

UNITED STATES DEPARTMENT OF
EDUCATION WASHINGTON, D.C 20202

IN THE MATTER OF

INSTITUTE OF MULTIPLE
TECHNOLOGY,

Respondent.

Docket No. 92-26-ST

Student Financial
Assistance Proceeding

DECISION

Appearances:

Leigh Manasevit, Esq. and Kristin E. Hazlitt, Esq., Brustein & Manasevit, for the Institute of Multiple Technology.

Edmund J. Trepacz, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before:

John F. Cook, Chief Administrative Law Judge.

I. PROCEDURAL BACKGROUND.

The Director of the Division of Audit and Program Review, Office of Student Financial Assistance Programs (SFAP) 1 of the U.S. Department of Education issued a Notice of Termination and Fine as to the eligibility of the Institute of Multiple Technology (IMT or Institute) to participate in programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. § 1070 et seq and 42 U.S.C. § 2751 et seq, on February 14, 1992. IMT filed a request for review on March 6, 1992.

On March 19, 1992, a notice of receipt of request for review and a prehearing briefing order were issued. On April 15, 1992, IMT filed a motion for a pre-hearing conference or in the alternative an extension of time to file its brief. On April 16, 1992, SFAP filed a response in opposition to IMT's motion for a prehearing conference or an extension of time to file its brief. Additionally, SFAP filed its initial brief on April 16, 1992.

During April 1992, several teleconferences were held with the parties during which a jurisdictional issue was discussed that arose by reason of the fact that SFAP's Termination and

Fine Notice filed with the Office of Hearings and Appeals and served upon IMT lacked Appendix A, which was referenced in SFAP's Notice at page 4. A motion to dismiss was filed, followed by briefs from both parties. Thereafter, the tribunal issued an Interlocutory Decision in the case. The tribunal held that SFAP's failure to include Appendix A in its Notice of Intent to Terminate and Fine did not result in a failure to provide adequate notice to IMT. SFAP remedied the situation when it provided Appendix A to IMT and the tribunal. Accordingly, the tribunal denied IMT's motion to dismiss and issued a new prehearing briefing order.

SFAP and IMT filed their initial briefs on October 30, 1992. The parties filed their reply briefs on November 30, 1992. On December 30, 1992, the parties filed a joint motion for an extension of time to submit their joint statement of stipulations and issues. The tribunal granted the extension and the parties filed their joint statement of stipulations of fact, issues of law and SFAP's objection to the relevancy of certain stipulated facts on January 6, 1993.

A notice of hearing was issued on January 8, 1993, setting a hearing date of February 9, 1993.

On January 27, 1993, counsel for SFAP filed a motion to bifurcate the above-captioned termination and fine proceeding and also requested that the fine proceeding be stayed until the tribunal issued a decision as to a previous motion filed by that counsel on January 21, 1993, for a summary judgment or in the alternative to vacate the notice of hearing issued on January 8, 1993.

These motions and the time needed by counsel for both parties to file briefs made the holding of a hearing on February 9, 1993, impossible. Consequently, due to SFAP's motions, the tribunal was forced to cancel the hearing scheduled for February 9, 1993.

Briefs were filed by both parties as to SFAP's motions. Both motions were denied on April 20, 1993, and the hearing was rescheduled for May 18, 1993. In the decision of April 20, 1993, the parties were reminded of the provisions of § 668.90 (a) (4) which provides:

(4) The hearing official shall base findings of fact only on evidence considered at the hearing and on matters given judicial notice. If a hearing is conducted by written submissions, findings of fact must be agreed to by the parties.

The parties were therefore informed that even if IMT's eligibility to participate in programs authorized under Title IV of the HEA were terminated, any other factual issues would need to be determined relating to the fine portion of the proceedings such as (1) the gravity of the alleged violations, which would bring into consideration the seriousness of the violation, the good faith of the respondent, and any other mitigating factors, and (2) the size of the respondent school, which would bring into consideration not only the amount of Title IV, HEA program funds received by or on behalf of students for attendance at the institution, but also the number of students in attendance and the number of branch campuses, if any.

As to these issues the parties were informed that if findings of fact could be agreed to as called for in § 668.90(a) (4), then the parties could avoid the expense of a hearing .

A telephone conference took place on Monday, May 3, 1993, during which the attorney for SFAP stated that an interlocutory appeal would be filed by SFAP as to a ruling or rulings of the tribunal along with a request for a stay of the May 18, 1993, hearing date. On Tuesday, May 11, 1993, the tribunal arranged a telephone conference with the attorneys for the parties to determine the status of the proceeding. Eight days had gone by with no action by SFAP as to the appeal and the date of hearing was then only 7 days away. This lack of action by SFAP, in view of the imminent date of hearing created substantial problems for the parties involved, including the tribunal which was again required to secure a hearing site and arrange for travel and lodging under totally uncertain circumstances.

The attorney for SFAP stated that he still intended to file an interlocutory appeal and a request for a stay, but was not specific as to when this would happen although reference was made as to the end of the week, which would have been May 14, 1993. In view of the fact that the hearing was to take place only 4 days later, this kind of timing was considered inappropriate by the tribunal.

The tribunal pointed out during the conference that if the parties were actually interested in avoiding an evidentiary hearing it was absolutely necessary that action be taken pursuant to § 668.90 (a) (4) and that efforts along that line should have been taken previously and should at the least be taken now so that the case could be completed as one single proceeding rapidly rather than to attempt to break the proceeding into parts with the added time and totally unnecessary added expense to all parties, particularly since the respondent institution had previously been in Chapter 11 bankruptcy proceedings.

It was pointed out during the telephone conference of May 11, 1993, that during the prior telephone conference of May 3, 1993, the tribunal had asked counsel for both parties whether they wished to avoid the expense of a hearing and come under the provisions of § 668.90 (a) (4) by submitting agreed findings of fact and requesting that a decision be issued upon these written submissions. At that time the tribunal stated that part of the agreed findings of fact could be the stipulation previously filed and it could also include other findings not yet agreed to. When this question was asked on May 3, 1993, the attorney for the Respondent said that he was willing to discuss this with the opposing counsel to see if agreement could be reached as to findings of fact. However, the attorney for SFAP did not agree to do this, but said that he was going to file a petition for interlocutory review.

At the time of the conference on May 11, 1993, more than a week had gone by without action by SFAP. Again the attorneys were asked whether they wished to attempt to reach agreement as to findings of fact and come within the provision of § 668.90 (a) (4). Again the attorney for the Respondent was willing to do this, but the attorney for SFAP did not at that point affirmatively express a desire to do this; however, later in the conference of May 11, 1993, the attorney for SFAP took the approach that he would now consider meeting with the Respondent's attorney as to agreement concerning facts. Despite this, there still appeared to be some uncertainty as to exactly what SFAP's attorney would do as to this since he stated that he had to discuss the matter with his client.

The tribunal pointed out to SFAP's attorney that, if the findings of fact were agreed to pursuant to § 668.90(a) (4), those findings would have to include the facts pertaining to all issues in the case, including the fine portion as well as the termination portion, or the tribunal would be powerless to issue a decision based only on written submissions.

In view of all of the circumstances, the tribunal considered that it had to change the date of hearing. If the hearing date of May 18, 1993, were to be maintained, the Respondent's attorneys explained that they would have had to immediately expend continuous efforts to prepare for hearing, while at the same time SFAP's attorney said he would be filing an interlocutory appeal and request a stay. This presented an impossible situation which would have required a great expenditure of money on behalf of the institution which could have been for naught if SFAP were successful in obtaining a stay. Also if the attorneys were going to endeavor to agree upon findings of fact under § 668.90(a) (4) it was logical to set the date of hearing forward so the parties could exhaust all efforts as to findings of fact in the interim. (This exhaustion of efforts should have been carried out earlier and perhaps could have happened if SFAP's attorney had not declined to take part in these efforts on May 3, 1993.)

Therefore, the date for the hearing was changed to June 9, 1993.

In view of the uncertainty as to SFAP's attorney's position as to the efforts to reach agreement as to the findings of fact, since he stated that he had to consult with his client, an order was issued on May 14, 1993, setting a prehearing conference, pursuant to the provisions of § 668.89, to take place on Wednesday, May 26, 1993.

Pursuant to § 668.98, SFAP then filed a petition for interlocutory review of these rulings with the Secretary of Education on May 19, 1993. Counsel for SFAP also submitted at that time a motion to stay the proceedings.

At the prehearing conference which took place on May 26, 1993, the attorneys for the parties agreed that they would meet on Tuesday, June 1, 1993, to endeavor to reach an agreement as to findings of fact applicable to all issues in the case so that the hearing could be conducted by written submissions pursuant to § 668.90 (a) (4). As a part of the statement containing the agreed to findings of fact would also be a statement as to any objections as to relevancy or materiality by either counsel as to any specific findings of fact. IMT's counsel stated that he would in the meantime contact his client to determine whether it had any objection to the submittal of the agreement as to findings of fact in lieu of an evidentiary hearing. The attorneys stated that the agreement would be filed on the morning of June 3, 1993, assuming that IMT had no objections to this method of conducting a hearing. The attorneys then agreed to present oral arguments at 10:00 a.m. on Tuesday, June 8, 1993.

