an ineligible program during 1986/87. In addition we found that the Academy had apparently misrepresented the nature of its educational program to the Department.

(ASA Exhibit 34-1).

35. After consulting with ED, ASA learned that the basis for ED's determination that it had conducted an "ineligible program" was that the school was only approved by NYSED to measure courses in clock hours and that the institution was limited to seeking eligibility from ED to participate in Title IV programs based on clock hours. In ED's view, the minimum duration of an eligible program in clock hours is 600 clock hours and, therefore, ASA's program of 570 clock hours did not qualify it as an eligible institution. (ASA Exhibit 36-1).

36. On May 24, 1988, counsel for ASA provided to ED's Mr. McKiernan a detailed written explanation, together with supporting documentation, of the underlying circumstances regarding not only the process leading to ASA's registration with the NYSED and its Title IV eligibility from ED, but also why, in its view, the assumptions and the conclusions in Mr. McKiernan's April 22, 1988 letter were not correct. (ASA Exhibit 36).

37. Specifically, counsel for ASA provided ED with several written approvals that it had received from the NYSED which referenced credits as a unit of academic measurement. (ASA Exhibit 36-1-4). Finally, counsel's letter pointed out that ASA was not aware of any requirement of ED that a school which is approved by the State to measure its program in clock hours could not also measure its program in credits for purposes of receiving federal eligibility to participate in Title IV student aid programs. (ASA Exhibit 36-3-4). For these reasons, Mr. Butner requested that the findings of the program review be dismissed. (ASA Exhibit 36-4).

38. ASA received a letter dated June 7, 1988 from Ms. Joan Duval, Director of ED's Division of Eligibility and Certification (ASA Exhibit 37), which indicated that, as a result of ED's program review, she had determined that the school was not eligible to participate in ED's Title IV student financial assistance programs, and that she was revoking the eligibility of the school retroactive to September 4, 1986, which was the date ASA was granted eligibility. (Langsam Aff., at 41-29; ASA Exhibit 37).

39. On June 15, 1988, ED issued its initial final program review determination in this case. (ASA Exhibit 38).See footnote 10 10/ On August 5, 1988, ASA timely filed its request for review of ED's final program review determination. (Order Striking Evidence, issued by Administrative Judge Walter J. Alprin on September 22, 1988, ASA Exhibit 53-1). On September 22, 1988, Judge Alprin granted ASA's motion to strike three documents purporting to interpret New York law submitted by ED as untimely filed. (ASA Exhibit 53- 3).

40. On October 14, 1988, ED purported to "rescind[] the final program review determination dated June 15, 1988 ... in part, because that final program review determination did not include all of the grounds supporting the return of those Pell Grant Program funds." (ASA Exhibit 49).

41. On December 3, 1990, ED issued an amended final program determination stating that ASA was an ineligible program for Title IV purposes during the 1986-87 award year based upon the policy of 34 C.F.R. § 600.3. (OSFA Exhibit G-1-2). OSFA determined that if a state, such as New York, authorizes clock hours only for measuring an institution's programs of postsecondary education, the institution must measure those programs in clock hours for purposes of

determining Pell awards. Accordingly, ED determined that ASA must refund to ED $695,751 in Pell Funds disbursed through ASA. (OSFA Exhibit G-6-1-2).

42. On January 16, 1991, ASA timely filed its request for review of the December 3, 1990 amended program review determination. (ASA Exhibit 54).

43. On October 18, 1984, the Deputy Assistant Secretary for Higher Education Programs and the Director of the Division of Eligibility and Agency Evaluation co-signed a "Dear Colleague" letter which addressed the clock hour/credit hour conversion procedures. The letter reflected the absence of ED guidance with respect to clock hour/credit hour conversions--

> Our office shares the view that a policy statement is needed
>
> on clock hour/credit hour conversions. However . . . we have determined that the Division of Eligibility and Agency Evaluation should not issue a blanket public policy on this issue at this time. This decision is based on the planned publication of proposed eligibility regulations, which, when issued, will provide an opportunity for the public to comment on all aspects of the proposed eligibility rules, including the clock hour/credit hour conversion issue. . . . It is our expectation that the Notice of Proposed Rulemaking will be issued prior to the end of November [of 1984].

44. While the proposed eligibility rules were expected in November of 1984, no such action was imminent as of November 1985 which prompted comment by the Committee on Education and Labor--

> More than a year ago, the Department [of Education] announced a "moratorium" on the conversion of course measurement from clock hours to credit hours. The Committee appreciates the intent of the Department to be assured that institutions are properly measuring course units. The rationale for this "moratorium" expressed in an October 18, 1984 "Dear Colleague" letter . . . seems to be premised upon the imminent issuance of new proposed eligibility rules. More than a year has passed and the proposed regulations have not been issued. The Department's "moratorium" and inaction on new rulemaking is now unduly intrusive and onerous.
>
> In fact, the Committee seriously questions the statutory authority for such a decision which has a direct impact on the educational program of many institutions and therefore seems contrary to the provisions of Section 432 of the General Educational Provisions Act (GEPA) which explicitly prohibits the Department from exercising any direct supervision or control over the curriculum, program of instruction, or administration of an educational institution.
>
> Therefore, it is the opinion of the Committee that as long as an educational institution utilizes generally accepted educational principles in evaluating its units of study or courses of instruction, it is inappropriate for the Department to intrude upon this institutional prerogative by attempting to either deny eligibility to the institution or program or to lock an institution into a singular system of unit or course measurement.

