IN THE MATTER OF Yorktowne Business Institute,
Respondent.

Docket No. 92-33-ST
Student Financial Assistance Proceeding

DECISION

STATEMENT OF THE CASE

In a notice dated February 27, 1992, the Office of Student Financial Assistance (OSFA) of the Department of Education (Department) seeks termination of Yorktowne Business Institute's (Yorktowne, the school or YBI) eligibility to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. §1070 et seq. In addition, OSFA seeks to impose a fine upon Yorktowne of $245,000 for the regulatory violations set forth within the notice. (ED Ex. 83.)

The termination notice is based upon the contention of OSFA that the school failed to serve in the capacity of a fiduciary for the Department during award years 1988-89 and 1989-90. OSFA says that YBI duped prospective students into enrolling at the school, made substantial misrepresentations concerning the quality of its educational program and its ability to place graduates in meaningful employment. Further, OSFA asserts that the school engaged in other fraudulent admissions practices, and failed to maintain adequate checks and balances within its system of internal controls, resulting in the theft of student financial aid funds. In addition, OSFA says that YBI failed to make timely tuition refunds to lenders holding Guaranteed Student Loans (GSLs)See footnote 1 [1] on behalf of its students. Finally, OSFA contends that Yorktowne's recordkeeping was in such a state of disarray that it was unable to maintain proper fund accounting and could not insure correct disbursements of monies received.

Following receipt of this termination and fine notice, Yorktowne requested a hearing to contest the OSFA proposed termination and fine actions. A hearing was held before me in Washington, D.C. from November 9-17, 1992, at which time Yorktowne admitted to some of the regulatory violations, denied others, and offered evidence of corrective actions. The school seeks another opportunity to conform to requirements of the Department. Posthearing briefs were filed. Substantial use of them is made this decision.

FACTS

In February 1991, the Department's Office of Inspector General (OIG) conducted an inspection of Yorktowne.See footnote 2 [2] Inspections are undertaken by the OIG to provide an assessment of the manner in which postsecondary institutions comply with Federal and state laws and regulations, accrediting standards and individual school policies. (Tr. at 23.) Such inspections consist of a review of student files and an analysis of salient school documents, and include the conduct of interviews with former and current school employees and former and current students. (Tr. at 40.)See footnote 3 [3]

As noted, during the inspection of Yorktowne, the OIG reviewed a sample of 69 student files. (Stip. of Fact 8.) These files represented students who attended Yorktowne's 3 campuses during award years 1988-89, 1989-90 and 1990-91. (See ED Ex. 1.)See footnote 4 [4] The review of these files involved a search for miscellaneous documentation required to determine student eligibility for Federal funds and needed to establish the propriety of the disbursement and retention of Title IV, HEA program monies. (Tr. at 30.) In addition, dozens of interviews were conducted to provide insight into how financial aid was administered, and to determine the nature of the educational program provided. (Tr. at 40, 45-6.)

Yorktowne permitted a single individual, Felicia Wilkerson, to assume responsibility for authorizing payments and disbursing student financial assistance funds. This was in contravention of a regulatory requirement that no one office should have responsibility for both functions with regard to any particular student. (Tr. at 830; see 34 C.F.R. 668.14(d)(1),(2).) The result of this was that Ms. Wilkerson conspired with another employee to steal Federal funds by processing bogus GSL checks. (Tr. at 31-33.) This practice, which occurred as late as 1990 (Tr. at 831-32; ED Ex. 129), was brought to a halt because it was uncovered by the OIG incident to the inspection. (Tr. at 108, 569-70.)See footnote 5 [5] Yorktowne was warned against allowing one person to both authorize and disburse funds in the spring of 1989 when the Maryland Department of Higher Education, as a result of its review, advised the school of the need to change that practice and to restore balance in its system of administration. (Tr. at 830-31; ED Ex. 128.)

Beyond this, the OIG discovered that Yorktowne improperly disbursed funds to students. Documents necessary to determine student eligibility for any financial assistance were missing from numerous student files.See footnote 6 [6] In addition, Yorktowne did not adequately maintain records of student attendance, with the concomitant effect of not enforcing its policy of satisfactory academic progress. Tr. at 83-103.)See footnote 7 [7] The school also did not timely make tuition refunds, although the full scope of this practice is deputed. (Tr. at 293-360.)See footnote 8 [8] Finally, school officials engaged in practices of altering students' admission tests (Tr. at 307-08.), falsifying leaves of absence (Tr. at 567, 603-05.), providing false information on financial aid applications (Tr. at 566, 637-38.), promising jobs and training that were not provided (Tr. at 367, 371, 378-79, 381-83, 387.), and backdating essential student aid documents. (Tr. at 805-810, 814.)

YBI'S CURRENT OPERATION OF ITS TITLE IV PROGRAMS

Yorktowne admits that serious problems existed in the manner in which it operated its Title IV programs. However, Yorktowne says that those problems have been addressed. As proof of that, Yorktowne presented the testimony of Catherine Hubert, who has been the director of the school since June 1990; Patricia Hunt, Director of Student Finance for the school's parent company, Fischer Educational System, Inc.; and Loretta Drummond, Yorktowne's Director of Financial Aid.

A. Current Operation

Ms. Hunt's believes that Yorktowne meets and in various ways actually exceeds the standards of administrative capability as required in the Department's regulations. (Tr. 745.)See footnote 9 [9] Furthermore, Ms. Hubert, believes that Yorktowne has discharged its obligations to act as a co-administrator of federal student aid programs and as fiduciary for federal student financial aid funds in an excellent manner. (Tr. 586.)

Since at least the beginning of 1992, all refunds at Yorktowne have been made accurately, timely and in accordance with federal regulations. (Tr. 740; 760-761.) The system used to accomplish this is as follows:

When a student withdraws from Yorktowne prior to graduating or is dropped for academic reasons, the Director of Education generates a Student Status Change Notice, which gives all the pertinent information about the student's withdrawal, including the last date of attendance and the reason for the withdrawal. These notices are routed by the Director of

Education to Loretta Drummond as Director of Financial Aid. She computes the amount of refund due the student, if any, and provides that calculation along with a copy of the other documentation required by Yorktowne's parent, Fischer Educational System, Inc. (Fischer), including an academic transcript, record of attendance, a copy of the Student Status Change Notice for the lender if there was a Guaranteed Student Loan involved, as well as a copy of the exit interview. Tr. 739.) All that information is pulled together and submitted to Fischer by Yorktowne, normally within two weeks. That entire package is forwarded to the individual whose full time job with Fischer is to process student refunds. That individual looks through the package to make sure that the calculation was done correctly. Once the calculation is determined to be correct, the paper work is routed through Connie Hipp, Fischer's Controller, who approves the refund. The paper work is then sent to the Accounts Payable Department at Fischer, which generates the actual check. (Tr. 739-740.)

Yorktowne has a staff of four full-time financial aid professionals plus a full-time default management counselor, all of whom are backed up by the financial aid staff at the corporate offices of Fischer. (Tr. 748.)

Yorktowne believes that it is administering its Title IV programs with adequate checks and balances and a system of internal controls. (Tr. 748.) In this regard, the school has done the following: Yorktowne has established and maintains student records and financial records for purposes of the standards of administrative capability as required by the Department.

It has designated a capable individual to be responsible for administering all the Title IV programs in which it participates It has a system to assure that all the information received either by Fischer at its corporate offices in Nashville or by it that bears on a student's eligibility for Title IV funds is communicated to that designated individual. (Tr. 747.)