The Secretary denied SFAP's petition for interlocutory review on May 27, 1993.

On June 2, 1993, SFAP's counsel forwarded a request for a prehearing conference on the record because SFAP was unable to agree to all of the proposed stipulations exchanged between counsel on June 1, 1993.

On Wednesday, June 2, 1993, and Friday, June 4, 1993, telephone conferences were held with counsel for the parties during which both counsel indicated that more time was needed for them to confer with their clients and with each other for the purpose of attempting to cause the hearing in this case to be carried out by written submissions pursuant to 34 C.F.R. § 668.90 (a) (4). An order was issued granting the schedule requested by both counsel.

Therefore it was necessary that the oral argument set for 10:00 a.m. on Tuesday, June 8, 1993, and the hearing set for 9:30 a.m. on Wednesday, June 9, be canceled.

On June 21, 1993, a statement of Findings of Fact Agreed To By The Parties as well as IMT's Statement of Facts Remaining In Dispute was filed. As a result of the later statement it appeared that an evidentiary hearing was necessary and that it was necessary to schedule a telephone conference with counsel for the parties on June 30, 1993.

After a June 30, 1993, telephone conference, counsel for IMT indicated, by letter of July 1, 1993, that they would be available for a hearing during the week of August 23, 1993, or the week of September 6, 1993. Counsel for SFAP indicated, by letter of July 2, 1993, that he would be available for a hearing during the weeks of August 2 or August 16, 1993. On July 7, 1993, the tribunal sent a letter to both parties noting that the letters of July 1 and July 2, 1993, indicated conflicting dates of availability by counsel and requesting that the parties confer and determine which week the parties would be available for a hearing. The tribunal's attorney-advisor initiated several telephone calls to counsel for SFAP between July 8, 1993 and July 22, 1993 to determine SFAP's availability for a hearing in response to the tribunal's July 7, 1993 letter. Counsel for SFAP could not be reached until Wednesday, July 21, 1993, at which time he indicated that he would be available for a hearing during the week of August 23, 1993. Finally, the tribunal issued a Notice of Hearing on July 22, 1993, setting the date for an evidentiary hearing for August 25, 1993.

On Friday, August 13, 1993, at about 4:45 p.m. ET, counsel for SFAP filed a "MOTION FOR SUMMARY JUDGMENT" with the tribunal. Because of the timing, the tribunal did not receive the motion until Monday, August 16, 1993. On August 16, 1993, IMT filed a "MOTION FOR SCHEDULING OF RESPONSE TO MOTION FOR SUMMARY JUDGMENT." When no response to IMT's motion, filed August 16, 1993, had been received from SFAP's counsel, the tribunal on Friday, August 20, 1993, scheduled a telephone conference with counsel for both parties to determine what SFAP's intention was as to such response, particularly in view of the fact that, as indicated in IMT's motion, there was less than one business day remaining before IMT's counsel would be leaving for the hearing site. During this conference, it appeared that counsel for SFAP did not consider that he needed to respond to IMT's motion. A thorough discussion then ensued and SFAP's counsel stated that he would file a statement in opposition to IMT's motion. On Friday, August 20, 1993, at 3:53 p.m. ET, the tribunal received SFAP's statement in opposition to IMT's motion by facsimile. In addition, on Friday, August 20, 1993, at 4:05 p.m. ET, the tribunal received a response to SFAP's statement in opposition from IMT by facsimile. IMT's motion was granted on August 20, 1993, and an order was issued providing that on or before twenty days from the completion of the evidentiary hearing in Puerto Rico, IMT would file its response to SFAP's Motion for Summary Judgment. The hearing took place on August 25, 1993. At the conclusion of the hearing, the time for IMT's response to the motion for

summary judgment was changed to correspond to the date for its post hearing brief. The parties have filed post hearing briefs the Last of which was received on November 1, 1993.

The actions taken by counsel for SFAP involving multiple motions since the notice of hearing of January 8, 1993, caused a waste of both public and private resources.

This kind of action by counsel is not in compliance with Executive Order 12778 entitled "Civil Justice Reform." In connection with the issuance of that Executive Order a fact sheet was issued by the White House on October 23, 1991. Paragraphs three and four stated, in part:

. This Executive Order on Civil Justice Reform seeks to produce a more fair American Legal system by making Federal litigators a model for parties in the private sector involved in dispute resolution. Excessive litigation imposes high costs on American individuals, small businesses, industry, professionals, and government at all levels. (emphasis added) .

The actions taken by SFA's counsel in bringing these motions has resulted in excessive litigation and is hardly a model for parties in the private sector.

In that regard, it is clear that the institution was entitled to an evidentiary hearing at least on the issue of the proposed fine. Counsel for SFAP even subscribed to this during the course of the hearing. 2 Consequently, there never had been a basis for the motion for summary judgment since, at all stages, there always were issues of material fact in dispute as to the fine portion of the proceedings. (This was made even more clear from the statement of facts remaining in dispute filed on June 21, 1993).

Absent counsel's actions a hearing would have taken place on February 9, 1993, and a decision would have been issued in March of 1993. Aside from the 8 month delay in final disposition caused by SFAP's counsel, large amounts of administrative resources were wasted. This is evidenced by the fact that the case had to be scheduled for hearing four times. Administrative personnel for the Department lost time in multiple rescheduling of courtrooms and travel arrangements and court administrators at the hearing site, also, were needlessly disturbed on multiple occasions .

However, the most substantial loss of valuable time sustained by administrative personnel and the tribunal was taken up by the multiple stages that these motions went through as described above. Aside from the loss sustained by the government, the institution, which had gone through a Chapter 11 Bankruptcy proceeding, was also put through needless expense for the multiple actions its attorneys were put through.

In view of the fact that the Secretary of Education had denied SFAP's petition for interlocutory review of the tribunal's first decision denying a motion for summary judgment, the second motion for summary judgment which was brought in an untimely manner, was totally unjustified on its merits because there had been no material change as to the disputed facts concerning the gravity portion of the fine issue. Therefore, the actions of counsel for SFAP in bringing the multiple motions has resulted in excessive litigation contrary to the intent of Executive Order 12778 .

II. ISSUES.

A. Biennial Audits.

1. Did IMT violate 34 C.F.R. § 668.23(c) (4) (1989) 3 as of February 1, 1990, for failure to submit an audit of the Guaranteed Student Loan (GSL) and Pell Grant Programs by January 31, 1990, for the award years 1987-88 and 1988-89?

2. Did IMT violate §§ 668.23(c) (4) and 690.84(b) (1990) as of April 16, 1991, for failure to submit an audit of the GSL and Pell Grant Programs by April 15, 1991 for the award years 1987-88, 1988-89, and 1989-90 in view of the fact that IMT had been granted extensions of time to file such audit on three different occasions setting new deadlines of January 31, 1991, February 15, 1991, and April 15, 1991, respectively?

3. Did IMT violate § 668.23(c) (4) (1991) as of February 1, 1992, for failure to submit an audit of the GSL and Pell Grant Programs by January 31, 1992, for the award years 1987-88, 1988-89, 1989-90, and 1990-91?

B. Fiduciary Duties.

Did IMT violate § 668.82(c) for failure to meet the standard of conduct required of a fiduciary by reason of failure to submit required audits?

C. Consideration of Remedies and Penalties.

1. Termination.

a. Can the amendment to § 668.90 (a), that became effective on September 14, 1991, be applied to the circumstances of this case if the institution has failed to comply with the requirements of §§ 668.23(c) (4) and 690.84(b) (1990) as of a period prior to April 16, 1991, such that the tribunal must find that a termination of IMT's eligibility to participate in Title IV, HEA Programs is warranted for such violation, considering the fact that the audit report required by those regulations was eventually, but untimely, filed on October 19, 1992?

b. If the institution failed to comply with the requirements of § 668.23 (c) (4) as of February 1, 1992, but later, in an untimely manner filed an audit report on October 19, 1992, is the effect of the application of the amendment to § 668.90 (a), that became effective on September 14, 1991, such that the tribunal must find that a termination of IMT's eligibility to participate in Title IV, HEA Programs is warranted?

c. If the above mentioned amendment is not applicable to the circumstances of this case, and if the institution failed to comply with the requirements of §§ 668.23(c) (4) and 690.84(b) (1990) , is termination or limitation of IMT's eligibility to participate in Title IV, HEA Programs, as provided for under § 668.86, nevertheless warranted?

2. Fine.

If IMT violated any of the regulations set forth above, do such violations warrant a fine or fines, and if so, in what amount? (Is the imposition of a fine in the amount of \$70,000, sought by the designated departmental official, warranted, in whole or in part?)

a. What evidence is there which relates to the size of the respondent school such as:

1) the amount of Title IV, HEA program funds received by or on behalf of students for attendance at the institution, and

2) the number of students in attendance at the respondent school and the number of branch campuses if any?

b. What evidence is there relating to the gravity of IMT's alleged violation or failure to carry out the relevant regulations such as:

1) the seriousness of the resultant effect of the alleged violations, and

2) the good faith of the respondent and any other mitigating factors?

