IN THE MATTER OF OREGON STATE SYSTEM OF HIGHER EDUCATION, Respondent.

Docket No. 92-25-SP
STUDENT FINANCIAL ASSISTANCE PROCEEDING

Appearances: James J. Casby, Jr., Esq., Department of Justice, General Counsel Division, Eugene Oregon, for the Oregon State System of Higher Education, Eugene, Oregon

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

Before: Judge Daniel R. Shell

DECISION

Procedural Background

The United States Department of Education Office of Student Financial Assistance (**OSFA)** issued a final program review determination notice on January 10, 1992, charging the oregon State System of Higher Education **(oregon)**See footnote 1 [1] with two regulatory violations:

Finding 1. Oregon State System of Higher Education institutions have improperly charged a student loan administrative services fee of $10 for each Stafford and SLS loan for the period July 1, 1987, to the present . . . . In addition, the University of Oregon has also charged this fee for PLUS loans for the same period.See footnote 2 [2]

Finding 2. Title IV funds have been improperly used to pay student loan admlnistrative services fees for Guaranteed Student Loan reclpients at Western Oregon State College, Oregon Health Sciences University, and the University of Oregon. Based upon our finding that the [Oregon] student loan administrative services fee is not authorized, but [is] in fact prohibited under Federal law, the use of Title IV funds to pay this fee is a violation of additional regulatory requirements.See footnote 3 [3]

As a result of site visits conducted July 8 through July 10, 1991, at the University of oregon and Portland State University, a Final Program Review Determination was issued and found that:

[I]n the term subsequent to the borrower's receipt of a GSL, a student loan administrative services fee is placed on the accounts receivable for such student.

Subsequently, this accounts receivable for tuition and fees, including the student loan administrative services fee, is pa l from a combination of sources, including Title IV lnancial aid funds, cash payments, and non-Title financial aid funds.See footnote 4 [4]

By letter of September 12, 1991, Oregon contested the conclusions of the program review report. On February 21, 1992, Oregon filed a formal request for review of the Final Program Review

Determination. On May 6, 1992, the parties filed a "Joint Statement of Stipulations of Fact."See footnote 5 [5]

Factual Summary

The parties stipulated to the following relevant facts: 1) The University of Oregon, Oregon State University, Portland State University, Western Oregon State College, Southern Oregon State College, Eastern Oregon State College, Oregon Institution of Technology, University of Oregon Health Science Center Medical School, and the University of Oregon Health constitute the Oregon State System of Higher Education.See footnote 6 [6] 2) "[Oregon] charges a 'Student Loan Administrative Services Fee' of $10.00 to students receiving non-institutionally funded student loans, including Guaranteed Student **Loans (GSLs)" and SLS loans for the** "period July 1, 1987 to the present."See footnote 7 [7] 3) The **University of Oregon,** the Oregon Institute of **Technology, and Oregon State University** charged a $10 administrative services fee for PLUS loans.See footnote 8 [8] 4) For the 1987-88, 1988-89, 1989-90, and **1990-91 academic years,** Oregon institutions have collected at least $731,000 from at least 73,140 GSL recipients. 5) At all oregon institutions, except for Portland State University, the student loan administrative services fee is collected in the following manner:

In the term subsequent to the borrower's receipt of a GSL, a student loan administrative services fee is placed on the accounts receivable for such student. Subsequently, this accounts receivable for tuition and fees and other various charges, including the student loan administrative services fee, is paid from a combination of **sources, financial aid funds, cash payments, and non-Title IV financial aid funds.**

6) At Portland State University, the student loan administrative services fee is **deducted from the general** deposit each student is required to make with the **institution before** each academic year, unless the fee is **paid from other sources** before the end of the academic year. 7) The program participation agreements between the Department and Oregon institutions provide in Article II, paragraph 3 that:

The institutions aqree not to charge any student a fee for processing or handling any application, form or data required to determine the student's eligibility for assistance under any Title IV Program or the amount of such assistance, or for completing or handling the Federal Student Assistance Report provided for in Section 483(e) of the HEA.See footnote 9 [9]

8) The parties agreed that the $10.00 "fee has been charged to students since the 1987-88 academic year pursuant to [Oregon's State] regulation (OAR 580-40-040) adopted by the oregon Board of Higher Education . . . [which] states:"

Student Loan Administrative Services Fee. Upon approval of a non-institutionally funded student loan a fee shall be charged for support services required to administer such a loan. No fee may be assessed for processing applications nor determining eligibility for student loans. However, once a loan has been approved and the proceeds of the loan received by the institution the fee authorized by this section shall be assessed.See footnote 10 [10]

In addition to the relevant facts stipulated, other unrefuted facts were presented. Although noting that considerable administrative activities are generated from the processing of applications used to determine student eligibility for the Title IV loan programs, Oregon explained that its administrative services fee is not based on those activities. Instead, according Oregon, "the administrative activities for which the fee is charged [includes the following]:

First, the loans come from the lenders to the institutions in envelopes, often in batches and occasional large batches; the envelopes or packages are routed to the institution Financial Aid Office . . . .

Institution staff are then required to open the envelopes or packages and, item by item, record that the check is available to the ,tudent/payee for pick-up . . . . A card or other docur nt is prepared which the student will sign to acknowledge delivery of the check; the card is attached to the check and both are then sorted for filing . . . . In addition, for each check, staff must confirm that the amount of the check is consistent with the amount of the loan; this requires staff to check the student's file . . . [I]n many instances, the student . . . comes prematurely to the counter where the checks are distributed; in such cases, staff must respond to these contacts and inform the student that the check is not yet received or otherwise ready for distribution . . . .

When the student appears after his/her check is available, the student presents **identification** to staff; staff go to where the **checks are maintained,** and search for the check . . . **staff extracts that** check and the attached acknowledgment signature card or document, returns to the **counter and, once the** student's identification has been examined and approved, has the student **execute acknowledgment** of receipt and hands the check to **the student;** in some instances, student identification is inadequate and the process must be repeated; in **some instances,** the institution is a co-payee, **requiring additional** activity . . . .