It has an adequate number of qualified workers to administer its Title IV programs. Also, the school believes that it exceeds the standards of administrative capability as required by the Department: It verifies 100 percent of its students. It has a full-time default counselor who also does post-admissions screening. This individual, Mr. Chavis, meets with the student after he or

she comes from the Admissions Department and before the student goes to the Financial Aid Department to apply for financial aid. He sees each student again after he or she leaves the Financial Aid Office. He determines what information the student has received from his or her admissions representatives and if the student has any questions about the school or the school's curriculum that have not been answered. This counselor's role in default management is to prevent students from defaulting on their guaranteed student loans once they cease attending Yorktowne. (Tr. 669; 745.)

It also has a policy to check with the pertinent guarantee agencies to make sure that a student has not defaulted on a prior guaranteed student loan, which would render a student ineligible for subsequent Title IV aid. Such a procedure is not required under the regulations even though a prior default often is not revealed on a financial aid transcript. (Tr. 745-746.)

Fischer Educational System, Inc., Nashville, TN, is the parent company for eight schools in 12 locations across the United States, one of which is Yorktowne. Fischer has approximately 2,500 students, and six of the eight schools award two-year Associate degrees. The schools owned by Fischer also offer diploma and certificate courses in areas like accounting, business, medical and dental assisting, electronics, business and secretarial. (Tr. 721.) At the time of the hearings, only Yorktowne was the subject of a formal termination proceeding by OSFA.

As Director of Student Finance for Fischer, Ms. Hunt works closely with the financial aid staff at the individual schools owned by Fischer. One of the individuals she works with in this regard is Loretta Drummond, Director of Financial Aid at Yorktowne. (Tr. 723.) Based on Ms. Hunt's experience in working with financial aid directors and training a number of individuals to be financial aid directors over her 15 years of experience in the financial aid field, Ms. Hunt considers Ms. Drummond to be a very knowledgeable and dedicated financial aid professional. (Tr. 724.) Ms. Drummond has been Director of Financial Aid for Yorktowne since September 1990. (Tr. 653.) Ms. Drummond has nine years of experience in the field of federal student financial aid as well as a Bachelor of Arts degree in elementary education from Morgan State University. (Tr. 653.) Prior to coming to Yorktowne, Ms. Drummond was Director of Financial Aid at three other proprietary schools, PTC Institute (Tr. 657.), Airco Technical Institute (Tr. 661.), and National Business School (Tr. 663.)

For her part, Ms. Drummond draws on the expertise of various individuals in the corporate office of Fischer. In addition to Ms.Hunt, there are three individuals who work for Ms. Hunt plus Connie Hipp, the Controller. (Tr. 672-674.)

The interactions between Fischer and Yorktowne in the area of student financial aid include the following:

a. The school has all the face-to-face contact with the student and collects the documents that are needed to complete the financial aid package. (Tr. 724-725.)

b. It assists students in completing application forms completely and accurately. (Tr. 724 -725.)

c. It enters information from the Application for Federal Student Aid filled out by the student into its computer system because Fischer's financial aid system is completely automated. (Tr. 725.)

d. It performs the needs analysis and determines the amount of financial aid the student is going to be eligible for, and it then enters the projected awards into the computerized financial aid system. (Tr. 725.)

e. When It completes the financial aid packaging of each student, it also does some initial counseling with the student, which includes default management and explaining the nature of the awards and the amounts. It then prepares a complete set of all the documentation, which is then forwarded to Fischer. (Tr. 725.)

f. The school is encouraged to and frequently does contact Fischer in order to obtain answers or assistance in determining a student's eligibility or any other questions relating to financial aid. Such questions can include, for example, whether a particular immigration document is acceptable to determine if the student is eligible to receive Title IV funds or whether a form of tax return is valid. (Tr. 727-728.)

g. The school's Financial Aid Director is required to make professional judgments regarding things such as whether a student may be classified as an independent student, and those professional judgments are almost always discussed with Fischer prior to making a final determination.

h. Fischer has assigned a single auditor to review all of Yorktowne's financial aid packages as they are received. The Fischerauditor determines that everything that is required to be included is included, that everything is filled out completely, and that there are no omissions or discrepancies in the information provided. (Tr. 728-729.)

i. If the Fischer auditor has a question or if any additional documentation or clarification is necessary, the Fischer auditor will fill out an Exception Notice (ED Exhibit 54-17.) and send that to Yorktowne or, if it is a matter than can be handled telephonically, the Fischer auditor will handle it in that manner. (Tr. 729-730.)

j. If the Fischer auditor has a question deemed to be potentially a significant problem, the award of financial aid to that particular student would be put "on hold" so that no funds are disbursed until the issue is resolved. (Tr. 730-731.)

k. The decision about whether to put the student's awards "on hold" is made by Fischer. An example of a significant matter that would put an award on hold would be if there was a discrepancy in the information or if the student had been selected by the U.S. Department of Education for verification and all the verification documentation had not yet been received. (Tr. 731.)

1. The corporate office makes individuals such as Patricia Hunt available for training sessions for the school's financial aid office. (Tr. 674.)

C. YBI's Financial Aid Operations

When Ms. Drummond took over as Director of Financial Aid at the school in September 1990 (Tr. 653), she added staff. The Financial Aid Office now consists of four full-time individuals, two financial aid officers and a clerk in addition to the Director. (Tr. 664.)

Ms. Drummond also put in a tracking system, a Financial Aid Checklist, a policy for pre-screening all students applying for financial aid, and a Financial Aid Activity Log. Pre-screening is an informal interview with the student to ascertain basic information about the student such as income and household size in order to advise the students what documents they need to bring in order to formally apply for financial aid. The Financial Aid Activity Log is a form put in the front of each student's folder identifying the various activities involving a given student reflected in that folder, such as whether a financial aid transcript has been requested or received, and is a device used by the school to check that it is getting all the information on that particular student. (Tr. 666-667.) An example of a Financial Aid Activity Log is ED Ex. 80-6.

As was her policy at her previous employment as Director of Financial Aid, Ms. Drummond instituted a policy of verifying all students when she became Director of Financial Aid even though the regulations only require verification on those students selected by the Department for verification. (Tr. 667-668; 675; 723.) See 34 C.F.R. § 668.54. However, none of the 69 students reviewed by the OIG inspection team was enrolled after Ms. Drummond became Director of Financial Aid and instituted 100 percent verification for all newly enrolled students. (Tr. 668.)

Under this system, with respect to 100 percent of the students, Fischer verifies all the information provided in that student's financial aid package. Thus, the school's students complete a verification worksheet which shows family size, the members of the family and how many of them are enrolled in other postsecondary institutions, and any untaxed income. (Ex. R-61-1.) The school requires copies of tax returns for tax filers, and then verifies the tax returns by obtaining tax account information from the Internal Revenue Service. The school seeks to verify that the income in fact reported to the Internal Revenue Service is the same as reflected on the tax return provided by the student. (Tr. 731-732.)

If the information received as part of the process of verification is different from the information originally provided to the school, necessary documentation to resolve the differences is obtained, and any changes that need to be made as a result are made. Those changes may have the effect of increasing or decreasing the total amount of Title IV aid the student is eligible to receive. (Tr. 675-676.) One example of a change increasing the amount of aid a student is eligible to receive would be if his or her household size went up. By the same token, if the household size went down, the amount of aid the student was eligible to receive might decrease. (Tr. 676.) In any event, once the documentation of whatever changes come to light is received, a new needs analysis is performed by the school in order to determine whether the change has had any effect on the amount of Title IV aid the student is eligible to receive, and a Student Aid Report (SAR) is resubmitted to the Department's contract processor. (Tr. 676-677.)