III. EXHIBITS.

A. Respondent's Exhibits.

Resp. Ex. 1. Program Participation Agreement, 1985.

Resp. Ex. 2. Letter from William L. Moran, Director, Student Financial Assistance Programs to President, IMT (June 1991) and Letter from William L. Moran, Director, Student Financial Assistance Program to President, IMT (June 1992) re: default rates.

Resp. Ex. 3. Documentation regarding IMT bankruptcy proceeding:

a. Letter from Edilberto Berrios Perez to Mr. James M. Phillips, Executive Director, Association of Independent Colleges and Schools (January 14, 1991).

b. Plan of Reorganization

c. Order Approving Disclosure Statement

d. Disclosure Statement as Amended in Open Court

e. 1129 Statement

Resp. Ex. 4. Contract with General Accounting & Computer Service .

Resp. Ex. 5. Letter from Jose R. Rivera Ramos, CPA to Mr. M. Lauck Walton, Senior Coordinator-Financial Reporting, Career College Association (December 2, 1991).

Resp. Ex. 6. Program Review Report transmitted November 21, 1989.

Resp. Ex. 7. Letter from Mr. Angel L. Negrón, President, IMT to Audit Review Branch, Division of Audit and Program Review (March 22, 1990).

Resp. Ex. 8. Letter from Patricia L. Dickerson, Chief, Section III, Audit Review Branch, Division of Audit and Program Review to Mr. Ancel L. Negrón, President, IMT (April 18, 1990).

Resp. Ex. 9. Letter from Ethelene R. Hughey, Chief, Audit Review Branch, Division of Audit and Program Review to Angel L. Negrón, President, IMT (October 15, 1990).

Resp. Ex. 10. Letter from Ethelene R. Hughey, Chief, Audit Review Branch, Division of Audit and Program Review to Angel L. Negrón, President, IMT (November 13, 1990).

Resp. Ex. 11. Correspondence regarding IMT efforts in response to Program Review.

a. Letter from Angel L. Negrón, President, IMT to Ms. Patricia Comer, U.S. Department of Education, Region II (March 12, 1990) .

b. Letter from Angel L. Negrón, President, IMT to Ms. Patricia Comer, U.S. Department of Education, Region II (June 30, 1990).

c. Letter from Luis G. Hernández, Vice President, IMT to Ms. Patricia Comer, U.S. Department of Education, Student Financial Assistance (August 9, 1990).

d. Letter from Angel L. Negrón, President, IMT to Ms. Patricia Comer, U.S. Department of Education, Region II (April 15, 1991).

e. Letter from Angel L. Negrón, President, IMT to Ms. Nancy Hoglund, U.S. Department of Education, Accounts Receivable Section (May 20, 1991).

Resp. Ex. 12. Letter from Angel L. Negrón, President, IMT to Ms. Ethelene Hughey, Audit Review Branch (January 14, 1992).

Resp. Ex. 13. Federal Express receipt evidencing filing of non-federal audits at issue.

Resp. Ex. 14. Summary of limitation, suspension, termination, fine, emergency action, disqualification and debarment/suspension activity for October 1, 1991-September 30, 1992. Includes four page summary of actions initiated in 1992 as a result of late audits.

Resp. Ex. 15. Excerpts of monthly reports of limitation, suspension, termination, fine, emergency action, FFELP disqualification, debarment/suspension and reimbursement system activity for September 1992 through June 1993. Includes four page summary of actions initiated in 1993 as a result of late audits .

Resp. Ex. 16. Summary of portions of Resp. Ex. 11 that are written in Spanish.

Resp. Ex. 17. English translation of Resp. Ex. 4 (Contract with General Accounting & Computer Service).

Resp. Ex. 18. Correspondence between IMT and various accountants that it had hired to perform federal audits; letter from Daniel Cruz of General Accounting & Computer Service to Ms. Patricia Comer, U.S. Department of Education; expense report; copies of checks issued by IMT.

Resp. Ex. 19. Letter from Ms. Patricia Comer, U.S. Department of Education, to Ms. Margie Rivera of IMT, discussing response to program review of November 21, 1989 (May 8, 1990).

B. SFAP's Exhibits.

Ex. E-1. SFAP letter of February 14, 1992 informing IMT of action to terminate eligibility and fine proceeding.

Ex. E-2. SFAP printout indicating the Title IV Programs that IMT participated in, the years of participation, and the amount of Title IV funds for each year.

Ex. E-3. SFAP printout tracking due audits and displaying school data.

Ex. E-4. IMT's letter dated March 22, 1990 acknowledging its failure to submit the non-federal audit by January 31, 1990, and requesting an extension of one year (to January 31, 1991) for submitting an audit report for three award years including 1989- 90.

Ex. E-5. SFAP's letter dated April 18, 1990 granting one year extension request.

Ex. E-6. SFAP's letter dated November 13, 1990 reminding IMT of its obligation to submit the audit reports by January 31, 1991.

Ex. E-7. SFAP's letter dated February 1, 1991 reminding IMT of its obligation to submit the audit reports.

Ex. E-8. SFAP's note of February 5, 1991 memorializing IMT's request via telephone for ten day extension to submit the audits due on January 31, 1991 and grant of extension.

Ex. E-9. IMT's letter to SFAP dated April 10, 1991.

Ex. E-10. SFAP's letter to IMT dated May 7, 1991 informing IMT that the audit reports are late.

Ex. E-11. IMT's letter to SFAP dated January 14, 1992 requesting additional extension of time to submit audits.

Ex. E-12. Excerpted copy of Federal Register dated July 31, 1991.

C. Rulings as to Exhibits.

The parties agree to the authenticity and admissibility into evidence of all documents offered as exhibits by IMT and SFAP which were numbered as follows: IMT's Exhibits R-1 through R-13 and SFAP's Exhibits E-1 through E-12. ⁴ During the hearing the following exhibits were offered by IMT: Ex. R-14-iv-86, R-15-4- 48, R-16, R-17, R-18-1-2, and R-18-4-11. These were received in evidence during the hearing. Subsequent to the hearing, IMT has also offered Ex. R-14-i-iiia, Ex. R-1S-1-3a, and Ex. R-19. SFAP has not objected to these newly offered exhibits. Therefore, all exhibits are received in evidence.

IV. FINDINGS OF FACT AND OPINION.

A. FINDINGS OF FACT⁵

1. IMT has been eligible to participate in the Title IV, HEA programs since 1985.
2. The Department of Education (Department) considers IMT to be an eligible institution to participate in the Title IV, HEA programs as a proprietary institution of higher education.
3. The Department and IMT have entered into a Program Participation Agreement covering the time period from when IMT began participation in the Title IV, HEA programs through the present .
4. On February 14, 1992, SFAP initiated an action to terminate the eligibility of IMT to participate in the Title IV, HEA programs and to fine IMT \$70,000.00.
5. The termination and fine actions resulted from IMT's alleged failure to submit timely biennial non-federal audits for the Title IV, HEA programs that it participated in for award years 1987-88 through 1988-89 and 1989-90 through 1990-91; and, based on that failure to submit timely audits, IMT's alleged failure to meet the standards of conduct required of a fiduciary in the administration of the Title IV Programs.
6. On March 6, 1992, IMT requested a hearing in regard to those findings pursuant to 34 C.F.R. ?? 668.81-97.
7. IMT participated in the Pell Grant and GSL Programs for award years 1987-88 through 1988-89 and 1989-90 though 1990-91.
8. For award year 1987-88, IMT received approximately \$1,739,711 in Pell Grant funds and approximately \$251,904 in GSL funds.
9. For award year 1988-89, IMT received approximately \$1,158,515.00, in Pell Grant funds and approximately \$105,393.00 in GSL funds.
10. For award year 1989-90, IMT received approximately \$600,718.00 in Pell Grant Funds.