Staff involved in the distribution of the checks forward the acknowledgment card **or document for** filing; the cards are sorted and filed in the loan file of the appropriate student . . . . **Each institution arranges** for each student, at least once, to be counseled regarding the student's **obligation as a borrower;** this requires notifying the student, **conducting the** counseling (usually by videotape) and having staff respond to questions . . . . In **the event a** student drops below the course load level required to maintain the Title IV loan, or withdrawing, the institution must follow a procedure described in the . . . attached . . . document . . . Loan Check **Procedures** . . . .See footnote 11 [11]

OSFA counters that the activities for which the administrative services fee is charged are activities "institutions are required to perform under Subpart F Requirements, Standards and Payments for Participating Schools, GSL and PLUS Program Regulations. "See footnote 12 [12] According to OSFA, schools are required to bear their own costs in fulfilling their responsibilities under the Guaranteed Student Loan Programs. Even more important, OSFA offers that a number of the activities described by Oregon are services necessary to determine a student's continued eligibility for assistance or the amount of such assistance, to wit: checking files and other records to determine if the student appearing to receive his or her loan proceeds is, in fact, the student to whom the student loan check is written.

As additional facts, OSFA represented at an administrative hear ng held July 27, 1992, that "the parties have stipulated that Oregon institutions have charged a student loan administrative services fee ot Slo for each Stafford and SLS loan for the period July 1st, 1987, to the present."See footnote 13 [13] According to OSFA, the $73,140 is not, however, up to date. The implication is that Oregon improperly charged more than the $731,400 cited in the January 10, 1992, final program review determination notice. This issue was addressed at the hearing:

Mr. SANN: Exactly. I should point out to Your Honor, however, that 73,140 is not up to date. That was based on the most accurate information available at the time of the issuance of the program review report. And the parties have agreed that we would await the ruling by Your Honor on the legal issue before Oregon would go ahead and engage in the accounting to determine the current figure .

JUDGE SHELL: In January of '92, when you issued your notice, the notice was as a result of a program review?

Mr. SANN: That's correct, Your Honor.

JUDGE SHELL: And the program review covered what year, sir?

Mr. SANN: It covered 1987 through '88, 1988 to '89, 1989 to '90, 1990 to '91, with the requirement that Oregon perform an accounting to provide up to date figures to the amount of GSL fees that had been collected.

JUDGE SHELL: So you're talking about from July of 1987 through June of 1991, that was the program review period?

Mr. SANN: Essentially that's correct, in the sense that that was the information that was available; but the scope of the program review was July 1st, 1987, through the present, in terms of the review.

JUDGE SHELL: So you understand what I'm doing, I'm considering only what was included in the notice that was issued. If at some later date there's an amendment to the notice or a subsequent notice after the closing date that you have used in what was served on the Oregon System, you're welcome to do that; but the only thing I'm going to consider is the facts that are in front of me, the '87 award year through the '91.

I understand there are ramifications if there is a finding adverse to Oregon that you could follow through on later. But what I'm dealing with is a still picture, a balance sheet at a certain point in time, and I am well aware of the fact that the Department has certain required action in the event there is a violation found. So you understand my role is limited to what you have given me to deal with. All right?

Mr. SANN: Okay.See footnote 14 [14]

Consequently, this tribunal views this action as OSFA's attempt to uphold its finding that Oregon institutions improperly charged $731,400 in administrative services fees and that amount is limited by the underlying facts in its January 10, 1992, final program review determination notice. Indeed, in a May 8, 1992, "Joint Statement of Stipulations of Fact," both parties stipulated that "[f]or the 1987-88, 1988-89, 1989-90, and 1990-91 academic years, [Oregon] institutions have collected at least $731,400 from at least 73,140 GSL recipients."See footnote 15 [15] Hence, the last academic year for which improper administrative services fees were allegedly charged by Oregon is the 1990-91 academic year.

Issues for Discussion

Whether a $10.00 charge to GSL recipients for student loan administrative services performed **after** the initial determination of the recipient's eligibility to receive Title IV funds is prohibited by Section 1094(a)(2) of the Higher Education Act (HEA) and, if so, whether Oregon has improperly used Title IV funds to recover the charge.

Arguments of Counsel

Findinq 1- Improper student loan administrative services fee at the Oreqon State Svstem of Higher Education to students in the Stafford, PLUS. and the SLS loan programs

OSFA's Arquments

OSFA maintains that Oregon's administrative services fee is prohibited by Section 487(a) of the HEA of 1965, as amended.See footnote 16 [16] Section 487(a)(2), 20 U.S.C. 1094(a)(2), of

the HEA provides:

[T]he institution shall not charge any student a fee for processing or handling any application, form, or data required to determine the student's eligibility for assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42 or the amount of such assistance, or for completing or handling the Federal Student Assistance Report provided for in section 1090(e) of this title.

Even though the administrative services fee is a charge or activities performed after the **initial determination of** eligibility, OSFA claims that the fee is nonetheless prohibited by Section 1094(a)(2).See footnote 17 [17] According to OSFA, "[t]he activities [that] participating schools are **required to perform after** the initial determination of

eligibility are inextricably linked with eligibility determinations."See footnote 18 [18] OSFA argues that Oregon institutions have an obligation to **confirm that a student** is enrolled in the school when the **student shows up at the school's** cashier counter to pick up his or her loan check. Verifying that the student is still enrolled in the school and that the amount of funds on the loan check is correct is part of the service:
that an institution is **required to perform throughout** the loan process, from the initial application all the way through the **time that the student completes their** proqram at the

school . . . This also is a service related to a student's continuing eligibility, because if a student defaults on a guaranteed student loan,
then they are no longer eligible for Title IV assistance. See footnote 19 [19]

Further, OSFA cautions that "[t]o the extent [Oregon] can establish that it is charging the fee for activities unrelated to eligibility, these activities are those for which the school is required to bear its own costs."See footnote 20 [20] According to OSFA, "[i]t just simply is not acceptable to charge Slo to process checks, open envelopes, and take checks out."See footnote 21 [21]

Oreqon's Arquments

oregon maintains that its administrative services fee is not prohibited by Section 1094(a)(2).See footnote 22 [22] According to Oregon, its fee is "included in the calculation of the student's need as part of the cost of attendance analysis . . . but is charged to the student only if aid is awarded."See footnote 23 [23] In this manner, according to Oregon, the fee is lawful because the fee is unrelated to "determining eligibility for aid."See footnote 24 [24]

Oregon offers a rebuttal to OSFA's contention that administrative activities occurring after a student has been approved for a Title IV loan but prior to delivering the loan proceeds to the student constitute activities for "determining

eligibility."See footnote 25 [25] Instead, according to Oregon, these activities are one's which are

more properly classified as administrative services "confirming that the student has 'maintained' eligibility."See footnote 26 [26] Oregon notes that:

[T]o some extent the Department's position is correct, that there are some activities **which occur by the** institution after the lender has disbursed the loan and before the -heck is delivered to the student. But
. . . these activities do not fall under the concept of required to determine the student's eligibility, for two reasons. One . . . is that the regulation itself (34 C.F.R. **682.604(b)(2))** . describes those activities . . . not in terms of a determination of eligibility, but rather a judgment by the institution that the student maintains eligibility. . . .[T]he second reason is . . . [e]ven if those activities are within the scope **of the provision** . . . there is a wealth of activity which falls clearly outside **of even those activities required** to determine whether the **student has maintained** eligibility, and it is those activities on which our fee is based. See footnote 27 [27]

In addition, because the Oregon state regulation on school administrative services fees "was written to avoid charging a fee prohibited by [Section 1094(a)(2)]," **Oregon argues** that the regulation should be read as providing for "costly support services" which are "outside the shadow of the statute's prohibition."See footnote 28 [28]

Findinq 2 - Improper use of Title IV tunds to pay student loan
administrative services fees

OSFA's Arquments

OSFA contends that Oreqon committed a second and independent regulatory violation. According to OSFA, the use of Title IV funds to pay Oregon's administrative services fee is improper regardless of whether the fee is itself permissible.See footnote 29 [29] OSFA contends

that "[a]ll [Oregon] institutions other than Portland State University" improperly used Title IV funds to pay the student loan administrative services fee.See footnote 30 [30] " OSFA argues in a somewhat circular fashion that "even assuming that the fee were somehow proper, which OSFA's position is that it's not, an additional violation occurred by usinq Title IV funds to pay this fee.See footnote 31 [31] As a factual matter, OSFA contends that the "determinant factor" as to whether Title IV funds have been used improperly is "whether the student happens to pay the fee themselves before an actual deduction is made from Title IV funds."See footnote 32 [32]

According to OSFA, the administrative services fee is placed on an accounts receivable for each student and is subsequently paid from a combination of sources including Title IV funds. OSFA argues that using Title IV funds to **pay the** student administrative services fee violates Section 484(a) of the HEA, 20 U.S.C. 1091(a), because Section 484(a) ostensibly requires that Title IV funds be used solely for **expenses** related to the student's attendance at the school, namely, "costs of attendance. "See footnote 33 [33] Section 484(a) provides:

In general In order to receive any **grant, loan,** or work assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42, a student must

. . . . (4) file with the institution ofhigher education which the student intends to attend, or is attending (or in the case of a loan or **loan guarantee with the lender),** a statement **of educational purpose (which** need not be notarized but **which shall include** such student's social security number or, if the student does not have a **social security** number, such student's student identification number) stating that the money attributable to such grant, loan, or loan guarantee will be used solely for expenses related to attendance or continued attendance at such institution; and (5) be a citizen or national of the United States .

OSFA distinguishes that its program review does "not address deduction of the administrative services fee from 'Title IV loan proceeds,' but rather use of any

Title IV funds to pay this fee."See footnote 34 [34] Additionally, OSFA offers that the "point in time at which the fee is assessed is not relevant to our concern . if an unauthorized fee is charged, the point in time that it is paid does not change the unauthorized nature of the fee. "See footnote 35 [35] As OSFA explains, "when [Title IV] funds are sent to the institution before they've been properly credited to, say, tuition, or a check has been issued to the student for purposes of meeting their educational expenses, those funds are Title IV funds; and in many cases . . . there only would be Title IV funds that would be available to the student. "See footnote 36 [36] The consequence of OSFA's position is that Title IV funds may be used to pay only costs of attendance permitted under 34 C.F.R. 682.604(d)(ii).

Oregon's Arquments

With regard to Finding Two, Oregon defends that none of its institutions assess an administrative services fee as a deduction from GSL or any other Title IV loan proceeds. Oregon offers that it has not violated 34 C.F.R. 682.604(d)(1)(ii) by crediting students' accounts with Title IV Federal funds. According to Oregon, the student uses his own funds to pay his accounts receivable instead of using Title IV funds. In the alternative, Oregon argues that "[t]he [Oregon] fee is a cost of attendance" no different than a "library fine" or a "GSL 'origination fee.'" Put another way, Oregon contends that its fee is a cost of attendance because the fee amounts to a "miscellaneous personal expense[]" that is "owed to the school by the student for which substantially all of the school's students incurring those costs have been billed. See footnote 37 [37]

Finally, Oregon explains that, consistent with 34 C.F.R. 682.604(c)(2)(i), the checks for "all loans guaranteed by the Oregon guarantee agency" are delivered to the student.See footnote 38 [38] As a result, according to Oregon, "the funds leave control of the school . . . however briefly" and become funds of the student. Even where the student merely endorses the GSL check over to the school, that act is just "as if the student wrote his or her own check to the school and deposited the aid check to his or her account. "See footnote 39 [39] Oregon further explains that "[b]y accepting and endorsing a single payee check,

the funds become fungible with the student's other liquid assets."See footnote 40 [40] Consequently, a student endorsing a GSL check over to an Oregon institution is not a "transaction by which the student's account is credited with aid."See footnote 41 [41]

At oral argument, Oregon offered that its administrative services fee is put on a student's account and the student is mailed a bill which is paid in **one of several ways:**

A student might simply send in a check or come to the counter with cash to pay that bill. **Another way** that it may get paid is that in the final **quarter of** the year, in the spring quarter, the student gets the final disbursement of the guaranteed student loan funds, through the bank, through the **institution, and directly** to the student. And at the time the student gets the check, the cashier will advise the **student that** the student has certain charges that still remain on his bill, for instance, the tuition for the final quarter; perhaps library fines or parking fines; and also possibly the guaranteed student loan fee. And at that point the student may well take the check, which is payable to the student, endorse it, give the check back to the school, **and at that point that check would** be credited to the student's account and the proceeds of that check used to pay off those charges, and any surplus or excess returned to the student. The problem is that there's no way of knowing which students fall into the other category, that is to say, who paid the fee from some other source.See footnote 42 [42]

Consequently, Oregon maintains that as a result of the manner in which its administrative services fee is paid, "there is no violation of 34 C.F.R. 668.32, because by the time, even in the most direct payment case, by the time the cashier at the institution gets the proceeds of the Title IV funds, they're fungible [sic].See footnote 43 [43]

OSFA Demands

As a result of Findings One and Two, OSFA concludes that "Oregon institutions have improperly charged in total an amount in excess of $731,400 to 73,140 GSL loan recipients with this fee."See footnote 44 [44] In this action, OSFA seeks the "[r]eversal of all unauthorized student loan administrative services fees (an amount in excess of $731,400). . . and payment[s] of the $8,500 [and $15,000 in] informally proposed fine[s]."See footnote 45 [45] S OSFA bases the $731,400 upon reports received by the Department from

OSSC, Oregon's primary guarantee agency, for the 1987-88, 1988-89, 1989-90, and 1990-91 award years "and from all other guarantee agencies for the 1987-88 and 1988-89 award years."See footnote 46 [46] The guarantee agencies report's, according to OSFA, identify the number of loans made to each Oregon institution.See footnote 47 [47]

According to OSFA, the amount of unauthorized administrative services fees collected by Oregon institutions was $731,400.See footnote 48 [48] A computer worksheet was generated from OSFA's "Institutional Data System" by a Department institutional review specialist which showed the number and amount of Guaranteed Student Loans received by students at Oregon institutions for all guarantee agencies for the 1987-88 and 1988-89 award years and for Oregon State Scholarship Commission (OSSC) only for the 1989-90 and 1990-91 award years.See footnote 49 [49] Based upon this information, OSFA determined that 73,140 students were charged a $10 student loan administrative services fee.