Another outcome of a change might be that a student remains eligible for the same amount of Title IV aid but not in the same Title IV programs as initially thought. For example, if the

amount of a Pell Grant a student was eligible to receive went down, he or she might then be eligible for an increase in his or her Supplemental Educational Opportunity Grant to make up the difference in the reduction in his or her Pell Grant. (Tr. 677). D. YBI's Education Department

Catherine Hubert has been Director of the school since June 1990.See footnote 10 [10] (Tr. 538.) Almost immediately after becoming Director, Ms. Hubert was faced with a Department program review. At the exit conference she was advised that there were serious problems in the area of financial aid. She immediately brought in two experts in financial aid she had worked with before, Loretta Drummond and Shirley Marshall. (Tr. 543-544.) Ms. Drummond's initial task was to evaluate the program review report and assist in responding to it. Ms. Marshall was to evaluate the school's financial aid office and its personnel, as well as all other personnel. (Tr. 544.)

Ms. Hubert brought in a new Director of Education, began to evaluate and replace teachers, and updated the curriculum of the various programs. (Tr. 545.) When asked why she turned her attention first to the Education Department after bringing in her financial aid team, she responded: Because my main concern is that the students are getting the programs that they are supposed to get and getting everything that they are supposed to get in a clear and concise manner.(Tr. 548.)

Yorktowne does the following to monitor and improve the quality of its educational programs: a. At the end of every eight week grading period, students are given a form to critique his or her classes and teachers. The student can provide this critique anonymously if he or she so chooses. The critique covers whether the teacher is providing the student with everything he or she needs to get out of that course; whether the students are learning and- understanding what is being taught; how concise the teacher is; how willing the teacher is to help students; whether the students like the material that is being taught; and any comments that they wish to make. (Tr. 577.)

b. These critiques are than collected and reviewed by the Director of Education as well as by Ms. Hubert. The results of the critiques are discussed with the various instructors, and if a complaint is repeated with respect to a particular course or instructor, it is investigated to find out what the problem is. (Tr. 577.)

c. In addition, each new student is asked to provide a critique of the school's program after approximately two-three weeks of his or her start date in order to ascertain the student's reaction to the program of instruction and to determine if there are any problems. (Tr. 578.) d. The Director of Education evaluates every instructor twice a year by observing the instructor in the classroom and talking to his or her students. (Tr. 577-578.)

e. The school holds faculty meetings every two weeks. All faculty must attend, and an agenda is prepared and circulated prior to the meeting setting forth what has transpired during the prior two-week period and includes whatever information needs to be communicated from the administration to the faculty. (Tr. 579.)

f. New faculty are selected by Ms. Hubert in consultation with the Director of Education, who does the initial interview. If the Director of Education feels that an individual is qualified and recommends that a candidate be hired, the candidate is then scheduled for a joint interview between Ms. Hubert and the Director of Education. (Tr. 579.) In order to be considered for employment, candidates must have a minimum of a four-year college degree in the subject matter which they are to teach. (Tr. 579.)

g. Faculty credentials are verified and are very closely monitored during their initial period of employment. The Director of Education observes and critiques new faculty almost constantly during the first week of employment and frequently during the next few weeks of their employment. (Tr. 579.)

h. The school requires all faculty members be available to students for counseling and extra help from 3:00 p.m. until 4:30 p.m. every day. In addition, the school offers remedial training to its students to assist them in brushing up on basic math and basic English. These remedial programs are free and begin two weeks before a student's actual start date in order that the school can get a chance to know its students before they actually start attending classes. (Tr. 580.)

i. In this regard, before any prospective student can be admitted, he or she must be tested to determine whether he or she has the ability to benefit from a course of instruction. This is done regardless of whether a prospective student does or does not have a high school diploma or equivalency diploma. (Tr. 561; 562.) These tests are all administered by Mr. Stanley Koch, who teaches GED for Anne Arundel County. Mr. Koch brings the test with him, takes the students into an empty classroom, administers the test, which he proctors, grades the tests, and gives only the results to Ms. Hubert. (Tr. 561-562.) The results of those admission tests administered by Mr. Koch identify if the student is weak in a particular area such as math or English, and the school then emphasizes the remedial program in those areas in which the student has been identified as being weak. (Tr. 580.)

j. Ms. Hubert instituted a Student Council in order for there to be a liaison among the students, the administration and the faculty. (Tr. 554.) A number of the students who had enrolled prior to Ms. Hubert becoming Director in June 1990 were resistant to some of the changes that Ms. Hubert instituted, and she "felt that the best thing to do was let them be part of the policy making procedures of the school without letting them run it and [the Student Council] was a good way to do it." (Tr. 554.) The administration and faculty of Yorktowne received considerable input from the Student Council and "made quite a bit of positive change because of the input we received from them." (Tr. 555.)

The Student Council was not continued after the students who had been enrolled prior to Ms. Hubert taking over as Director graduated because the students who enrolled at YBI after Ms. Hubert became Director "really had no interest in it. We have an open-door policy where they can [come] into my office anytime they want or catch me in the hall, the same way with the Director of Education, he's available all the time for the students so they have quite a bit of say." (Tr. 555.)

k. The school provides its students with an educational resource center which has an extensive library of books, video films and audio tapes that students can use or check out and take home with them, all of which is provided free of charge. (Tr. 580-581.)

1. The school provides its students with the opportunity to go on field trips to places such as the National Aeronautics and Space Administration and the Giant Food computer center as well as computer shows, all of which provide students with the opportunity to interact with the kinds of companies from whom they will be seeking employment and to get a feel for what it is like to work in one of those kinds of facilities. (Tr. 581.)

m. The school has outside speakers come in from federal agencies and other potential employers as well as employment agency representatives. Individual speakers also are brought in if they can make substantive presentations such as the author of the accounting text used at the school. (Tr. 582.)

n. The school provides both academic and personal counseling to its students through the Director, the Director of Education, the Director of Financial Aid, as well as various faculty members. (Tr. 582.)

E. Employment

Yorktowne Business Institute presently assists its graduates in obtaining employment it does the following:

a. Each student takes a course known as Career Development, which provides the student with techniques and strategies necessary to successfully conduct an effective job search campaign. (ED Exhibit 94-21). Career Development is taught by the Director of Placement. This course includes preparation of a resume, writing of cover letters, and preparation of the government employment application, known as the 171. It also teaches proper interviewing techniques, which include mock interviews, grooming, and dressing for success. (Tr. 557.)

b. The school has a Job Bank, which is a book that the Director of Placement develops through various contacts in the community, potential employers calling in who have previously used Yorktowne graduates, as well as newspaper ads. The Job Bank is the compilation of these various items. (Tr. 557.)

c. The school also conducts Job Fairs, which are organized by the Director of Placement, who initiates and organizes a group of employers to come to Yorktowne at a specific time and date to interview students, talk about their companies, tour the school's facilities and sometimes provide input as to the kinds of skills employers are looking for in prospective employees. (Tr. 557.) During the six months preceding the hearing in this case, the school had three separate Job Fairs and had another one scheduled for December 10, 1992. (Tr. 557.)

d. The school also has a special focus on employment with the Federal government, and in October 1992 the U.S. Department of Agriculture administered the General Schedule Test to Yorktowne's students. (Tr. 558.)

e. The school also provides to its students who do not have high school diplomas assistance in obtaining their equivalency diplomas (the General Education Development Certificate, known as a "GED"; see 34 C.F.R. § 668.2) by providing, free of charge, classes to prepare for the GED as well as a mock GED test. Once a student passes the mock GED test, the school provides that student with the application to take the real GED test, the location and times where the test is given, "and strongly encourages them to go and get it because we feel they're ready." (Tr. 558.)