11. For award year 1990-91, IMT received approximately \$691,000 in Pell Grant Funds.
12. IMT was originally required to submit biennial non-federal audits for award years 1987-88 through 1988-89 on January 31, 1990, and for award years 1989-90 through 1990-91 on January 31, 1992.
13. In March 1989, the Institute petitioned for bankruptcy in the United States Bankruptcy Court for Puerto Rico under Chapter 11 of the Bankruptcy Code.
14. In September 1989 and May 1989 respectively, as a result of the bankruptcy, IMT closed its branches in Ponce and Santurce, Puerto Rico.
15. On November 21, 1990, the Bankruptcy Court later declared that IMT had substantially complied with the Plan of Reorganization thus successfully completing the bankruptcy proceeding.
16. In August of 1989, IMT retained the certified public accountant firm, General Accounting and Computer Service, to perform accounting services of IMT.
17. In 1991, IMT determined that General Accounting Computer Service had neglected its duties, and replaced this firm with Jose R. Rivera Ramos, C.P.A.
18. Jose R. Rivera Ramos did not initiate the audit for which he was retained because he was under the mistaken belief that payment for his services had to be approved by the Bankruptcy Court .
19. In September of 1989, the Department conducted a program review of IMT's main campus in Mayaguez, Puerto Rico and of its branch campus in Arecibo, Puerto Rico.
20. On November 21, 1989, the Department's Institutional Review Branch of the Office of Student Financial Assistance issued a Program Review Report requiring IMT to substantially review and reconstruct all school records.
21. By letter dated March 22, 1990, IMT requested and was granted permission to submit an audit report covering award years 1987- 88, 1988-89, and 1989-90 on January 31, 1991. The due date for the 1990-91 audit was not specified in the request or in the Department' s response .
22. IMT did not submit an audit report covering award years 1987- 88, 1988-89, and 1989-90 on January 31, 1991.
23. On or about February 5, 1991, IMT orally requested and was granted an extension of time until February 15, 1991 to submit an audit report covering award years 1987-88, 1988-89, and 1989-90.
24. IMT did not submit an audit report covering award years 1987- 88, 1988-89, and 1989-90 on February 15, 1991.

25. On April 10, 1991, IMT requested and was granted an extension of time until April 15, 1991 to submit the audits.

26. IMT did not submit an audit report covering award years 1987- 88, 1988-89, and 1989-90 on April 15, 1991.

27. On January 14, 1992, IMT requested and was denied an extension of time to submit an audit report.

28. On April 14, 1992, IMT filed a request for a Pre-Hearing Conference, or In the Alternative, For An Enlargement of Time to Submit Brief. IMT stated in that motion that it wanted to set a schedule for submission of the audits in order to resolve the matter. The Department opposed the request for enlargement of time. A decision was not issued on that motion due to other procedural motions .

29. The Regional Inspector General for Audit, New York, received an audit report covering the 7/1/87 through 6/30/91 award years for IMT. The audit report was received by the Regional Inspector General for Audit by Federal Express on October 19, 1992, was received by the Regional Inspector General for Audit personally on October 26, 1992, and was issued on November 18, 1992.[6](#)

30. The IMT currently enrolls approximately 900-950 students. During school year 1987-88, IMT enrolled approximately 1,444 students. During school year 1988-89, IMT enrolled approximately 1,070 students. During 1989-90, IMT enrolled approximately 447 students. During school year 1990-91, IMT enrolled approximately 391 students.

31. At present, IMT operates one main campus in Mayaguez, Puerto Rico and one branch campus in Arecibo, Puerto Rico.

32. If IMT is terminated from participation in federal student financial aid programs, the majority of IMT's students will no longer be able to attend IMT and will be forced to drop out of their current educational programs.

33. Termination, along with emergency actions, are the most severe sanctions which may be imposed on an institution.

34. The purpose of the Department's regulations in regard to the submission of biennial audits by institutions participating in the Title IV Programs, is in part, to require an institution to account to the Department for the Title IV program funds it receives and to account to the Department for its administration of those funds. The biennial audits are essential to the Department's effective monitoring of an institution's Title IV Program activities.

35. There have been instances where OSFA has issued a notice of termination against a school for failure to file biennial audits, but has withdrawn the proposed termination after the audits were filed.

36. There have been instances since July 31, 1991, where schools have filed late biennial audits, but where OSFA has not pursued termination of the school.

37. There have been instances since July 31, 1991, where OSFA has issued a notice of termination against a school for failure to file biennial audits, but has withdrawn the proposed termination after the audits were filed.

38. The parties agree to the authenticity and admissibility into evidence of all documents offered as exhibits to the pleadings filed by IMT and OSFA.

39. The Regional Inspector General for Audit, New York, received an audit report covering the 7/1/91 through 6/30/92 award year for IMT. The audit was received by the Regional Inspector General for Audit by Federal Express on June 18, 1993.

B. SFAP'S OBJECTION TO THE RELEVANCY OF CERTAIN FINDINGS OF FACT AGREED TO BY THE PARTIES.

SFAP objects to the relevancy of the facts presented in paragraphs 13 through 20, inclusive, 28, 29, 30, 31, 32, 35, 36, 37, and 39 of the Findings of Fact Agreed to By the Parties on "the grounds that these facts have no bearing on the fact of whether, on or before February 14, 1992 (sic), IMT submitted its biennial non-federal audits as required by federal regulation." (SFAP's Objection To The Relevancy Of Certain Stipulated Facts filed on June 21, 1993.) During the hearing SFAP stated that it had no objection as to relevancy of these facts as relates to the issue concerning a possible fine. Tr. at 17-21.

C. SFAP'S MOTION FOR SUMMARY JUDGMENT.

Despite the fact that both this tribunal and the Secretary of Education had previously rejected SFAP's motion for summary judgment, on August 13, 1993, prior to the evidentiary hearing in Puerto Rico, counsel for SFAP again made essentially the same motion for summary judgment.

The Interlocutory Decision of April 20, 1993, which denied the first motion for summary judgment sets forth a basis for denial of the second motion and the contents of that decision are incorporated herein.

It is clear that IMT was entitled to an evidentiary hearing at least on the issue of the proposed fine. There never has been a basis for the motions for summary judgment since, at all stages, there always were issues of material fact in dispute as to the fine portion of the proceeding. At the time that the second motion was brought there had been no material change as to the disputed facts concerning the gravity portion of the fine issue .

Moreover, at the hearing, counsel for SFAP admitted that IMT was free to submit evidence as to the fine issue. Tr. at 159. Counsel for SFAP also made no objection to the relevancy of certain facts as to the fine. In view of this recognition, counsel for SFAP had no basis for a motion for summary judgment. Therefore, the act of bringing a second motion for summary judgment was

totally unjustified. These activities by counsel for SFAP caused a waste of both public and private resources.

For these reasons, SFAP's second motion for summary judgment is denied.

D. OPINION AND ADDITIONAL FINDINGS OF FACT.

1. Failure to submit audits: Burden of Persuasion.

IMT claims that the Department has failed to meet its burden of persuasion. Resp. Initial Br. at 18. IMT argues that the Department has incorrectly asserted that IMT failed to timely file two separate audits for two separate programs. Resp. Initial Br. at 6-9. IMT further contends that SFAP has misstated essential facts and that SFAP has failed to address the fact that IMT has now filed all outstanding audits. Resp. Reply Br. at 2- 4.

SFAP contends that IMT incorrectly argues that the Department has failed to meet its burden of persuasion. SFAP Reply Br. at 5-6. SFAP points out that institutions that participate in the Pell Grant and GSL programs must submit biennial non-federal audits by January 31 of the year following the last audit. SFAP Reply Br. at 6-7.

§ 668.88(c) (2) requires SFAP to bear the burden of persuasion in proceedings authorized by Part 668, Subpart G. That section states as follows:

The designated department official has the burden of persuasion in any fine, suspension, limitation or termination proceeding under this subpart.

Here, the parties have stipulated to the relevant facts concerning the audits as follows:

IMT was originally required to submit biennial non-federal audits for award years 1987-88 through 1988-89 on January 31, 1990, and for award years 1989-90 through 1990-91 on January 31, 1992. [7](#)

By letter dated March 22, 1990, IMT requested and was granted permission to submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on January 31, 1991. The due date for the 1990-91 audit was not specified in the request or in the Department's response.

IMT did not submit an audit report covering award years 1987-88, 1988-89, and 1969-90 on January 31, 1991.

On or about February 5, 1991, IMT orally requested and was granted an extension of time until February 15, 1991 to submit an audit report covering award years 1987-88, 1988- 89, and 1989-90.

IMT did not submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on February 15, 1991.

On April 10, 1991, IMT requested and was granted an extension of time until April 15, 1991 to submit the audits.

IMT did not submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on April 15, 1991.

On January 14, 1992, IMT requested and was denied an extension of time to submit an audit report.

The Regional Inspector General for Audit, New York, received an audit report covering the 7/1/87 through 6/30/91 award years for IMT. The audit report was received by the Regional Inspector General for Audit by Federal Express on October 19, 1992, was received by the Regional Inspector General for Audit personally on October 26, 1992, and was issued on November 18, 1992. [8](#)

Findings of Fact No. 12, 21-27, 29 (footnotes added) . These stipulations leave no doubt as to the fact that IMT did not timely file its required non-federal biennial audits for the award years 1987-88, 1988-89, 1989-90, and 1990-91.

Specifically, under § 668.23(c) (4) (ii) (1989), IMT's biennial non-federal audit for award years 1987-88 through 1988- 89 was due on January 31, 1990. [9](#) IMT failed to meet this deadline, which was a violation of § 668.23(c) (4) (ii). Nonetheless, the Department effectively waived this violation when it granted IMT permission to submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on January 31, 1991.