Discussion

The discussion of this case is divided into the following parts: 1) Finding 1 - Improper student loan administrative service fee and 2) Finding 2 - Improper use of Title IV funds to pay student loan administrative services fees. Each finding is further divided into subparts. Finding 1 - Improper student loan administrative service fees is divided into a discussion of statutory interpretation and the application of that interpretation. Finding 2 is divided into a discussion of the impact of the resolution of finding 1, commingled funds, and burdens of proof.

Finding 1
Improper student loan administrative services fee
Statutory_interpretation

This case turns **on the proper interpretation of 20** U.S.C. 1094(a)(2). As in any case involving statutory interpretation, the "starting **point must be the language employed by Congress.See footnote 50** [50] If the statute is clear and unambiguous, "that is the end of the matter, for the court, as **well as the agency, must give** effect to the unambiguously expressed **intent of Congress."See footnote 51** [51] Where the straightforward application of the **plain terms of** the statute does not produce a result "demonstrably at odds with the intentions of its drafters," there is no occasion for the tribunal to accept any party's invitation to look beyond the plain language of the statute.See footnote 52 [52] If, on the other hand, the statute is silent or ambiguous on the question, the tribunal must determine whether the agency's **construction is** a "permissible" one.See footnote 53 [53] In such a case, the **tribunal must defer to the** agency's interpretation so long as it is **reasonable and consistent** with statutory purposes.See footnote 54 [54]

According to OSFA, Section 1094(a)(2) prohibits institutions from charging fees for activities conducted by institutions to

Lechmere v. NLRB, No. 90-970, slip op. at 3 (U.S. January 27, 1992).

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determine a student's initial and continued eligibility for student financial assistance. Oregon argues that the controlling words of Section 1094(a)(2) are "required to determine" and that these words have a more restrictive meaning than the interpretation OSFA has offered.'See footnote 55 [55] In addition, according to Oregon, the statutory word "eligibility" should not be read to mean both initial eligibility and continuing eligibility because (1) none of the requirements of Sections 1091(a) - (j) "pertain to the institution support activity in handling the assistance once it is available," (2) OSFA's reading of Section 1094(a)(2) would "destroy 20 U.S.C. 1090(a)(1)," and (3) the legislative history of Section 1094(a)(2) is "inconsistent with the USED interpretation. "See footnote 56 [56] Oregon's arguments are more persuasive. Indeed, OSFA's reading of the statute is at odds with the plain meaning of the statutory language. Section 1094(a)(2) provides, in pertinent part:See footnote 57 [57]

The institution shall not charge any student a fee for processing or handling any application, form, or data **required to determine** the student's eligibility for assistance under this subchapter. . . .(emphasis added).

A plain reading of this statutory lanquage yields a straightforward result. Relying only upon the language of the statute, the words "determine" and "required" refer to the student's eligibility to obtain student financial assistance. The word "determine" is defined as "to fix conclusively or authoritatively . . . to settle or decide by choice of alternatives or possibilities . . . resolve.See footnote 58 [58] The word "require" is defined lS "to demand as necessary or essential . . . . to impose a compulsion or command on: compel. "See footnote 59 [59] Com on sense use of the terms "require" and "determine" refers to the idea that an essential item is needed to make a decision. These words denote finality or completion of action.

Moreover, the surrounding words also denote completion or final determination. The

statutory provision proscribes institutions from charging fees for **"processing** . . . application[s]." Common sense dictates that in normal circumstances an "application" must be "process[ed]" in some finite time. There must be some distinct moment in time that an application for a Title IV loan is considered processed and a potential student borrower is "determine[d]" eligible (or ineligible -- as the **case may be) for a Title IV loan.See footnote 60** [60]

Notably, a different question arises regarding the determination that an eligible student borrower has become ineligible (i.e. if a student has withdrawn from an institution, that student then becomes ineligible for a Title IV loan). Whatever the cause or reason for the student's new status as an ineligible student borrower, **the facts remain: data was** collected, an application processed, and the student determined eligible for a Title IV loan prior to her withdrawal from classes. The initial determination of eligibility and the subsequent determination of ineligibility

are two distinct events. Nothing in the unambiguous words of the Section 1094(a)(2) suggests that the two events should be conflated into one on-going activity. Accordingly, the plain meaning of the provision is that institutions are prohibited from charging students a fee for activities conducted by the institution that are essential to the determination of a student's eligibility to participate in Title IV loan programs.See footnote 61 [61]

Consequently, once the eligibility is determined, the proscription of Section 1094(a)(2) does not apply.See footnote 62 [62] Section 1094(a)(2) prohibits neither institutions from charging fees for post-eligibility-determination activities nor fees for nonessential activities that are not required by statute or regulation.See footnote 63 [63]

OSFA makes a gallant effort to vindicate its peculiar interpretation of Section 1094(a)(2) by bootstrapping Section 1094(a)(2) to the regulatory requirements of 34 C.F.R. Part 682, Subpart F.See footnote 64 [64] Those requirements, however, refer to conditions governing a student's **continued** eligibility for Title IV loans. The unambiguous language of Section 1094(a)(2) does not refer to continued eligibility.See footnote 65 [65] Unlike Section 1094(a)(2), 34 C.F.R. 682.604, 682.605, and 682.607 require institutions to follow certain procedures to ensure that an eligible student has not become ineligible. Section 1094(a)(2), on the other hand, only governs the institution's initial determination that a student is eligible for Title IV financial assistance.See footnote 66 [66]

As noted suPra, only where the statutory provision is ambiguous need the tribunal make further inquiry into whether the agency's interpretation is "based on a permissible construction of the statute. 1'See footnote 67 [67] In the case at bar, the statutory provision is clear and unambiguous. The plain meaning of the statutory provision ends the tribunal's task.See footnote 68 [68]