F. Attendance

Attendance is taken on a daily basis. Each teacher keeps his or her own individual log book, and, in addition, all students must sign in at every class. These sign-in sheets are then turned in to the Director of Education, who reviews them and compiles a list of the students who are absent. (Tr. 573.) The list of absent students is then provided to Mr. Halvorsen's Department to be posted to the student's record both in hard copy and entered into the computer system. (Tr. 574.)

The Director of Education also follows up with respect to all students who are absent. Either the same day or at least within 24 hours of a student being absent, the Director of Education, a counsellor or a teacher calls the student to find out why he or she was absent, whether he or she is going to be there the next day, and to identify if there is a problem. (Tr. 574.) If a student is identified as having an attendance problem, the student is counselled, and, if absences continue, the student is put on attendance probation.

Under Yorktowne's attendance policy, a student is not allowed to miss more than 20 percent of his or her program. If a student misses more than 20 percent that student has to make up at a minimum whatever is over 20 percent either by doing make up work or, if the class is a hands-on class such as a laboratory, he or she has to do a hands-on make-up class. If the student has to make up a laboratory with a specific assignment, that is made up with the instructor there. If the class that was missed is a lecture, the student is given an assignment to do either at home or on the premises. The work made up is documented by the teacher, who reviews it, and by the Director of Education, following which the documentation is put into the student's permanent file. (Tr. 574-575.)

These attendance procedures have been in effect at Yorktowne since approximately the middle of 1991 (Tr. 575.) and attendance has improved as a result. (Tr. 575.) This is evidenced in part by the fact that the school's percentage of students who graduate has increased and because the close monitoring of attendance has documented that absences have decreased. The issue of attendance is discussed "from day one in orientation and they hear about it every day that they are in school." (Tr. 575.)

Attendance is particularly a problem for Yorktowne's students because they are very low income students who have multiple problems that can interfere with attendance. These problems include having to deal with one or several children and often little money and a wide variety of personal problems. "[W]e tried to instill in them that nothing can stop them from coming to school because when you become an employee, sick kids or personal problems or lack of money is not going to be an acceptable reason for not going to work and they will be terminated [from their employment]. And we try to teach them that this is a job, going to school." (Tr. 576.)

Attendance is also particularly a problem for the student population at Yorktowne because "most of these young people have never completed anything. Some of them have completed high school barely, but they have never been successful at anything and their self-esteem is low, so it's important that they succeed at Yorktowne." (Tr. 576.)

G. Babysitting

Ms. Hubert instituted a babysitting service. There are at least eight to ten care-givers present at the school at any one time. (Tr. 616.) The program is in fact not just babysitting but a learning experience patterned after Head Start. (Tr. 617.)

The reason Yorktowne provides free babysitting for its students on the premises is that students with small children can bring their children and go to class without worrying about whether their children are being cared for. This is very important because the students are predominately women with low incomes who could not afford babysitting and still go to school. This applies both to day students and evening students since many of the students are single parents. (Tr. 551-552.)

H. Equipment

Yorktowne teaches WordPerfect 5.2 and will upgrade to 6.0 as soon as that is ready, COBOL, LOTUS 1, 2, 3, as well as REPORT PROGRAM GENERATOR (RPG), all of which are universal languages used on any computer. (Tr. 614.) Graduates can readily transfer their computer skills to IBM. (Tr. 614.)

Most of Yorktown's equipment had been purchased the year before Ms. Hubert became Director in 1990, and at least as long as Ms. Hubert has been there, equipment has never been a problem with prospective employers. (Tr. 615.) In fact many employers send their employees to Yorktowne to be trained in a specific area such as WordPerfect or LOTUS 1, 2, 3. (Tr. 615.)

The issue of the typewriters is different. The problem with the typewriters is providing all the necessary maintenance because the "typewriters take a hell of a beating, the students don't know how to use them and they pound on them and ... you have to have ongoing service on them." (Tr. 616.) There was a problem with the company that the school had contracted with for servicing of typewriters. As a result, Ms. Hubert changed companies and the new company comes in twice a week. Each typewriter is overhauled twice a year. (Tr. 549-550.)

I. Computerization of Student Records And Data

Within approximately one year of taking over as Director of Yorktowne, Ms. Hubert replaced every member of the administrative staff who was there when she took over, except for one individual, Mr. Eric Halvorsen. Mr. Halvorsen is in charge of the school's Data Information Systems Department and does everything relating to the computerization of student records and all reports, including reports for accrediting as well as for the State of Maryland and the Federal government. (Tr. 555-556.)

Ms. Hubert set this up as a new department to handle all computerization of student data and financial data. One element of that new department was making the computer system compatible with the computer system of the parent company, Fischer Educational System. (Tr. 546.) This computerization of records included student records, which Ms. Hubert found to be in disarray and in need of being revamped. (Tr. 547.) She placed Mr. Halvorsen in charge of this new department, and fired Walter Cooke, the Registrar and the person who previously had been in charge of the computerization of records, including student records. (Tr. 547.)

In implementing Ms. Hubert's directive regarding the updating and computerization of records, Mr. Halvorsen began with the records of those students who were currently enrolled. (Tr. 547.) That was accomplished by approximately early-mid-1991. (Tr. 704.) Mr. Halvorsen then began to work backwards with respect to students who were no longer at the school. (Tr. 547.)

Ms. Hubert also indicates that this task was not completed by the time the OIG inspection team came to the school in February 1991, and in fact "it had barely begun". (Tr. 548.)

J. The Reimbursement Method of Payment

For over 18 months the school has functioned under the reimbursement method of payment for all Pell Grant funds as well as all of the campus-based programs, which are the Perkins Loan Program, the College Work Study Program, and the Supplemental Educational Opportunity Grant Program (Tr. 734; 34 C.F.R. § 668.2.) Thus, Yorktowne is on the reimbursement method of payment for all Title IV funds except Guaranteed Student Loan proceeds, which are paid in the form of checks from lenders made out jointly to the student and the school.

In was in April 1991 that the Department transferred Yorktowne from the advance payment system to the reimbursement method of payment. Under the advance payment system, as soon as the Student Aid Report is received, the student's account is credited, and the school is able to draw down actual cash from Federal funds. Under the advance payment system, money is paid and the back-up documentation supporting the disbursement is provided to OSFA at a later date. (Tr. 734-735.) The opposite occurs under the reimbursement system: all of the back-up documentation supporting the student's entitlement to the federal funds is provided to the Department before any cash is paid by the Department for that particular student. (Tr. 735.)

Before the Department pays any Title IV funds to the school under the reimbursement method, the Secretary has to determine that the disbursement is proper.

In addition to the actual documentation that the Department requires the school to support payment under the reimbursement method, the Department also requires that the documentation be reviewed and the propriety of the payment be certified by an expert in the area of student financial aid approved by the Department. (Tr. 735.) For that purpose the Department has approved Connie Hipp, who also is a certified public accountant. (Tr. 736.)