IMT did not submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on January 31, 1991. Again, this . was a violation of § 668.23(c) (4) (ii). Nevertheless, the Department again effectively waived this violation when it granted IMT an extension of time until February 15, 1991 to submit an audit report covering award years 1987-88, 1988-89, and 1989-90.

IMT did not submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on February 15, 1991. Again, this was a violation of § 668.23(c) (4) (ii). Once again, the Department waived this violation when it granted IMT an extension of time until April 15, 1991 to submit the audits.

IMT did not submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on April 15, 1991. Again, this was a violation of § 668.23(c) (4) (ii). This time, the Department did not waive the violation, because it denied IMT's request on January 14, 1992, for an extension of time to submit an audit report covering award years 1987-88, 1988-89, and 1989-90. Therefore, this was IMT's first violation of § 668.23(c) (4) (ii).

Since IMT had not previously submitted an audit, under §§ 668.23(c) (3) and 668.23(c) (4) (ii) (1991), IMT's biennial non- federal audit for award years 1989-90 through 1990-91 was due on January 31, 1992. IMT failed to meet this deadline, which was a violation of § 668.23 (c) (4) (ii) Moreover, because IMT had not previously submitted an audit for award years 1987-88 and

1988- 89, under § 668.23(c) (3) (1991),[10](#) this new audit was required to cover IMT's activities during award years 1987-88 and 1988-89 as well. Therefore, this was IMT's second violation of § 668.23(c) (4) (ii). Thus, IMT's argument to the contrary notwithstanding, [11](#) the Institute committed two violations of the audit requirement contained in § 668.23(c) (4) (ii) . [12](#)

Finally, IMT admits at numerous points in its briefs that it did not timely file at least one audit. Resp. Initial Br. at 5, 6, 7, 9, 10, 11, 12-13, 15, 16, 17; Resp. Reply Br. at 2, 4, 6, 7. ([13](#))

Therefore, SFAP has satisfied its burden of persuasion to establish that IMT has not timely submitted its required non- federal biennial audits for the award years 1987-88, 1988-89, 1989-90, and 1990-91. Specifically, IMT has twice violated the requirements of § 668.23(c) (4) (ii). The first violation occurred on April 16, 1991; the second violation occurred on February 1, 1992.

2. Fiduciary Duties.

IMT claims that it has satisfied its fiduciary responsibilities. Resp. Reply Br. at 6.

SFAP contends that IMT has failed to meet the standard of conduct required of a fiduciary in the administration of Title IV programs. SFAP Initial Br. at 6-7; SFAP Reply Br. at 7.

The termination notice (ED Ex. 1) alleges that the termination action is also based on IMT's failure to meet the Standard of Conduct required of a fiduciary, as set forth in § 668.82. It is alleged that by its failure to submit the required audits, IMT has failed to act in the capacity of a fiduciary in its administration of Title IV, HEA programs because it has failed to account for the funds it has received under those programs, as required by program regulations and § 668.82(b).

The Secretary has established a standard of conduct for an institution that participates in the Title IV, HEA Programs. § 668.82(a) provides that: "A participating institution acts in the nature of a fiduciary in its administration of the Title IV, HEA programs."

In that capacity: "the institution is subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs."

§ 668.82(b).

§ 668.82 goes on to provide that:

(c) An institution's failure to administer the Title IV, HEA programs, or to account for the funds it receives under those programs, in accordance with the highest standard of care and diligence required of a fiduciary, constitutes grounds for a fine, or the suspension, limitation or termination of the eligibility of the institution to participate in those programs.

The net effect of the violations of regulations set forth in part 1 above is that IMT in the past has not acted as a fiduciary is required to act in administering the Title IV, HEA programs and

therefore has also violated § 668.82. This is particularly true as relates to the failure to submit to the Department biennial non-federal audits as described above in part 1.

3. Consideration of Remedies and Penalties.

a. Termination.

IMT claims that termination is an unjustly severe sanction. According to IMT, the relevant regulations do not support the sanction of termination. IMT also contends that Department precedent does not allow for the sanction of termination in this proceeding. Resp. Initial Br. at 9-13; Resp. Reply Br. at 4-6.

SFAP argues that IMT's failure to submit timely biennial non-federal audits mandates termination of its eligibility to participate in all Title IV programs. SFAP Initial Br. at 4-6. SFAP also claims that in a termination action based upon an institution's failure to submit timely biennial non-federal audits pursuant to § 668.23(c) (4), the administrative law judge must uphold the termination action. SFAP Reply Br. at 2-4.

§ 668.90(a) (3) (iv) states as follows:

In a termination action taken against an institution based on the grounds that an institution has failed to comply with the requirements of § 668.23(c) (4), the administrative law judge must find that the termination is warranted[.]

§ 668.90 (a) (3) (iv) (1992).

The language is very clear. In a termination action taken against an institution based on the grounds that an institution has failed to comply with the requirements of § 668.23(c) (4)1 the administrative law judge must find that the termination is warranted .

§ 668.23(c) (4) currently states as follows:

(4) (i) If the institution receives campus-based funds, the institution shall submit the audit report to the Inspector General by March 31 of the year following the last award year covered by the audit.

(ii) If the institution does not receive campus-based funds, the institution shall submit the audit report to the Inspector General by January 31 of the year following the last year covered by the audit.

§ 668.23(c) (4) (1992).

This same wording also existed in § 668.23(c) (4) in 1989, 1990, and 1991.

The present action, therefore, is a termination action against an institution based on the grounds that the institution has failed to comply with the requirements of § 668.23(c) (4). SFAP's action is based on the claim that IMT has failed to submit non-federal biennial audits in a timely

manner as required by § 668.23(c) (4). Therefore, the language of § 668.90(a) (3) (iv) requires the administrative law judge to terminate IMT in this action if the audit regulation has been violated. The words allow for no discretion. [14](#)

§ 668.90(a) (3) (iv) was published in the Federal Register on July 31, 1991 and became effective 45 days after its publication, on September 14, 1991. [15](#) IMT argues at pages 9-10 of its initial brief that this regulation should not apply where an institution can demonstrate that factors beyond the institution's control contributed to a failure to meet a regulatory deadline. IMT further contends, at pages 5-6 of its reply brief, that this regulation, which became effective on September 14, 1991, cannot be applied retroactively to an audit violation that occurred before that date.

This tribunal specifically rejected those arguments in In the Matter of San Francisco College of Mortuary Science, Docket No. 92-8-ST, U.S. Dep't of Education (Decision) (December 31, 1992) at 24-37, *aff'd* by the Secretary (Decision of the Secretary) (March 26, 1993). In San Francisco, the tribunal held that § 668.90(a) (3) (iv) allows for no discretion: once the administrative law judge finds that an institution has failed to comply with the requirements of § 668.23(c) (4), the administrative law judge must find that the termination is warranted. The tribunal in that case also held that § 668.90(a) (3) (iv) could apply to an audit violation that occurred before the regulation's effective date of September 14, 1991. As described *supra* in section 1 of this opinion, the tribunal has found that IMT's first violation of § 668.23(c) (4) occurred on April 16, 1991. Therefore, based upon the rule laid down in San Francisco, the tribunal here holds that § 668.90(a) (3) (iv) requires the administrative law judge to find that termination of IMT's eligibility to participate in the Title IV, HEA programs is warranted .

Additionally, as described in section 1 of this opinion, the tribunal has found that IMT's second violation of § 668.23 (c) (4) occurred on February 1, 1992. This date is well after September 14, 1991, the effective date of § 668.90 (a) (3) (iv). Accordingly, the tribunal holds that § 668.90(a) (3) (iv) requires the administrative law judge to find that termination of IMT's eligibility to participate in the Title IV, HEA programs is warranted .

Since § 668.90(a) (3) (iv) is applicable to the circumstances of this case, the tribunal need not reach the issue of whether IMT's failure to comply with the requirements of §§ 668.23(c) (4), absent the requirements of § 668.90 (a) (3) (iv), also warrants termination or limitation of IMT's eligibility to participate in Title IV, HEA Programs as provided for under § 668.86.

b. Fines.

IMT asserts that the fine imposed in the current matter is overly severe. Resp. Initial Br. at 14-18; Resp. Reply Br. at 6-7.

SFAP claims that IMT's failure to submit timely biennial non-federal audits mandates a fine in the amount of \$70,000. SFAP Initial Br. at 7-8; SFAP Reply Br. at 7-9.

§ 668.84 authorizes the administrative law judge to impose a fine on an institution that violates any provision of Title IV of the HEA or any regulation or agreement implementing that title.

Under § 668.92, the decision maker is required to take into account the following: the gravity of the institution's violations or failure to carry out the relevant statute, regulation or agreement; the gravity of any misrepresentation; and the size of the institution.

The fine notice (ED Ex. 1) imposes against IMT a fine of \$70,000. This is based upon IMT's failure to submit two Pell Grant Program audits, for which a fine of \$50,000 (\$25,000 each) was proposed, and two GSL Program audits, for which a fine of \$20,000 (\$10,000 each) was proposed. This was in error. As stated supra in note 6, under § 668.23(c) (1), only one audit was required to cover IMT's Title IV, HEA programs for award years 1987-88, 1988-89, and 1989-90 on April 15, 1991. Again, only one audit was required to cover IMT's Title IV, HEA programs for award years 1987-88, 1988-89, 1989-90, and 1990-91 on January 31, 1992. Therefore, IMT committed only two audit violations, and not four, as is alleged in the termination and fine notice.