The tribunal "must give effect to the unambiguously expressed intent of Congress."See footnote 69 [69] **Where the straightforward** application of the plain terms of the statute does not produce a result "demonstrably at odds with **the intentions of its** drafters," there is no occasion for the tribunal to accept any party's invitation to look **beyond the plain language** of the statute. **Accordingly, the tribunal will not look** beyond the plain meaning of Section 1094(a)(2) to consider whether OSFA's interpretation of the statutory provision is permissible; such a detour would conflict with the rules of statutory interpretation. See footnote 70 [70] Based on the plain meaning of Section 1094(a)(2), institutions are prohibited only from charging fees for required or essential activities conducted in the course of determining whether a student is eligible for **Title IV** financial assistance. **Therefore, the tribunal finds that Section** 1094(a)(2) does not prohibit institutions from charging students fees for administrative services rendered subsequent to the institution's determination that a student is eligible to receive Title IV financial assistance.

The next issue is whether the activities for which Oregon charges its $10 administrative services fees are activities rendered subsequent to the institution's determination that a student is eligible to receive Title IV financial assistance.

First, the undisputed facts of this case comport with Oregon's assertion that its fees are for activities which occur **after** a student is determined eligible for Title IV financial assistance. As noted supra, the parties stipulated to the fact that the student loan administrative services fee is

collected "in the term subsequent to the borrower's receipt of a GSL."See footnote 71 [71] Moreover, the activities for which the fee is charged all occur after the student's loan check is issued by the lender.See footnote 72 [72]

Second, the tribunal finds that the activities for which Oregon charges its $10 administrative services fees are activities rendered subsequent to the institution's determination that a student is eligible to receive Title IV financial assistance and, therefore, do not violate Section 1094(a)(2). As an initial matter, the tribunal notes that it is a well settled maxim of federalism that Federal tribunals should

defer to a state's interpretation of its own laws.See footnote 73 [73] In the case at bar, the State of Oregon enacted a student loan services fee regulation which provides:

Upon approval of a non-institutionally funded student loan a fee shall be charged for support services required to administer such a loan. No fee may be assessed for processing applications nor determining eligibility for student loans. However, once a loan has been approved and the proceeds of the loan received by the institution the fee authorized by this section shall be assessed.See footnote 74 [74]

The State's student loan services fee regulation prohibits the State's institutions from **charging administrative services** fees to students prior to the institution's determination that the student is eligible for a Title IV loan. Accordingly, the State's regulation is in harmony with the plain meaning of Section 1094(a) (2).

In sum, the tribunal finds **that (1) Section** 1094(a) (2) prohibits neither institutions **from charging fees for posteligibility-determination activities, nor fees for non-essential** activities that are not required by statute or regulation and (2) the activities for which Oregon charges its $10 administrative services fees are activities **rendered subsequent to** the institution's determination that a student is eligible to receive Title IV financial assistance **and, therefore, does not violate** Section 1094(a) (2).

Findinq 2 - ImproPer use of **Title IV funds to** paY student loan administrative services fees

Finding 1 resolves finding 2

The tribunal's finding that Oregon has not committed a regulatory violation under Finding **One necessarily resolves** Finding Two in Oregon's favor.See footnote 75 [75] Oregon has not improperly used Title IV funds to recover its administrative services fee because the fee does not violate Section 1094(a) (2).See footnote 76 [76] The fee is for tivities subsequent to the institution's determination that a student is eligible for a Title IV loan and is charged to the student **after** the student's loan check is disbursed to the student.See footnote 77 [77]

Moreover, even if Oregon used Title IV loan proceeds to recover its administrative services fee, Oregon would be permitted to use Title IV funds to recover its fee under 20 U.S.C. 108711(2).

Section 108711(2) provides that Title IV funds may be used to cover costs of <-- tendance. A "cost of attendance" may include:

an allowance for books, supplies, transportation, and **miqcellaneouq personal expenqes** for a student attending the institution on at least a half-time basis, as determined by the institution.(emphasis added).See footnote 78 [78]

Oregon's argument that its administrative services fee is a miscellaneous personal expense is persuasive. The fee is an expense related to attendance at an institution. Educaticn's regulations are not out of step with this finding. Section 682.200 Subpart B provides, in pertinent part:

Estimated cost of attendance: (1) Except as provided in paragraph (2) of this definition, the tuition and fees applicable to a student, plus the school's estimate of other expenses reasonably related to attendance at that school, for the period of enrollment for which the loan is sought. These expenses may include, **but are not limited to:** reasonable transportation and commuting costs; costs for room, board, books, and supplies; the insurance premium for the loan; and, if applicable, the origination fee for the loan. These expenses may not include the purchase of a motor vehicle.

Accordingly, Oregon's fee is permissible by the Department of Education's own regulation. Charging student borrowers fees for administrative expenses related to administering an institution's GSL loan program comes within the expenses related to attendance at school provided for in the regulation.

Comminqled funds

Oregon notes that consistent with 34 C.F.R. 682.604 (c)(2)(i), the checks for "all loans guaranteed by the Oregon guarantee agency" are delivered to the student.See footnote 79 [79] As a result, "the funds leave control of the school" and become funds of the student. Even where the student merely endorses the GSL check over to the school, that act is just "as if the student wrote his or her own check to the school and deposited the aid check to his or her account. ,See footnote 80 [80] Consequently, the funds become fungible when they are commingled with the student's other liquid assets.See footnote 81 [81]

Burdens of proof

In addition, OSFA failed to meet its burden of proof in finding two. OSFA failed to provide this tribunal with the name of even one Oregon student who allegedly paid the administrative services fee by having the fee deducted from his or her Title IV funds. The burden of proof in this proceeding is governed by 34 C.F.R. 668.116(d). Section 668.116(d) provides:

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.

OSFA takes the position that its burden in this proceeding is simply to accuse the alleged wrongdoer -- while the alleged wrongdoer must prove his innocence. This cannot be so.