The process leading to the point where Ms. Hipp makes her certification to the Department is as follows:

a. Ms. Hunt obtains a list of every student whose account has been credited with a Pell Grant or campus-based award during the previous month and physically pulls the entire financial aid file for every one of those students. (Tr. 736.)

b. Ms. Hunt then personally goes through each file, spending approximately one week per month on those files. (Tr. 736.)

c. Ms. Hunt's review of each of these files is both subsequent to and duplicative of the process that the Fischer auditor initially went through when the student was packaged by Yorktowne and the financial aid file was forwarded to Fischer. (Tr. 736.) See Sections VII.A.-B., supra.

d. Ms. Hunt checks for omissions, conflicting information, missing forms, verifies that the student was making satisfactory academic progress, and checks attendance and grades. If she is satisfied that the file is in proper order, Ms. Hunt forwards the file to Ms. Hipp for her review. (Tr. 736-737.)

e. If Ms. Hunt is not satisfied, she will follow-up with Yorktowne and only forwards to Ms. Hipp files with which Ms. Hunt is, in fact, actually satisfied. (Tr. 737.)

f. Ms. Hipp then replicates the same review that Ms. Hunt did and that the Fischer auditor initially did in reviewing the packages. (Tr. 737.)

g. When Ms. Hipp is satisfied, she then certifies the files and provides that certification to the Department of Education, and it is at that point that the school is reimbursed and can draw down actual cash for these students. (Tr. 738.)

Not once since Yorktowne was placed on the reimbursement system of payment in April 1991 has the Department questioned any of the students that Ms. Hipp has certified to the Department.

(Tr. 738.)

For these reasons, the record establishes that Yorktowne currently is operating its Title IV programs in basic compliance with the Secretary's requirements. In this regard, there were a few post audit mistakes by Yorktowne. Some by Loretta Drummond based on the testimony of Rita King and ED Exs. 122-127. However, the facts support a conclusion that presently Yorktowne is in substantial compliance with Department requirements.

IV.

YBI'S POSITION ON THE ALLEGATIONS IN THE TERMINATION NOTICE

A. Ability To Benefit Tests

OSFA questions eight student's tests. However, it was only partially upon on that basis that OSFA contends that the school failed to administer properly its ability to benefit (ATB) tests.

Yorktowne admitted to widespread fraudulent admission practices (TR. at 565-66, 637-38.), which involved every admissions representative. (Tr. at 637.)

By definition, a student who has graduated from high school or received a GED is not an ATB student. See 20 U.S.C. §§ 1088(b) and 1141(a), clause (1). Moreover, it is OSFA's established policy that an institution such as YBI initially "may rely on the student's statement on his or her application that he or she has a high school diploma or its equivalent." (Ex. R-71-3, Ex. R-71-1-2 and Ex. R-71-7.) In fact, OSFA's concedes that it initially is sufficient for the U.S. Department of Education "if a student certifies with the school that they have a high school diploma...". (Tr. 124.)

OSFA's also concedes that it is not a violation of any Title IV regulation for YBI to admit a student who represents to the school that he or she has a high school diploma and gets a score which is above the level set by the institution for a high school graduate but not necessarily above the score established by the school for a non-high school graduate. (Tr. 129-130.) In this regard, OSFA's witness also testified that ED Exs. 100 and 101 reflect that YBI had different admissions standards for non-high school graduates than it had for students representing that they had a high school diploma or GED. (Tr. 130-131.)

The significance of the foregoing to this allegation is underscored by OSFA's witness testifying that "[a]n ability to benefit test is a test that is administered to students that lack a high school diploma or an equivalent to determine whether or not the student can benefit from the programs that are offered". (Tr. 42.)

OSFA witness Ms. Schwarzenbach testified that she considered any student to be an ATB student unless that student's file contained an actual copy of his or her high school diploma, GED or high school transcript. (Tr. 42.) In this regard, the evidence shows that the Department is not so strict for entry students.

An August 24, 1987 letter from Fred Sellers, Chief Policy Section, Pell Grant Branch, Division of Policy and Program Development, United States Department of Education (Exhibit R-71-7) provides:

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

Of the eight students identified by OSFA (9, 19, 23, 33, 38, 48, 60 and 61), six were high school graduates:

Student No.	Exhibit
9	R-9-1; ED 22-6 and 22-8
19	R-19-2
23	R-23-1

33	ED 46-5 and 46-7-8
48	R-48-1
61	R-61-17-18

Of the two remaining students (38 and 60), OSFA stipulated that Student 38 was erroneously included in the Termination Notice in the category of students whose ATB score was below the minimum required. See Stips. of Fact previously filed by the parties.

With respect to the one remaining student, Student 60, reference is made to ED Ex. 73-3, where the notation "ATB Problems -- several changed answers." Of course, changing an answer is not by itself a violation of any Title IV regulation.

The Termination Notice seeks a $25,000 fine based on the assertion that "YBI's conduct constitutes substantial and serious abuse of the ability to benefit examination process and has allowed students who did not have the ability to benefit from all YBI's training to receive Title IV HEA funds to attend that institution" (ED Ex. 83-19.) The Termination Notice alleges a "pattern of abuse, wherein commissioned sales representatives administered and graded ATB". (ED Ex. 83-2). YBI asserts that However, no Title IV statute or regulation restricted who could administer and grade ATB tests. Also, YBI says that it cannot be fined for anything other than a violation of a Title IV statute or regulation. The Termination Notice alleges that the commissioned sales representatives "did not adhere to required time limits when administering the test and assisted students during the test by such means as pointing out the correct answer". (ED Ex. 83-2.) However, OSFA did not establish that ATB tests were required to be timed, much less that they were administered without regard to a required time limit. Section 668.7(b)(1)(i) required that ATB students be "administered a nationally recognized, standardized, or industry-developed test, subject to criteria developed by the institution's nationally recognized accrediting agency association ...". OSFA did not introduce evidence regarding the standards of YBI's accrediting agency.

It is worthy of note in this regard that the OIG looked at the files of 20 different students out of its judgmental sample of 69, and made allegations as to only 8 of those 20.

Nonetheless, there were fraudulent practices leading to student admissions.

The Department's knowledge of YBI admissions practices came from interviews with former students and school employees. (Tr. at 61-2.) OSFA offered the direct testimony of JerRald Shaw to corroborate the OIG's conclusion concerning this. (Tr. at 309.) The credibility of Mr. Shaw's testimony, and the accuracy of his observations, was supported by Ms. Hubert, who provided even greater detail. (Tr. at 565-66, 637-39.) Similarly, Mr. Shaw testified to widespread abuses in the administration of the school's ability-to-benefit (ATB) tests by recruiters. (Tr. at 307-08.) There is convincing evidence establishing that the changing of test scores was a common practice. (ED Ex. 22-5; ED Ex 46-6.)

B. Unmade Or Late GSL Refunds

OSFA asserts that untimely refunds were made to 26 students listed on its sample. Again, Yorktowne officials admitted that the school consistently made untimely tuition refunds. (Tr. at 150, 698, 760.) Also, there is documentation of this. (ED Exs. 120, 121.) As well, the school stipulated to its failure to make timely refunds for Students 16, 19 and 41. (Stip. of Fact 13.)

OSFA and YBI have stipulated that Student 6 was erroneously reported in the Termination Notice as due a GSL refund at the time of the OIG's inspection. (Stip. of Fact 12; Tr. 292.)

OSFA and YBI have also stipulated that Students 5 and 60 were erroneously reported in the Termination Notice as having received untimely GSL refunds. (Stip. of Fact 14; Tr. 320.)