Size

The first factor that the tribunal will consider is size. For award year 1987-88, IMT received approximately \$1,739,711 in Pell Grant funds and approximately \$251,904 in GSL funds. Finding of Fact No. 8. For award year 1988-89, IMT received approximately \$1,158,515.00 in Pell Grant funds and approximately \$105,393.00 in GSL funds. Finding of Fact No. 9. For award year 1989-90, IMT received approximately \$600,718.00 in Pell Grant funds. Finding of Fact No. 10. For award year 1990-91, IMT received approximately \$691,000.00 in Pell Grant funds. Finding of Fact No. 11.

At the hearing held in Puerto Rico, Mr. Angel L. Negron, President of IMT, testified that the current enrollment of IMT is approximately 1100 students. Tr. at 31.[16](#)

In In the Matter of Bnai Arugath Habosem, Docket No. 92-131- ST, U.S. Dep't of Education, (Decision August 24, 1993), the Secretary of Education discussed the consideration of the size of the institution in determining the appropriate amount for a fine. The Secretary requested the Institutional Data System, Office of Postsecondary Education, U.S. Department of Education, to provide fiscal year data regarding participation levels of educational institutions in the various federal student financial assistance programs. The Secretary took official notice of this information and attached it to his decision as Appendix A.

As noted above, for award year 1987-88, IMT received approximately \$1,739,711 in Pell Grant funds and approximately \$251,904 in GSL funds. Finding of Fact No. 8. According to Appendix A of the Bnai decision, for fiscal year 1988, the median amount of Pell Grant funds received by institutions was \$167,864, and the mean was \$574,904. Therefore, IMT received substantially more Pell Grant funds during fiscal year 1988 than the average institution did. However, during this same period, IMT received only \$251,904 in GSL funds, which was substantially less than the median and mean amounts of GSL funds received by institutions in fiscal year 1988.

The pattern is similar for fiscal years 1989 and 1990,¹⁷ with the exception that in 1990 the amount of Pell Grant funds received by IMT (\$600,718) was larger than the median amount received by institutions but smaller than the mean amount.

Based on the criteria set forth by the Secretary in Bnai and contained in Appendix A to that decision, the tribunal concludes that IMT is a medium-sized institution.

Gravity

The nature of the violations relating to failure to submit biennial financial and compliance audits is very serious.

Normally SFAP disburses Pell Grant program funds to institutions on the basis of their requests. It does not require those institutions to account for those funds prior to disbursement. Therefore, when SFAP disburses such funds, it does not know whether the funds are going to eligible students, whether students are receiving the correct award amounts, or whether the institutions are making required refunds to students or to the programs. Also, under the GSL Program, neither SFAP nor lenders know when lenders disburse loan checks to institutions on behalf of student-borrowers, whether the loan checks are being processed correctly, whether students are still eligible to receive those loans checks, or whether the institutions are making required refunds to lenders. An institution participating in the Title IV, HEA Program accounts to SFAP for the Title IV, HEA Program funds it receives, and accounts to SFAP for its administration of the Title IV, HEA Programs, by submitting to SFAP a financial and compliance audit, conducted by an independent auditor, of its administration of those programs. These audits are submitted on a biennial basis.

. As discussed supra in section 1, IMT was required to submit an audit of its administration of the Title IV, HEA Programs for award years 1987-88, 1983-89, and 1989-90 by April 15, 1991. Its failure to do so constituted its first violation of § 668.23(c).

IMT was required to submit an audit of its administration of the Title IV, HEA Programs for award years 1987-88, 1988-89, 1989-90, and 1990-91 by January 31, 1992. Its failure to do so constituted its second violation of § 668.23(c).

As discussed supra in Section 2, the net effect of these violations is that IMT in the past has not acted as a fiduciary is required to act in administering the Title IV, HEA programs and therefore has also violated § 668.82. This is particularly true as relates to the failure to submit to the Department biennial non-federal audits as described above in part 1.

However, in considering the gravity of IMT's regulatory violations, the tribunal must take into account any potential mitigating factors .

At least four mitigating factors are present in the instant case. ¹⁸ First, to some extent, IMT has demonstrated a good faith attempt to submit its audit reports. The Institute sought extensions of time in which to submit its audit report on March 22, 1990; February 5, 1991; April 10, 1991; and January 14, 1992. Findings of Fact No. 21, 23, 25, 27; Ex. R-7, R-8, R-12, E-4, E- 5, E-8, E-

9, and E-11. IMT sought these extensions because of the problems the school was facing as the result of its bankruptcy, the problems it had in hiring an accountant to perform the audit, and the necessity for IMT to respond to a lengthy, unrelated program review that was transmitted to the school on November 21, 1989. Tr. at 32-42, 48-54, 63-74, 77-81, 84-86, 88-90, 96-98, 101, 116-128, 132-137, 140-141, 146-149, 151-155, 164-167, 169-170, 204-208; Findings of Fact No. 13-20; Ex. R-3, R-4, R-5, R-6, R-11, R-12, R-16, R-17, R-18-1-2, R-18-5-7, R-18-8-10, R-18-11, and R-19.

Specifically, IMT was originally required to submit biennial non-federal audits for award years 1987-88 through 1988-89 on January 31, 1990, and for award years 1989-90 through 1990-91 on January 31, 1992. Finding of Fact No. 12. However, in March 1989, the Institute petitioned for bankruptcy in the United States Bankruptcy Court for Puerto Rico under Chapter 11 of the Bankruptcy Code. Finding of Fact No. 13; Ex. R-3. In September 1989 and May 1989 respectively, as a result of the bankruptcy, IMT closed its branches in Ponce and Santurce, Puerto Rico. Finding of Fact No. 14. On November 21, 1990, the Bankruptcy Court declared that IMT had substantially complied with the Plan of Reorganization, thus successfully completing the bankruptcy proceeding. Finding of Fact No. 15.

In August of 1989, IMT retained the certified public accountant firm, General Accounting and Computer Service, to perform accounting services for IMT. Angel L. Negron, President of IMT, testified that this contract included all accounting and audit work. Tr. at 32-33; Finding of Fact No. 16; Ex. R-4, R-17. Mr. Negron testified that he and Daniel Cruz, of General Accounting and Computer Service (GACS), also had a verbal agreement under which Mr. Cruz agreed to perform the compliance audit for the 1987-88, 1988-89, and 1989-90 years. Tr. at 34-35. Mr. Negron further testified that after initially sending Mr. Cruz a letter terminating the contract in February 1990 (Ex. R-18-1-2; Tr. at 204-208), Mr. Cruz was given another chance to complete the audits and that from February 1990 through April 1991, the Institute believed that Mr. Cruz was working diligently on the audits, based on the invoice and the checks contained at Ex. R-18-5-7. Tr. at 37-40, 50-54, 63-66, 88-89. Mr. Negron testified that in February 1991, Mr. Cruz orally requested an extension from the Department, which was granted (Finding of Fact No. 23). Tr. at 63-64. In April 1991, Mr. Negron met with Mr. Cruz and discovered that the audits still were not finished. Mr. Negron testified that IMT requested another extension from the Department (Tr. at 64-65; ED Ex. 9; Finding of Fact No. 25), in which IMT discussed its problems relating to the auditor and requested a professional opinion from the Department as to how to proceed. In a May 7, 1991 letter, the request for advice was denied. ED Ex. 10; Tr. at 63-66.

In 1991, IMT determined that General Accounting and Computer Service had neglected its duties, and replaced this firm with Jose R. Rivera Ramos, C.P.A. Tr. at 35-38, 66-70, 140-141; Finding of Fact No. 17; Ex. R-18-8-10. [19](#) Jose R. Rivera Ramos did not initiate the audit for which he was retained because he was under the mistaken belief that payment for his services had to be approved by the Bankruptcy Court. Tr. at 70-71, 146-149; Finding of Fact No. 18; Ex. R-5, R-12. The Institute also had difficulty in obtaining the audit workpapers from Mr. Cruz, and in November 1991 sent a letter to CPA Manuel Ulises Garcia Santiago (Mr. Garcia), who was Mr. Cruz's boss, in order to obtain these workpapers. Tr. at 71-74; Ex. R-18-11. Mr. Garcia did not provide IMT with the requested workpapers. Tr. at 74. In February 1992, IMT hired Enrique

Cardona to complete the audits. Mr. Cardona completed the audits within a few months, and IMT filed them in October 1992. Tr. at 77-78, 116-120, 132- 135.