To begin with, the meaning of Section 668.116(d) is more apparent when counterpoised by its sister regulation Section 668.88, the regulation governing Subpart G proceedings. Section 668.88(c) provides that OSFA "has the burden of persuasion in . . . proceeding[s] under this subpart." The drafters of Section 668.88 must be presumed to have carefully chosen the words "burden of persuasion" since the phrase is a legal term of art. Burden of persuasion is a heavier burden than "burden of proof.See footnote 82 [82] The phrase "burden of proving" is "intended to denote the burden of going forward" or of producing evidence while "burden of persuasion" denotes the ultimate burden of proving the allegations in the program review determination.See footnote 83 [83]

Significantly, Section 668.116(d) neither specifies what burden of proof OSFA must meet in Subpart H proceedings nor refers to the institution's burden as a "burden of persuasion." Consequently, it must be presumed that the drafters of Sections 668.88(c) and 668.116(d) intended OSFA'S burden to be the same in Subpart H

proceedings as it is in Subpart G proceedings. Indeed, this tribunal has already recognized that the locus of the burden of persuasion must rest with the agency because the agency is the proponent of the agency order.See footnote 84 [84] If both Sections are read ln harmony, the burdens on both parties would be the same. Accordingly, in this Subpart H proceeding, Oregon has the burden of production and OSFA retains the ultimate burden of persuasion for each finding it alleges. With regard to Finding Two, OSFA has not met its burden.

In sum, the tribunal finds that Oregon has not improperly used Title IV funds to recover its administrative services fees because [1] the fee, itself, does not violate Section 1094(a)(2), [2] once a student's loan check is disbursed to him, his GSL funds become fungible with his other liquid assets and, [3] OSFA has not provided this tribunal with any evidence which supports its allegation under finding two and therefore has not met its burden of persuasion under 34 C.F.R. 668.116(d).

Summary of the Case

This case may be summarized in five points. The first two points are relevant to Finding One. First, the plain meaning of Section 1094(a)(2) neither prohibits institutions from charging students fees for post-eligibility-determination activities nor prohibits fees for non-essential activities that are not required by statute or regulation. Second, the activities for which Oregon charges its S10 administrative services fees are activities rendered subsequent to the institution's initial determination that a student is eligible to receive Title IV financial assistance and therefore does not violate Section 1094(a)(2).

With regard to Finding Two, there are three points. Oregon has not improperly used Title IV funds **to recover** its administrative services fees because [1] the fee, itself, does not violate Section 1094(a)(2), [2] once a **student's** loan check is disbursed to him, his GSL funds become fungible with his other liquid assets and, [3] OSFA has not provided this tribunal with any

evidence which supports its allegation under finding two and, therefore, has not met its burden of persuasion under 34 C.F.R. 668.116(d).

Order

Based on the foregoing analysis and conclusions, OSFA's final program review determination that the Oregon State System of Higher Education return S731,400 in student loan administrative services fees based on Finding 1 and be found to have

improperly used Title IV funds to pay the student loan administrative services fees based on Finding 2 is **denied.**

Daniel R Shell
Administrative Law Judge

Issued: March 1, 1993
Washington, D.C.

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A copy of the attached document was sent to the fol'owina:

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Footnote: 1 [1] *Issued by the Chief of the Institutional Review Branch of Region X Seattle, Washington, W. Phillips Rockefeller.*

Footnote: 2 [2] *Ed. Ex. 1 at 2.*

Footnote: 3 [3] *Program Review Determination at 2-3.*

Footnote: 4 [4] *Program Review determination at 6; Ed. Ex. 2 at 6. See also OSFA Initial . . at 3; 34 C.F.R. 668.12(b)(2)(iii) and 663.32.*

Footnote: 5 [5] *In its October 30, 1992, Posthearing Br., OSFA notes that "[t]he parties have stipulated to the facts in this case." Id. at 2.*

Footnote: 6 [6] *See Oregon Initial Br. at 16n.1.*

Footnote: 7 [7] *Joint Statement at 1.*

Footnote: 8 [8] *See Joint Statement at 1 - 2. The University of Oregon ceased charging the fee for PLUS loans as of July 1, 1991.*

Footnote: 9 [9] *Joint Statement at 1-3. Additionally, OSFA offers that "University of Oregon officials have confirmed that a student loan administrative services fee is charged for noninstitutionally funded student loans including the Stafford, SLS, and PLUS loan programs, as well as a number of non-Title IV loan programs." Program Review Determination at 2. Further, OSFA represents that "[o]fficials from Portland State University, Western Oregon State College, and the Oregon Health Sciences University have confirmed that a student loan administrative fee is charged . . . except that no fee is charged for PLUS*

loans." Id. at 2.

Footnote: 10 [10] *Joint Statement at 2.*

Footnote: 11 [11] *Affidavit of James J. Casby, Jr., September 24, 1991, at 23.*

Footnote: 12 [12] *Program Review Determination at 4.*

Footnote: 13 [13] *Tr. at 6.*

Footnote: 14 [14] *Tr. at 6-7, 10-11.*

Footnote: 15 [15] *Joint Statement at 2.*

Footnote: 16 [16] *Under the authority of Section 487(a)(2), OSFA promulgated 34 C.F.R. 668.12(b)(2)(iii) and 663.32. Section 668.12(b)(2)(iii) provides:*

(b)(1) A participation agreement conditions the initial and continued eligibility of the institution to participate in any Title IV, HEA program upon compliance with the provisions of this part and the . dividual program regulations.
(2) In the participation agreement, the institution agrees-. . . . (iii) That it will not request from or charge any student a fee for processing or handling-

(A) Any application, form or data required to determinea student's eligibility for, and amount of, Title IV, HEA program assistance; or (B) The Federal Student Assistance Report required under section 483(f) of the HEA.

Section 683.32 provides:

(a) Before receiving any funds under any Title IV, HEA program, a student shall file a Statement of final Purpose for each award year with the institution, or under the GSL, PLUS, or SLS programs, with the lender.

(d) Until a student who is applying for Title IV, HEA program assistance under the Pell Grant, campus-based, SSIG or ICL programs files a Statement of OSFA Final Purpose with the institution, an institution may not, for any period of instruction, disburse funds to the student under any Title IV, HEA program.