The allegation in the Termination Notice relating to late refunds of guaranteed student loans is based on 34 C.F.R. § 682.607(c).

The provisions of 34 C.F.R. § 682.607 provide as follows in relevant part:

(c) Timely payment. A school shall pay a refund that is due

(1) Within 60 days after the earliest of the --

(i) Student's withdrawal as determined under § 682.605(b)(1)(i) or (b)(3);

(ii) Expiration of the academic term (e.g., semester, quarter, or trimester) in which the student withdrew, as determined under § 682.605(b)(1)(ii);

(iii) Expiration of the period of enrollment for which the loan was made; or

(iv) The date on which the school makes a determination that the student has withdrawn under § 682.605(b)(1)(ii); or

(2) In the case of a student who does not return to school at the expiration of an approved leave of absence under § 682.605(c), within 30 days after the last day of that leave of absence.

As to various refunds, OSFA's based its conclusion that a refund was not timely by counting from the time a refund check cleared. Under a variety of situations, the regulations direct schools to "return" loan proceeds. (34 C.F.R. §§ 682.604(d)(3), (4); 682.604(e)(3)(i); and 34 C.F.R. § 682.604(e)(3)(ii).) A school is directed to "[s]end with the loan proceeds" a certain notice.

Thus, the school argues that the date of payment is the date of mailing not the date the check clears. However, there are no specific regulations on the subject.

Yorktowne says that rejection of the bank clear date is required also by virtue of the fact that in a number of instances the check cleared a bank other than the bank listed as payee. An example of such a check appears at ED Ex. 67-56-57, which is a check dated December 1, 1990 and payable to Maryland National Bank, Merrifield, VA. This check, however, was not cashed by Maryland National Bank, but rather was cashed by the Indiana National Bank on December

28, 1990. The loan for this particular student was made by Maryland National Bank, which then sold the note to some other financial institution. Therefore, when Maryland National Bank received the check represented on ED Ex. 67-56-57, it had to ascertain to whom Maryland National Bank sold this student's note and forward the check to that institution. It is impossible to know whether the institution to whom Maryland National Bank had sold this student's note had in turn sold it to still another institution; however, it is obvious from ED Exhibit 67-56-57 that one would have to account for the time for the check to be mailed from YBI's parent company in Nashville to Merrifield where the check would have to be reviewed by someone and the proper recipient ascertained, following which the check would then be mailed to whomever Maryland National Bank thought was the correct recipient. None of those steps is accounted for in the speculations by OSFA's witness as to why there would be some lapse of time between the date the check was written and the date it cleared.

OSFA's witness admitted that in determining whether a refund was paid on time or late, the OIG inspection team made no adjustment "whatsoever for the amount of time it took for the receiving bank to receive the check until it actually cleared," even if the receiving bank, that is, the payee on the check, was not the bank that ultimately cashed the check. (Tr. 446.)

In fact, the Financial Aid Director of YBI has received telephone calls from lenders who received student loan refund checks from YBI, but the lender had no records on that particular student. Nevertheless, YBI's records showed that the lender had in fact been the lender for that student. Therefore, notwithstanding that YBI sent the check to the correct lender, pursuant to 34 C.F.R. § 682.607(a)(1)(i), the lender had no record of that student. (Tr. 690.)

In addition to the foregoing, Yorktowne sees defects in the OSFA evidence concerning late refunds. In one instance, according to the testimony of OSFA's witness, the refund due Student 10 was deemed by OSFA to be late notwithstanding the fact that the OIG inspection team determined that the refund was due to be made within 60 days of October 3, 1989, which would be December 2, 1989. (Tr. 328.) Here the subject refund check was dated October 19, 1989 (ED Ex. 23-15.) The basis for the assertion that a refund check which was clearly timely made was not in fact timely was based on the assertion that the subject check did not clear until December 13, 1989. (Tr. 325). The assertion that the check did not clear until December 13, 1989 is solely based upon the witness' interpretation of a handwritten notation appearing on ED Exhibit 23-3 made by a member of the OIG inspection team who did not testify. In other words, the clear date is predicated on the assumption that the notation was correctly interpreted. In this regard, counsel for YBI was unable to cross-examine OSFA's witness as to this particular check for Student 10 because OSFA had neglected to include the front and back of the check in the record.

Further, with respect to Student 10, even if one were to accept the date cleared as December 13, 1989 based on ED Exhibit 23-3, Yorktowne says that still would not establish that this refund was untimely. The date on the check is the date the refund is paid according to YBI.

With respect to the allegation that Student 9 was entitled to a larger refund than he in fact received, the predicate for OSFA's assertion as to the length of time that this student attended is based on the testimony by OSFA's witness as to a note on ED Ex. 22- 9 that the witness testifying did not make. OSFA's witness testified that Student 9 attended from July 10, 1989 to

September 29, 1989, (Tr. 295.) and based her conclusions regarding the amount of the refund due to Student 9 on that assumption. The evidence in the record shows that this student attended through November 20, 1989. The November 20, 1989 date appears on ED Exs. 22-6, 22-19, 22-33, 22-34, and 22-35. Student 9 signed a leave of absence because he broke his arm and requested leave from August 21, 1989 through November 13, 1989 (ED Ex. 22-22.) However, he returned from his leave of absence on November 11, 1989. (ED Ex. 22-23.) Therefore, OSFA's conclusion regarding the amount of the refund due this student is unsupported. Furthermore, Student 9's first GSL disbursement on July 18, 1989 for $1,221.09 was fully earned. (R- 9-2.) His second GSL disbursement was returned to USA Funds on October 26, 1989. (R-9-9-10.)

With respect to Student 11, OSFA claimed a refund was due to be made on December 29, 1989, a Friday, and was not made until January 4, 1990, the following Thursday. However, OSFA's Appendix D lists this refund as 2 months late. Furthermore, YBI made the determination that Student 11 had withdrawn on November 14, 1989. (R-11-6.) Therefore, Student ll's refund was not 2 months late as alleged by OSFA but was timely.

OSFA's calculation that a refund was due was based on the last date of attendance. 34 C.F.R. § 682.605 states in relevant part:

(b) The withdrawal date. (1) Except as provided in paragraphs (b)(2) and (b)(3) of this section, the student's withdrawal date is the earlier of --

(i) The date the student notifies the school of the student's withdrawal, or the date of withdrawal specified by the student, whichever is later; or

(ii) The date of withdrawal, as determined by the school.

With regard to determining when a student has withdrawn, it is usually the case that a student who decides to no longer attend YBI fails to notify YBI of that fact. Usually the student just stops attending. (Tr. 670.) Since the responsibility for following up on students who are absent from the class belongs to the Director of Education at YBI, it is his department that makes the initial assessment that a student is a drop, i.e., has decided to no longer attend. (Tr. 670; 739.) Once that determination is made, the Director of Education generates the Notice of Change of Status form which is turned in to the Data Information Systems Department, headed by Mr. Halvorsen, where it is reviewed. (Tr. 670.) That information is then input into the school's computer by the Data Information Systems Department and all of that information is then forwarded to the Financial Aid Office at YBI. (Tr. 670.)

Yorktowne also objects to allegations as to Student 14. Under 34 C.F.R. § 682.607(c)(1), which is quoted above, there are various alternative means to determine when a refund is due. The regulations specify that payment is to be "[w]ithin 60 days after the earliest of" the various alternatives.

OSFA's witness testified that the refund for Student 14 was not late. (Tr. 333.)