During this same time period, in September of 1989, the Department conducted a program review of IMT's main campus in Mayaguez, Puerto Rico and of its branch campus in Arecibo, Puerto Rico. Finding of Fact No. 19. On November 21, 1989, ED's Institutional Review Branch of the Office of Student Financial Assistance issued a Program Review Report requiring IMT to substantially review and reconstruct all school records. Finding of Fact No. 20; Ex. R-6, R-11, R-16, R-19.²⁰ This program review contained 18 findings (Ex. R-6), and required an extensive review of the school's student files and reconstruction and . reconciliation of the school's fiscal records, as well as numerous letters between the school and the Department. Tr. at 40-42, 79, 89-90; Ex. R-11, R-16, R-18-4, R-19. These efforts required a large amount of staff time and detracted from IMT's ability to simultaneously work on the audit reports. Tr. at 89- 90, 96-98.

As a result of IMT's bankruptcy, its difficulties in retaining an accountant, and the necessity of responding to the complicated, unrelated program review, IMT did not submit its required biennial non-federal audit for award years 1987-88 through 1988-89 on January 31, 1990.

By letter dated March 22, 1990, IMT requested and was granted permission to submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on January 31, 1991. The due date for the 1990-91 audit was not specified in the request or in the Department's response. IMT did not submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on January 31, 1991. On or about February 5, 1991, IMT orally requested and was granted an extension of time until February 15, 1991 to submit an audit report covering award years 1987-88, 1988-89, and 1989-90. IMT did not submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on February 15, 1991. On April 10, 1991, IMT requested and was granted an extension of time until April 15, 1991 to submit the audits. IMT did not submit an audit report covering award years 1987-88, 1988-89, and 1989-90 on April 15, 1991. On January 14, 1992, IMT requested and was denied an extension of time to submit an audit report. Findings of Fact No. 21-27; Ex. R-7, R-8, R-12, E-4, E-5, E-8, E-9, and E 11.

On February 14, 1992, OSFA initiated this action to terminate the eligibility of IMT to participate in the Title IV, HEA programs and to fine IMT \$70,000.00. Finding of Fact No. 4.

Subsequently, the Regional Inspector General for Audit, New York, received an audit report covering the 7/1/87 through 6/30/91 award years for IMT. The audit report was received by the Regional Inspector General for Audit by Federal Express on October 19, 1992, was received by the Regional Inspector General for Audit personally on October 26, 1992, and was issued on November 18, 1992. Finding of Fact No. 29. ²¹ In addition, the Regional Inspector General for Audit, New York, received an audit report covering the 7/1/91 through 6/30/92 award year for IMT. The audit was received by the Regional Inspector General for Audit by Federal Express on June 18, 1993. Finding of Fact No. 39.

To summarize, the problems the school was facing during the course of and as the result of its bankruptcy; the problems it had in retaining three different accountants to perform the audit, with the attendant difficulties in monitoring the efforts of the first two accountants until the retention

of the third, who then completed the audits; and the necessity for IMT to respond to a lengthy, unrelated program review that was transmitted to the school on November 21, 1989, do not excuse IMT's failure to timely submit its required non-federal biennial audits. However, the school's documented attempts to complete the audits despite these problems, and its communications with the Department in which it kept the Department informed of its progress and periodically requested extensions of time, 22 demonstrate a good faith attempt to submit its audit reports despite these problems. This good faith attempt on the part of IMT constitutes an important mitigating factor.

Second, as discussed above, IMT did eventually submit an audit, albeit late, in October 1992. Findings of Fact No. 29; Ex. R-13. Nonetheless, while both parties acknowledge that IMT did at least attempt to submit its audit in October 1992, SFAP argues that audits are not considered to be submitted unless they satisfy the regulatory criteria and are deemed acceptable. SFAP Reply Br. at 8; Resp. Initial Br. at 5, 15; Resp. Reply Br. at 2, 3, 4, 5, 6-7. However, there is no evidence in the record indicating that the audits submitted by IMT were unacceptable.

Third, although it is considered that the failure to submit required biennial audits is a very serious violation, the determination as to an appropriate fine must take into consideration the fact that the IMT's eligibility to participate in Title IV, HEA programs will be terminated. This is the most severe penalty that can be rendered as relates to IMT. Therefore, since this is a medium-sized college, it is considered that a fine of \$15,000 is appropriate for the two audit violations. While the tribunal has also determined that by failing to file the audits as required, IMT violated its fiduciary duties under § 668.82, in light of the mitigating circumstances described above and the fact that a fine has been levied for the failure to file the audits, it is considered that no additional fine should be imposed for this violation.

Fourth, the tribunal recognizes that the many procedural motions submitted by SFAP since January 1993 have needlessly delayed the determination of this case and very probably have added substantial expense and detriment to IMT. Therefore, it is considered that the amount of the fine should be reduced accordingly. Therefore, in light of all of the mitigating circumstances of this case, it is considered that a fine of \$10,000 is appropriate for the two audit violations as well as for the fiduciary violation.

V. CONCLUSIONS OF LAW.

A. Biennial Audits.

1. In view of the fact that SFAP granted IMT extensions of time to file biennial audits, it is considered that IMT did not violate 34 C.F.R. § 668.23(c) (4) (1989) as of February 1, 1990, for failure to submit an audit of the Guaranteed Student Loan (GSL) and Pell Grant Programs by January 31, 1990, for the award years 1987-88 and 1988-89.

2. IMT violated §§ 668.23(c) (4) and 690.84(b) (1990) as of April 16, 1991, for failure to submit an audit of the GSL and Pell Grant Programs by April 15, 1991 for the award years 1987- 88, 1988-89, and 1989-90 in view of the fact that IMT had been granted extensions of time to file

such audit on three different occasions setting new deadlines of January 31, 1991, February 15, 1991, and April 15, 1991, respectively.

3. IMT violated § 668.23(c) (4) (1991) as of February 1, 1992, for failure to submit an audit of the GSL and Pell Grant Programs by January 31, 1992, for the award years 1987-88, 1988- 89, 1989-90, and 1990-91.

B. Fiduciary Duties.

IMT violated § 668.82(c) for failure to meet the standard of conduct required of a fiduciary by reason of failure to submit required audits.

C. Consideration of Remedies and Penalties.

1. Terminations.

. a. The amendment to § 668.90(a), that became effective on September 14, 1991, can be applied to the circumstances of this case if the institution has failed to comply with the requirements of §§ 668.23(c) (4) and 690.84(b) (1990) as of a pe period prior to April 16, 1991, such that the tribunal must find that a termination of IMT's eligibility to participate in Title IV, HEA Programs is warranted for such violation, considering the fact that the audit report required by those regulations was eventually, but untimely filed on October 19, 1992.

b. If the institution failed to comply with the requirements of § 668.23(c) (4) as of February 1, 1992, but later, in an untimely manner filed an audit report on October 19, 1992, the effect of the application of the amendment to § 668.90(a), that became effective on September 14, 1991, is such that the tribunal must find that a termination of IMT's eligibility to participate in Title IV, HEA Programs is warranted.

c. Since the above mentioned amendment is applicable to the circumstances of this case, the tribunal need not reach the issue of whether termination or limitation of IMT's eligibility to participate in Title IV, HEA Programs, as provided for under § 668.86 is otherwise warranted.

2. Fine.

A fine of \$10,000 against IMT for violations found herein is appropriate .

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

The Institute and SFAP have filed briefs and a Statement of Findings of Fact Agreed to by the Parties. Such briefs and Statement of Findings of Fact Agreed to by the Parties, insofar as they can be considered to have contained proposed findings and conclusions have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are in whole or in part contrary to the facts and law or because they are immaterial to the decision in this case .

VII. ORDER.

Based on the foregoing findings of fact and conclusions of law, and all the proceedings] had herein, it is hereby:

ORDERED, That the eligibility of the Institute of Multiple Technology to continue participation in student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, be terminated, and it is further ORDERED, That the Institute Of Multiple Technology immediately and in the manner provided by law pay to the United States Department of Education a fine in the sum of \$10,000.

John F. Cook
Chief Administrative Law Judge

Issued: November 26, 1993
Washington, D.C.

SERVICE

A copy of the attached initial decision was sent to:

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

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

Leigh Manasevit, Esq.
Kristin Hazlitt, Esq.
Brustein & Manasevit
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Ron Lipton
Acting Director, Compliance and
Enforcement Division

Office of Student Financial
Assistance Programs
U.S. Department of Education
Room 3919, ROB-3
7th & D Streets, SW
Washington, D.C. 20202

1 SFAP was formerly known as the Office of Student Financial Assistance (OSFA) .

2 Mr. Trepacz stated, in part, at p.159 of the transcript:

I just wanted to indicate that we do maintain an objection to the materiality and henceforth the relevancy of that evidence with respect to the termination .

Regarding the fine, we don't object because our position, again, consistently with this morning, was that the institution is certainly free to put in whatever they need to put in on the fine with respect to that

3 Unless indicated otherwise all citations as to Code of Federal Regulations will be from 34 C.F.R.

4 Paragraph 38 of the Findings of Fact Agreed to by the Parties filed on June 21, 1993 and Tr. at 13, 31, 209-210.

5 These findings of fact are based upon the statement filed on June 21, 1993, entitled "Findings of Fact Agreed to by the Parties ."