Footnote: 17 [17] *See OSFA Posthearing Br. at 4; OSFA* ***Initial Br.*** *at 9-13; Tr. at 43. As noted infra, OSFA alleges that Oregon violated 34 C.F.R. 668.116 as well as its statutory precursor, 20 U.S.C. 1094(a)(2). Because a regulation issued by an administrative agency "must be consistent with the statute under which it . s promulgated," the decision in this case will be based upon t.e statutory interpretation of Section 1094(a)(2). District of Columbia v. Catholic University, 397 A.2d 915, 919 (D.C. 1979).*

In addition, according to OSFA, Oregon's administrative services fee is not permitted by of Section 1094(a)(2) because that Section "sets forth an institution's obligations under the [program participation agreements]." OSFA ***Posthearing Br.*** *at 7; 20 USC 1094(a)(2). OSFA argues that Oregon was required to agree, as a condition of its initial and continuing participation in any Title IV, HEA program, that Oregon would not charge students fees "for processing or handling any application, form, or data required to determine the student's eligibility for assistance." OSFA Posthearing Br. at 7. The relevant language in the participation agreement is identical to the statutory language. Consequently, the existence of a participation agreement does not alter the analysis of Finding one.*

Footnote: 18 [18] *OSFA Posthearing Br. at 4.*

Footnote: 19 [19] *Tr. at 29.*

Footnote: 20 [20] *Id. at 4; Tr. at 49-58; OSFA Initial Br. at 7-11; see 34 C.F.R. Part 628, Subpart F.*

Footnote: 21 [21] *Tr. at 30.*

Footnote: 22 [22] *Oregon also argues that its administrative services fee comes within the gray area of being neither prohibited by Section 1094(a)(2) nor expressly permitted by that section. To bolster its position, Oregon relies on the axiom of statutory construction, inclusio unius est exclusio alterius (the inclusion of one is the exclusion of another). See e.g., Black's Jaw Dictionary 687 (5th ed. 1979). According to Oregon, "Congress would not have included a list of*

specific activities for which a fee could not be charged if its intentions were to exclude fees for all activities." Oregon Initial Br. at 5.

Footnote: 23 [23] *Oregon Posthearing Br. at 2.*

Footnote: 24 [24] *Id.*

Footnote: 25 [25] *In the alternative, Oregon contends that if Section 1094(a)(2) was read to prohibit its administrative services fee, it is fundamentally unfair to enforce the "policy" against Oregon .without "prior notice of it and an opportunity to conform [Oregon's] conduct [to the policy]." Oregon Initial Br. at 14. This cannot be so. Oregon's argument assumes as fact, what is in issue. Namely, whether the statute is ambiguous. If the statute is held to unambiguously prohibit Oregon's fee, then Oregon has been put on notice of the statutory prohibition since at least October 17, 1986, the effective date of the statute*

Footnote: 26 [26] *Oregon Posthearing Br. at 3; see also 34 C.F.R. 682.604(b)(2).*

Footnote: 27 [27] *Tr. at 45-46.*

Footnote: 28 [28] *OSFA Posthearing Br. at 4.*

Footnote: 29 [29] *To bolster its argument, OSFA alleges that the administrative services fee is not an authorized cost of attendance as defined in 34 C.F.R. 682.604(d)(ii) and 20 USC 108711. Section 682.604(d)(ii) provides:*

The school may credit a reqistered student's account with only those loan proceeds covering costs of attendance owed to the school by the student for which substantially all of the school's students incurring those costs have been billed, and any additional loan proceeds that the student requests in writing that the school retain in order to assist the student in managing his or her loan funds for the remainder of the academic year.

Footnote: 30 [30] *OSFA Initial Br. at 14-16; Proqram Review Determination at 6. Officials at Portland State University reported to OSFA that the administrative services fee was deducted from the general deposit students are required to make before matriculation rather than charged as an accounts receivable from the student. See Program Review Determination at 6; OSFA Initial Br. at 16 & n.14.*

Footnote: 31 [31] *'Tr. at 14.*

Footnote: 32 [32] *Tr. at 14-15.*

Footnote: 33 [33] OSFA Initial Br. at 16; 34 C.F.R. 668.32.

Footnote: 34 [34] Program Review Determination at 8.

Footnote: 35 [35] Id.

Footnote: 36 [36] Tr. at 21.

Footnote: 37 [37] See 34 C.F.R. 682.604(d)(1)(ii) and 20 USC 108711(2); Oregon Initial Br. at 7. At oral argument, OSFA contended that it was "totally inappropriate to consider [the administrative services fee] a miscellaneous personal expense for cost of attendance purpose[s]." OSFA distinguished the GSL origination fee from Oregon's fee by pointing out that the GSL origination fee is "deducted by the bank pursuant to statute."

Footnote: 38 [38] See Oregon Initial Br. at 5.

Footnote: 39 [39] Id. at 5.

Footnote: 40 [40] Id.

Footnote: 41 [41] Id.

Footnote: 42 [42] Tr. at 18-19.

Footnote: 43 [43] Tr. at 20-21.

Footnote: 44 [44] Program Review Determination at 2.

Footnote: 45 [45] Program Review Determination at 5, 8. The remedy OSFA is seeking is the return of the Slo administrative services fee to all students who were charged the fee since the 1987-88 academic year, the year the fee was

instituted. According to OSFA, 73,140 student borrowers were charged a $10 administrative services fee during the period covered by the program review.

Footnote: 46 [46] See Program Review Determination at 2.

Footnote: 47 [47] OSFA explained that the 73,140 recipients cited in its Program Review Determination includes students who received PLUS loans as well as GSL loans. In addition, OSFA noted that "[t]he current terminology used by the Department is for 'the GSL programs' to be sort of an umbrella term to include the Stafford program, the SLS program and the PLUS program." Program Review Determination at 2.

Footnote: 48 [48] *See Ed. Ex. 4.*

Footnote: 49 [49] *See Ed. Ex. 4*

Footnote: 50 [50] *"Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979).*

Footnote: 51 [51] *K Mart Corp. v. Cartier Inc., 486 U.S. 281, 291 (1988).*

Footnote: 52 [52] *Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).*

Footnote: 53 [53] *K Mart Corp., 486 U.S. 291-292; Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). The rules of statutory interpretation do not change because an agency regulation is also involved. As noted supra, 34 C.F.R. 668.12(b)(2)(iii) was promulgated under the authority of the statutory provision in issue. Moreover, Section 668.12(b)(2)(iii) adopted the same language as its statutory precursor. A regulation issued by an agency must be consistent with the statute under which it was promulgated. Consequently, the tribunal's analysis of Section 1094(a)(2) applies to the identical language used in the regulation as well.*

Footnote: 54 [54] *K Mart Corp., 486 U.S. at 292. The Department of Education is entitled to deference "when it interprets an ambiguous provision of a statute that it administers."*

Footnote: 55 [55] *Oregon asserts that "[t]he fault in USED's reading of the statute may be reduced to one factor: [t]o USED, the phrase 'required to determine' is written out of the statute, and the phrase 'which may affect' [is] substituted in its place." Oregon Initial Br. at 9.*

Footnote: 56 [56] *Oregon Initial Br. at 10-11*

Footnote: 57 [57] *Section 1094(a)(2) is quoted in full in the "Arguments of Counsel" section of this decision.*