YBI agrees with OSFA that Student 21's refund was due to be paid within 60 days of September 29, 1989, or November 28, 1989. (Tr. 334; ED Exhibit 34-21.) In fact, YBI's refund check was dated November 1, 1989 (ED Exhibit 34-23.) OSFA asserts that the refund was not timely because this check did not clear until December 14, 1989. (Tr. 334.) This assertion is based upon the handwritten notes from a member of the OIG inspection team at ED Ex. 34-3. As noted, the school sees no basis under the regulations for using the date the check clears as the date the refund was paid. Moreover, since OSFA did not include in the record the back of the check, there is a failure of proof as to whom this check was ultimately paid. In addition, it appears from the notations on ED Ex. 34-3 below the entry "cleared 12/14/89" that the word "INB" is written. That could be a reference to the Indiana National Bank as being the payee, and would explain the length of time for the check to clear.

The refund to Student 22 was late only if a refund is not made until on the date when the check cleared. (Tr. 336.) That date is shown on ED Ex. 35-3, which has the following handwritten notation by a member of the OIG inspection team: "Cleared 12/14/89 Ind Nat'1 Bk." (ED Ex. 35-3).

As to Student 25, the Termination Notice alleges a late refund only of guaranteed student loans. (ED Ex. 83-3). The school believes that testimony of OSFA's witness, however, was limited to an allegation that there was a late refund as to Pell and SEOG funds. (Tr. 335.) YBI believes that it need not respond to the allegation.

As to Student 26, because OSFA's basis for claiming that this refund was paid late was the length of time between the date of the check and the date it cleared, the school see no violation of ED regulations.

As to Student 29, the assertion by OSFA's witness that the 60- day time frame within which the refund check must be issued began for Student 29 on October 12, 1990 is based on ED Ex. 42-38 (Tr. 339.) ED Ex. 42-38 is an undated Status Change Notice to Lender stating that the student withdrew from school on October 12, 1990. Of course, for purposes of 34 C.F.R. § 607(c)(1)(iv), the relevant date is the date when the school made that determination, that the school was diligent in making such a determination. In this instance, the date that determination was made was December 12, 1990, two months after the student withdrew. This is based ED Ex. 42-35 and is wholly consistent with the fact that ED Ex. 42-36 was prepared on December 13, 1990 because, as OSFA's witness testified, the Separation Form which is ED Ex. 42-36 typically was done by YBI the day after the date when a student's withdrawal had been determined. (Tr. 338.) In the circumstances, it is difficult to find that the refund check for Student 29 dated December 26, 1990 (ED Ex. 42-39.) was timely. In my opinion, Yorktowne was not diligent and made a late refund.

As to Student 35, OSFA's witness-admitted that "with their [the school's] withdrawal date, the refund is not late." (Tr. 341). The OSFA violation finding was based on OSFA's opinion was that it took too long for YBI to ascertain that Student 35 had withdrawn. The school says that the violation alleged is not that it took too long for YBI to determine that Student 35 had withdrawn, but rather that Student 35's refund was late under the provisions of 34 C.F.R. § 682.607(c). Also, the school notes that although OSFA's witness made reference to the fact that a refund check

dated April 12, 1990 did not clear until May 2, 1990 (based on written notes from a member of the OIG inspection team at ED Ex. 48-3), the file does not indicate whether the payee bank, Maryland National Bank, was the actual ultimate recipient of these funds.

(ED Ex. 48-3.) Here again, I believe the school's refund was late because the school was not diligent.

Yorktowne says that there was no refund due to Student 38. However, Student 38's first GSL disbursement on June 6, 1990 of $1,221.09 was not fully earned. The students' last date of attendance was April 18, 1990 (ED Ex. 51-28) and the school earned only 10 percent of the tuition; and thus, only a portion of that disbursement. (ED Ex. 51-36; see also, Tr. at 293-94.)

In the case of Student 44, OSFA's witness admitted that the school's violation was "an excessive withdrawal date determination" (Tr. 346.)

In this regard, YBI says it is important to keep in mind what is required to establish grounds for a termination and grounds for a fine. 34 C.F.R. § 668.84(a)(1) permits the Secretary 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...

Similarly, 34 C.F.R. § 668.86(a) states in relevant part:

Scope and Consequence. The Secretary may terminate or limit the eligibility of any institution to participate in any or all Title IV HEA programs if the institution violates any provision of Title IV of the HEA or any regulation or agreement implementing that Title.

YBI says it may not be fined or terminated unless OSFA proves that YBI violated a provision of the Higher Education Act itself or a Title IV regulation or an agreement implementing Title IV. In the view of the school, taking too long to determine that a student has withdrawn does not meet this test. Again, I disagree with YBI.

With respect to the refund for Student 53, it is obvious from the fact that Maryland National Bank did not cash the refund check for Student 53 which is ED Ex. 67-56 that it was Maryland National Bank's practice to determine whether it was entitled to that check before it cashed it. Therefore, one can infer from these facts as established in the record that Maryland National Bank had a practice of reviewing and determining whether it was entitled to a check before it cashed the check. If it determined that it was not entitled to the check, it then forwarded that check to whomever Maryland National Bank thought was entitled to receive it. The same is true for Signet Bank, as is established in ED Ex. 52-49-50 where a check payable to Signet Bank was ultimately cashed by First Virginia Bank.

As to Student 48, OSFA's witness conceded that she did not know the date when YBI determined that Student 48 had withdrawn (Tr. 346.) The school thus says that OSFA failed to establish that the refund check dated January 18, 1990 was late. (Tr. 347; Ex. R- 48-6.) was late.

Moreover, Ex. R-48-5 is the Separation Form for Student 48 and is dated December 27, 1989. OSFA's witness testified that these Separation Forms were prepared the day after the date of determination that a student had withdrawn (Tr. 338), the date YBI determined Student 48 had withdrawn was December 26, 1989. Therefore, the school says that the refund check dated January 18, 1990 was timely. (Ex. R-48-5.)

The same situation applies to Student 50, whose refund check was dated February 9, 1990 (ED Ex. 63-15.) Here there is a statement by OSFA's witness that she was unable to ascertain the date when YBI determined that Student 50 had withdrawn. (Tr. 348.) However, ED Ex. 63-12 is a Separation Form for Student 50 and is dated January 23, 1990. Therefore, Student 50 was determined to have withdrawn on January 22, 1990.

The allegation that the refund for Student 52 was late is based upon "an excessive withdrawal date determination" (Tr. 350.) YBI determined that Student 50 had withdrawn on October 25, 1989, (ED Ex. 65-24.) The refund check was dated December 18, 1989 (ED Ex. 65-18), i.e., within 60 days of the date of determination of withdrawal.

The same conclusion applies to Student 54 since the date of determination that this student had withdrawn is October 29, 1990 (Tr. 351; ED Ex. 67-70.) The refund check to Maryland National Bank was dated December 1, 1990. (ED Ex. 67-56.) It cleared Indiana National Bank on December 28, 1990 (ED Ex. 67-57, i.e., within 60 days of when YBI determined that this student had withdrawn.

The same pattern applies with respect to Student 55 because OSFA concedes that YBI's date for determining that Student 55 had withdrawn was October 3, 1989, (Tr. 353.) The refund check is dated October 19, 1989, (Tr. 353; ED Exhibit 68-34.) Moreover, the Separation Form was dated October 4, 1989. (ED Ex. 68-30.) The OIG inspection team's notes indicate that the check cleared on December 13, 1989 (ED Ex. 68-3.) The notes do not indicate whether the check cleared the payee bank or a different bank.