6 The language "was received by the Regional Inspector General for Audit personally on October 26, 1992, and was issued on November 18, 1992, was inadvertently deleted from the Findings of Fact Agreed to by the Parties. Paragraph 29 of the Findings of Fact was intended by the parties to be identical to paragraph 27 of the Stipulations of Fact submitted by the parties on January 6, 1993. Tr. at 120-127.

7 This requirement is found in the regulations at § 668.23(c) (4) (ii) (1989, 1991). These audits were required to be submitted by January 31, as required under § 668.23(c) (4) (ii), rather than March 31, as required under § 668.23(c) (4) (i), because IMT did not receive campus based funds. Campus based programs are defined under § 668.2 as the Perkins Loan, College Work-Study, and Supplemental Educational Opportunity Grant Programs. IMT did not participate in these programs during the award years in question. IMT participated in the Pell Grant and GSL Programs for award years 1987-88 through 1988-89 and 1989-90 through 1990-91. Finding of Fact No. 7.

[8](#) This language is taken from both Finding of Fact No. 29, and from Stip. of Fact No. 27, because the parties have agreed that part of the language from Stip. of Fact No. 27 was inadvertently deleted from Finding of Fact No. 29. Tr. at 120-127. See note 5.

[9](#) §668.23 (c) (1) states as follows:

An institution which participates in the ICL, Perkins Loan, CWS, SEOG, GSL PLUS, SLS, or Pell Grant programs shall have performed a financial and compliance audit of its Title IV, HEA programs....

§ 668.23 (c) (1) (1989-1991) (emphasis added) .

The regulation requires "a financial and compliance audit". The language is in the singular; it requires only one audit of the institution's Title IV, HEA programs. Thus, IMT's failure to submit an audit for its Pell Grant and GSL programs constituted only one violation, and not two, as the termination and fine notice states. Therefore, under § 668.23(c) (1), both this audit and the subsequent audits mentioned infra were required to cover both IMT's Pell Grant and GSL programs. Therefore, only one audit was required to cover both programs at IMT.

[10](#) § 668.23(c) (3) states the following:

The institution shall have an audit performed at least once every two years. Each audit must cover the institution's activities for the entire period of time since the preceding audit . § 668.23(c) (3) (1991) (emphasis added) .

[11](#) IMT argues at pages 6-9 of its Initial Brief that it committed only one audit violation.

[12](#) IMT has stipulated to this in Finding of Fact No. 12. That finding states as follows:

IMT was originally required to submit biennial non-federal audits for award years 1987-88 through 1988-89 on January 31, 1990, and for award years 1989-90 through 1990-91 on January 31, 1992.

Despite this, IMT argues at pages 7-8 of its initial brief that the GSL program did not require biennial audits for participants before the 1988 amendments came into effect, with the result that biennial audits were not required by the GSL program until the January following the completion of a two year cycle after the enactment of the 1988 amendments, which would be January 1991. According to IMT, therefore:

The biennial audit requirement for the GSL program did not apply to award year 1987 and IMT's first biennial audit for the GSL program was not due on January 31, 1990, as stated by the Department, but January 31, 1991 in order to cover award years 1988-89 and 1989-90. Thus, the extension granted by ED in 1990, from January 31, 1990 to January 31, 1991, applied only to the Pell biennial audit. IMT did not need an extension in 1990 for its submission of GSL biennial audit inasmuch as it was not due until 1991.

Resp. Initial Br. at 8 (footnote omitted) . IMT goes on to argue that "Inasmuch as IMT's first GSL biennial audit was not due until January 31, 1991 (or April 15, 1991 with the extension), the Institute's second GSL biennial audit is not due until January 31, 1993." Resp. Initial Br. at 8.

The tribunal has previously rejected this argument. See In the Matter of San Francisco College of Mortuary Science, Docket No. 92-8-ST, U.S. Dep't of Education (Decision) (December 31, 1992) at 14-17, aff'd by the Secretary (Decision of the Secretary) (March 26, 1993).

Moreover, the Institute acknowledges that even if its argument was correct, it still was required to submit its Pell audit on January 31, 1990.

13 For example, "IMT has missed only one audit deadline . . ." Resp. Initial Br. at 6; "[IMT] has failed to comply with one deadline for the award years 1987-88, 1988-89, 1989-90." Resp. Initial Br. at 7; "IMT acknowledges that its audit reports were submitted late . . ." Resp. Reply Br. at 2; "The audit that was submitted on October 19, 1992 covered the three years at issue as well as award year 1990-91" Resp. Reply Br. at 3, note 2.

14 For this reason, the tribunal also rejects IMT's argument that this tribunal should not terminate IMT's eligibility to participate in the Title IV, HEA programs for IMT's failure to submit non-federal biennial audits in a timely manner as required by § 668.23(c) (4) because SFAP has not always sought termination of other institutions that also failed to timely submit required non-federal biennial audits, and thus acted in an arbitrary and capricious manner because it has not treated similarly situated schools consistently. See IMT's Post-Hearing Memorandum at 5-8.

15 See 56 Fed. Reg. 36682, 36693-4, 36698-9 (July 31, 1991).

16 In addition, the parties have stipulated to the following findings of fact.

The IMT currently enrolls approximately 900-950 students. During school year 1987-88, IMT enrolled approximately 1,444 students. During school year 1988-89, IMT enrolled approximately 1,070 students. During 1989-90, IMT enrolled approximately 447 students. During school year 1990-91, IMT enrolled approximately 391 students.

At present, IMT operates one main campus in Mayaguez, Puerto Rico and one branch campus in Arecibo, Puerto Rico.

Findings of Fact No. 30-31.

17 1990 is the last year for which complete figures were available. Bnai at 3.

18 Although much of the testimony from witnesses in this proceeding related to mitigating factors which were contemporary to the time of the violations involved, counsel for IMT also elicited testimony from several witnesses concerning subsequent and future expectations as to the school's accounting system, its compliance efforts, its financial stability, and the student population that it serves. Some of the witnesses also suggested that the Institute will submit future audits on time. Tr. at 7981, 84-85, 101, 127-128, 135-137, 151-155. However, the tribunal

does not consider this evidence as to future expectations to constitute a mitigating factor as relates to whether or not, or in what amount, the school should be fined for its past regulatory violations

19 Mr. Negron and Mr. Rivera testified that the date at the top of Ex. R-18-8 should state "April 23, 1991". Tr. at 85-86, 140-141.

20 IMT also submitted, and this tribunal has accepted into evidence, Ex. R-18-4, which is a May 8, 1990 letter from Daniel Cruz of GACS to Mrs. Patricia Comer of the U.S. Department of Education. The letter states that "we need more additional time, to finish with the finding number one of the program audit review. We believe that on 45 days more we have such finish the PMS-272." Ex. R-18-4. Furthermore, Mr. Negron testified that the letter refers to a program review. Tr. at 41-42. However, the letter does not contain a reference to IMT. On its face, the letter does not identify which school Mr. Cruz is referring to. Ex. R-18-4; Tr. at 48-49.

In an attempt to demonstrate that Ex. R-18-4 was indeed referring to IMT, the school has submitted, and this tribunal has accepted into evidence, Ex. R-19. This is a letter, also dated May 8, 1990, from Patricia Comer to Ms. Margie Rivera of IMT, in which Ms. Comer discusses unresolved audit findings. In her letter of August 30, 1993, counsel for IMT notes that "Page 19-3 implies that Ms. Comer was aware of Mr. Cruz's obligations and had granted a 45 day extension." However, it is not clear which letter was sent first and which one is in response. Both Ex. R-18-4 and Ex. R-19 are dated May 8, 1990. Mr. Negron testified that Mr. Cruz had originally telephoned Mrs. Comer to make this same request, and that Mrs. Comer had asked Mr. Cruz to put this request in writing. Mr. Negron also stated that Mr. Cruz gave him a copy of the letter sent to Mrs. Comer as to such extension and that Ex. R-18-4 is a copy of that letter. Tr. at 164-167, 169-170.

Overall, the combination of the documentary evidence referred to along with the testimony does loosely tie Ex. R-18-4 to the subject program review. Even if Ex. R-18-4 were not probative evidence, the findings of fact, the exhibits, and the testimony elicited at the hearing are sufficient evidence of the fact that the necessity to reconstruct large amounts of records and devote substantial staff time to responding to the November 21, 1989 program review detracted from IMT's ability to simultaneously work on the audit reports that are the subject of the instant proceeding.

21 This language is taken from both Finding of Fact No. 29 and Stip. of Fact No. 27, because the parties have agreed that part of the language from Stip. of Fact No. 27 was inadvertently deleted from Finding of Fact No. 29. Tr. at 120-127. See note 5.

22 However, there were gaps in these communications. For example, between April 15, 1991, when IMT missed its last audit extension deadline, and January 14, 1992, the Institute should have communicated more with the Department as to the status of the missing audits.