H. Rep. No. 383, 99th Cong., 1st Sess. 57-58 (1985).

45. On April 5, 1988, the Secretary published final eligibility regulations, effective July 1, 1988, which resolved the clock hour/credit hour controversy. The preamble purports to clarify the Secretary's existing policy which precludes the mismatching of clock hours as reported to the State and credit hours as reported to ED for Pell funds--

[t]he Secretary has added paragraphs (c) and (d) to § 600.3, "Special conditions," to clarify the Secretary's existing policy with regard to the relationship between an institution being legally authorized to provide a postsecondary education program in a State and the manner in which the institution provides that program, i.e., clock hours or credit hours, in that State.

Some States require a certain type of institution or school to measure its educational programs in clock hours in order to be legally authorized in that State to provide a program of postsecondary education. Therefore, that type of institution or school located in that State qualifies as an eligible institution or school under the relevant HEA statutory definition only if it measures its educational programs in clock hours. The Secretary has amended § 600.3 by adding paragraph (c), which will take effect July 1, 1988, to make this requirement explicit in the regulations.

Other States require a certain type of institution or school to use clock hours to measure its educational programs in order to receive a State license or charter. Some of these states may then permit an institution or school, once it has received that license or charter, to measure its educational programs in credit hours for other purposes. However, for the purpose of satisfying the statutory definition of an eligible institution or school under the HEA, the Secretary considers these institutions or schools to be legally authorized to provide a program of postsecondary education in these States only if they provide their educational programs in clock hours because that was a required element in receiving a license or charter from the State. The Secretary has further amended § 600.3 by adding paragraph (d), which also takes effect July, 1, 1988 to make this requirement explicit in the regulations.
34 C.F.R. § 600.3 was promulgated, in part, as follows:

(c)(1) If a State requires an institution to measure its educational programs in clock hours in order to be legally authorized in that State to provide a program of education beyond secondary education, the Secretary considers that institution is legally authorized in that State to provide a program of education beyond secondary education only if the institution measures its educational programs in clock hours.

. . . .

(d)(1) If as part of the application process for receiving a license, charter, or other document that demonstrates it is legally authorized to provide a program of education beyond secondary education in a State, the State requires an institution to measure its educational programs in clock hours, the Secretary considers that institution to be legally authorized to provide a program of education beyond secondary education in that State only if the institution measures its educational programs in clock hours.

53 Fed. Reg. 11,208, 11,209, 11,212 (Apr. 5, 1988).

Subsequent to the April 5, 1988 publication, ED received numerous objections to the July 1, 1988 effective date. As a result, the Secretary suspended the effective date of paragraph (d) of § 600.3 until July 1, 1989. 53 Fed. Reg. 25,489 (July 7, 1988). Pub. L. No. 100-369 also suspended the effective date of § 600.3(d) until July 1, 1989. The Secretary further suspended the effective date of 34 C.F.R. § 600.3(d) until October 1, 1989 "to permit institutions sufficient time to comply" with the instructions issued by the Department on July, 28, 1989. 54 Fed. Reg. 40,388 (Oct. 2, 1989). 34 C.F.R. § 600.3(c)(1) became effective July 1, 1988.

It is unclear whether the Secretary suspended the July 1, 1988 effective date of 34 C.F.R. § 600.3(c). In any event, the effective date or dates of 34 C.F.R. §§ 600.3(c) and (d) is after the 1986-87 award year in issue in this proceeding.

46. The Secretary subsequently submitted a bill to Congress which addressed, inter alia, the clock hour/credit hour dispute. The Secretary urged congressional action to "significantly diminish[]" abuse of Title IV funds--

Section 13 of the bill would amend section 481(d) of the bill to require an institution to measure the length of a course of study or its academic year for that course of study on a "clock hour" basis for purposes of title IV, if the course of study is licensed by the State in which it is located only on that basis.

(ASA Exhibit 46-36).

47. On April 26, 1989, ED issued a "Dear Colleague" letter which addressed the implementation of 34 C.F.R. § 600.3(c) and (d) and indicated that the effective date was July 1, 1989. The letter provided that "[t]hese regulations establish the rules and procedures that the Secretary of Education uses in determining whether an institution or school qualifies as an eligible institution under the Higher Education Act of 1965, as amended."