Footnote: 58 [58] *Webster's Ninth New Collegiate Dictionary 346 (1990). The tribunal looks to the disctionary for instruction because, just as Justice Stevens noted, "[t]he dictionary is a necessary, and somtimes sugfficient, aid to the judge confronted with the task of construing an opaque Act of Congress." Board of Education v. Mergens, No. 88-1597, slip op. At 1 (U.S. June 4, 1990) (Justice Stevens, dissenting).*

Footnote: 59 [59] *Id. at 1002; see also Black's Law Dictionary 1173 (5th ed. 1979) (noting that "require" means "to direct, order, demand, instruct, command, claim, compel, request, need, exact").*

Footnote: 60 [60] *Indeed, Education's regulations under "Policies and procedures" for verifying information contained in a student's Title IV financial assistance application imposes time limitations on the verification process. The policy plainly expresses the intent that the application process is not to go on indefinitely. See 34 C.F.R. 668.53(a)(1) and 668.53(a)(2).*

Footnote: 61 [61] *The words of a statute should be construed according to their ordinary sense, and with the meaning commonly attributed to them. PeoPles Druq Stores Inc. v. District of Columbia, 470 A.2d 751, 753 (D.C. 1983).*

Footnote: 62 [62] *Moreover, Oregon's argument that the axiom of statutory construction, inclusio unius est exclusio alterius, applies is persuasive. It must be presumed that Congress would not have included a list of specific activities for which a fee could not be charged if Congress' intention was to exclude fees for all activities.*

Footnote: 63 [63] *This interpretation of Section 1094(a)(2) is consistent with the overall tenor of the statute. Notably, Section 1090(a)(1) provides, in pertinent part:*

A student or parent may be charged a fee for processing an institutional or State financial aid form or data elements that is not required by the Secretary. (emphasis added).

Accordingly, the unambiguously expressed intent of Congress was to permit institutions to charge students fees for some activities related to Title IV financial assistance that are "not required by" the HEA or the Department's regulations.

Footnote: 64 [64] *OSFA Initial Brief at 9-11.*

Footnote: 65 [65] *Indeed, the word "continued" does not appear in the statutory provision.*

Footnote: 66 [66] *OSFA's interpretation of Section 1094(a)(2) has an aura of imagination that would stretch the statutory prohibition to an absurd consequence which Congress could not have intended. According to OSFA's logic, Congress intended to bankrupt many of the nation's institutions by precluding institutions from charging fees to students to recover any administrative costs related to administering Title IV programs because there is always the possibility that a student may become ineligible by withdrawing from an academic program. There is no evidence in the record that Congress had such an ill intent.*

Footnote: 67 [67] *Chevron, 467 U.S. at 843.*

Footnote: 68 [68] *Although Congress' intent cannot be established by a single reference, or even several statements, sundered from context, OSFA has not cited any relevant legislative history,*

and this tribunal is not aware of any, that supports OSFA's reading of the statutory provision. The tribunal is also mindful of the fundamental rule of statutory construction that the intent of Congress is to be found in the language which Congress has used in the statute. United States v. Goldenberg, 168 U.S. 95, 102103 (1897).

Footnote: 69 [69] *K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).*

Footnote: 70 [70] *"In this case, the tribunal is merely charged with the reading of the statutory provision to determine its meaning. Chevron, 467 U.S. at 842-843.*

Footnote: 71 [71] *Joint Statement at 1 - 2.*

Footnote: 72 [72] *The parties have agreed that the activities include, inter alia,: (1) opening envelopes that student loan checks are mailed in, (2) informing the student that the check is available, (3) verifying the student's identity when he or she signs the loan check, and (4) counseling the student on his obligations as a borrower. See Oregon Ex. A.*

Footnote: 73 [73] *See e.q.. Gulf Coast Trades Center, Dkt. No. 89-16-S, U.S. Dep't of OSFA (March 7, 1991) (Decision of the Secretary acknowledging a state's primary role in interpreting its own laws).*

Footnote: 74 [74] *Joint Statement at 2.*

Footnote: 75 [75] *Although in OSFA's opening brief they characterize Finding Two as a regulatory violation which is independent from Finding One, the final program review determination notice describes Finding Two as it is -- a finding "based upon [the] finding that the [Oregon] student loan administrative services fee is not authorized." Program Review Determination at 2-3.*

Footnote: 76 [76] *OSFA proposed an S8,500 "informal fine" on oregon based on the alleged improper use of Title IV funds. Based upon the foregoing analysis, the tribunal does not have jurisdiction to order the payment of fines in a proceeding under 34 C.F.R. Part 668, Subpart H.*

Footnote: 77 [77] *See Joint Statement at 2; Oregon Initial Br. at 5.*

Footnote: 78 [78] *20 U.S.C. 108711(2).*

Footnote: 79 [79] *See Oregon Initial Br. at 5.*

Footnote: 80 [80] *Id. at 5.*

Footnote: 81 [81] *Id.*

Footnote: 82 [82] *Burden of persuasion "under traditional **view never** shifts from one party to the other at any stage in the proceeding." The party with the burden of persuasion has the burden of persuading the trier[s] of fact that the existence of the fact is more pro able than its nonexistence. Black's Law Dictionary 178 (5th ed. 1979).*

Footnote: 83 [83] *See e.g.. In the matter of Sinclair Community College, Dkt. No. 89-21-S, U.S. Dep't of Education (May 31, l991)(Judge Cook) at 37-38. Although in Sinclair the administrative law judge noted that the institution "bears the ultimate burden of persuasion under 34 C.F.R. 669.116(d)," the final decision of the Secretary duly recognized that finding as "little more than dicta." Decision of the Secretary at 7. The administrative law judge's actual decision in Sinclair did not embody the resolution of which party bore the burden of persuasion. The Secretary's decision did, however, summarily assume, without analyzing Section 668.116(d), that the school in Sinclair had the ultimate "burden of persuasion." Id. at 7-8.*

Footnote: 84 [84] *See In re Alabama Dep't of Education, Dkt. No. 89-58-R, U.S. Dep't of Education (Oct. 23, 1991) (Interlocutory Order Judge Shell) at 23-24; Roach v. National Transp. Safety Board, 804 F.2d 1147, 1159 &n.ll (10th Cir. 1986) (holding that although the burden of production may shift throughout an administrative proceeding, the ultimate burden of persuasion remains with the agency); In re Kentucky Polytechnic Institute, Dkt. No. 89-56-S, U.S. Dep't of Education (April 27, 1990) (Interlocutory Order of Judge Cook) (noting that the proponent of a rule or order has the burden of proof); C. Koch, Jr., Administrative Law and Practice, 6.5 (1985) (noting that the common law has traditionally placed the burden of persuasion on the moving party and that practice is "observed in administrative hearings").*