48. Finally, on July 31, 1989, the Director of the Student Financial Assistance Program and the Director of Debt Collection and Management Assistance Service wrote ASA that--

If the institution was required to list its educational programs in clock hours as a precondition to receiving a State license, your institution must change to clock hours from credit hours in order to remain eligible to participate in student financial assistance program administered by ED.

(ASA Exhibit 51-2).

SERVICE

_____

On March 9, 1993, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

Stephen M. Kraut, Esq.
Office of the General Counsel
U.S. Department of Education
Room 4091, FOB-6
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Leslie H. Wiesenfelder, Esq.
Dow, Lohnes & Albertson,
1255 23rd Street, N.W.
Washington, D.C. 20037

On March 9, 1993, a copy of the initial decision was also distributed to--

Jack C. Reynolds
Director, Institutional Monitoring Division
(formerly Audit and Program Review)
U.S. Department of Education
Room 3923, FOB-3
7th and D Street, N.W.
Washington, D.C. 20202-5254

Footnote: 1 *1/ This regulation was repromulgated without substantial change in 34 C.F.R. § 668.2 (1987). 51 Fed. Reg. 41,919, 41,922 (Nov. 19, 1986).*

Footnote: 2 *2/ There is some question regarding the extent to which ASA may have been misled. However, ASA was informed in writing on February 4, 1986 by the NYSED's Chief of the Bureau of Adult Education that--*

[ASA] is hereby authorized to give only such courses of study as have been properly approved in writing by the Commissioner of Education. (emphasis added).

Footnote: 3 *3/ It appears that ASA concedes that Mr. Farley's representations, if true, authorize the measurement of courses semester hours but, this is, in addition to the measurement in instructional hours, not in lieu thereof.*

Footnote: 4 *4/ An instructional (clock) hour is a term of art defined as "an instructional unit of time consisting of a minimum of fifty minutes and a maximum of sixty minutes." 8 NYCRR § 126.1.*

Footnote: 5 5/ In ED's brief, counsel urges this tribunal to attach significant weight to two letters directed to ED by officials purportedly charged with the administration of education law in the State of New York. Both letters expressed the view that private schools and registered business schools are approved in terms of instructional (clock) hours only and such institutions were precluded from having their curricula authorized in terms of credit (semester) hours. ED's reliance on the comments of these NYSED officials is clearly misplaced. New York jurisprudence is clear that "the words and language of a statute constitute the best indication of its proper construction" and "in instances of ambiguity the court will turn the legislative history and other interpretive tools for assistance." In re Eastern and S. Dist. Asbestos Litig., 772 F. Supp. 1390, 1390-91 (E.&S.D.N.Y. 1991) (citing in part West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1148 (1991); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)). See also Ellington Constr. Corp. v. Zoning Bd. of Appeals, 566 N.E.2d 128, 132 (N.Y. 1990); Capital Newspapers v. Whalen, 505 N.E.2d 932, 935 (N.Y. 1987); People v. Zodda, 580 N.Y.S.2d 971, 973 (N.Y. Sup. Ct. 1991). This tribunal is unaware, however, of any instance in which a court resolved a matter of statutory construction based upon an opinion of a state official which was drafted in anticipation of litigation. The tribunal declines to adopt such an approach.

Footnote: 6 6/ ASA distinguishes French Fashion on the basis that NYSED "approved" ASA's use of credits in its catalog to describe its curriculum while NYSED rejected the use of credits in the catalog of the French Fashion Academy. Initially, NYSED did not approve the curriculum in semester (credit) hours. While the catalog had references to instructional (clock) hours and semester (credit) hours, the approval of its catalog adds nothing. The curriculum was approved in instructional (clock) hours and the curriculum was measured in instructional (clock) hours in the catalog as required by New York law.

Footnote: 7 7/ Based on the Secretary's decision in In re Pennsylvania College of Straight Chiropractic, Dkt. No. 90-8-SA, U.S. Dep't of Education (1990), there may be some doubt whether this policy continues in effect. The tribunal, however, will apply this policy until such time as there is a clear indication that this policy has been abandoned.

Footnote: 8 8/ The subject Program Review involved the 1986-87 award year; however, due to the problems created by, inter alia, ED's original final program review determination, dated June 15, 1988, (ASA Exhibit 47) ASA ceased operating as an institution eligible for Federal Title IV funds at the end of the 1987-88 award year.

Footnote: 9 9/ ED objects to the last sentence on the ground that this advice is contrary to Section 126.4(a) of NYSED regulations (8 NYCRR) which requires NYSED approval of all courses. Therefore, ED concludes that Mr. Farley "must have included that condition" of approval in his conversation. As the record contains no factual evidence to support ED's objection, the finding remains in the form as proposed by ASA and as supported by the record.

Footnote: 10 10/ The June 15, 1988 final program review determination was inadvertently also included in the record as ASA Exhibit 47.