The allegation that the refund was late as to Student 62 is because a check dated March 1, 1989 was not cashed by the payee until May 18, 1989. OSFA's allegation is based on OSFA's review of ED Ex. 75-48, from which OSFA concluded that YBI determined on February 9, 1989 that Student 62 had withdrawn and inferred from the time it took the refund check to clear that the check (ED Ex. 75-44.) was not mailed when it was dated. OSFA has ignored the date stamp of March 20, 1989 on the top of the check. (ED Ex. 75- 44.) Therefore, the allegation that this refund was untimely fails.

An additional reason why this allegation as to Student 62, must be rejected is that this student did not attend Yorktowne Business Institute, Landover, MD, but rather Yorktowne Business Institute in Glen Burnie, MD, which closed in February 1991 (Tr. 612-613; ED Ex. 75-5.) Moreover, the Termination Checklist form which is ED Ex. 75-48 that OSFA's witness relied on (Tr. 355-56) clearly indicates that Student 62 was a Glen Burnie student. Indeed, OSFA's witness testified that Glen Burnie was a separate, free standing location. (Tr. 478-479.) In fact this student's records were physically transferred to Landover after Glen Burnie closed in February 1991. (Tr. 612-613.)

In the case of Student 66, OSFA's witness admitted that she made up a date of determination for this student's withdrawal. (Tr. 357.) However, Ex. R-66-4 is Student 66's Separation Form and is dated November 15, 1989, which means that the date of determination of the student's withdrawal was November 14, 1989. Concerning Student 67, OSFA did not use the date on Student 67's Separation Form of December 12, 1990 (ED Ex. 80-14.) to set the date of determination for this student's withdrawal as December 11, 1990. If based on the latter date, the student's refund check dated December 26, 1990 (ED Ex. 80-12.) is timely, as is the date of January 29, 1991 for when the check cleared (based on handwritten notes at ED Ex. 80-3).

The allegation as to Student 68 is based on the date that a bank cashed the refund check for this student. OSFA's witness correctly noted (Tr. 359.) that YBI determined on August 30, 1989 that this student's last date of attendance was August 16, 1989 (ED Ex. 81-46), and that the refund check was dated October 6, 1989 (ED Ex. 81-49), within the 60 days presently allowed under the regulations. (Prior to July 20, 1989, only 30 days were allowed.) It is because this check did not clear until November 10, 1989 (ED Ex. 81-49) that the allegation is made that this refund was not timely. It is impossible to tell from the endorsement on the check, how many banks the check went through between October 6 and November 10, 1989.

Nonetheless, YBI officials admitted that the school consistently made untimely tuition refunds (Tr. at 150, 698, 760.) Further, there is specific documentation of late refunds made in 1987-88 and 1988-89. (ED Ex. 120, 121.) Consequently, the ameliorating and exculpatory circumstances described by the school serve only to reduce the severity of the violations. That said, the violations were serious and are established by substantial evidence. (See, for example, the first paragraph of this section. ((III B.))

C. Fraudulent Admission Practices

Initially the OIG did not share its information of fraud with YBI. The school first had actual notice when Ms. Hubert read the OIG's Inspection Report (ED Ex. 84.), which she received in August 1991. (Tr. 564.) The inspection report did not specify exactly who among admissions representatives were guilty.

Thus, YBI says that it had no facts upon which to act until October 1991 when the corporate office of Fischer Educational System, Inc., YBI's parent company, called Ms. Hubert and advised her that when the corporate financial aid officials reviewed some of the files for YBI students, they noted that certain documents appeared to have been used over and over for some students, changing only the name and Social Security number for the particular student. Ms. Hubert and Loretta Drummond, YBI's Financial Aid Director, reviewed a sampling of files for students recruited by each one of the then current admissions representatives, and "we observed that some of the records were in fact identical with the exception of the name and the Social Security number had been changed." (Tr. 566.) Ms. Hubert immediately "called all the reps [Admissions Representatives] in, confronted them with it and fired them all on the spot, right then [October 30, 1991]." (Tr. 566.)

D. Administrative Capacity - Improper Disbursements

- Failure to Maintain Records - Misrepresentations

OSFA alleges improper leaves of absence ("LOA") granted to 14 students. OSFA also asserts poor record maintenance resulting in unproper disbursements. These circumstances are established by substantial evidence, although again the OSFA case against the school was overstated. Nonetheless, even Yorktowne admitted widespread leave of absence (LOA) violations. (Tr. at 603-04; YBI's PHB at 82-3.)See footnote 11 [11] Both sides acknowledge that a student is placed on a LOA when a student requests this status. A school cannot request such a status for a student, particularly since the explicit regulatory predicate for putting a student on a LOA is unambiguous. 34 C.F.R. §682.605(c)(1). As such, when Ms. Hubert testified that the school's registrar told her it was school policy to automatically place every student on a LOA when they stopped attending, this was an incorrect policy.See footnote 12 [12]

YBI officials also testified that during the time period reviewed by the OIG, student files were in a state of disarray and were missing many necessary records (Tr. at 145, 147-48, 547, 69495), needed for the school operate as a fiduciary for the Department in making financial aid disbursements. (Tr. at 601, 704-06.)See footnote 13 [13] Consequently, extended discussion of the specific exculpatory examples discussed between pages 79 and 136 of YBI's post-hearing brief is unnecessary,See footnote 14 [14] although OSFA apparently concedes the non-existence of certain specific violations among the 69 student file samples.

Regardless of what YBI's satisfactory academic progress policy consisted, there is no question that the school was required to properly measure attendance. (ED Exs. 94-14; 95-14; 96-13.) Consequently, when YBI officials conceded that there was no adequate system to measure attendance during the time period reviewed by the OIG (Tr. at 699.), not only was this an admission concerning specific attendance deficiencies, but an acknowledgement that the school was not enforcing its satisfactory academic progress policy.See footnote 15 [15]

Students who testified for OSFA on the subject of misrepresentation are convincing.See footnote 16 [16] There is no substantial evidence to the contrary. Since the standard for proving a substantial misrepresentation is met, 34 C.F.R. §668.71, a corresponding finding is required.See footnote 17 [17]

Finally, YBI demonstrated its lack of administrative capability as a result of, among other things, its lack of internal controls which resulted in the theft of GSL checks.See footnote 18 [18] YBI evidenced a fundamental misunderstanding of this violation. The violation occurred because one individual, Felicia Wilkerson, had the function of both authorizing payments and disbursing funds. The involvement of Donnie Hayes in a conspiracy with Ms. Wilkerson was incidental to the violation. If the authorization and disbursement functions had been segregated outside of one person's control, the theft could not have occurred. (Tr. at 830.) Yorktowne was advised of the danger in 1989 (ED Ex. 128.), and did nothing, resulting in criminal conduct.See footnote 19 [19]

V PROPOSED FINES

As noted, OSFA appears to concede for purposes of judicial efficiency, the non-existence or non-chargeable nature of certain individual violations among the sample student population. This

is important in connection with the proposed fines in that certain of them are structured soley upon the sample files of individual students. Consistent with the expedient concession of OSFA, in terms of the Notice of Charges dated February 27, 1992, the fines proposed in II B. for late refunds must be reduced to $3,000 for three students for which the school had not made refunds at the time of the audit of $1,000 apiece. An additional $500 for the failure of the school to make refunds in a timely manner may be warranted but the OSFA computation is too confusing for assessment. (OSFA PHB 38.) Also, II D. is reduced to $11,000 for the 11 documented instances where there were leave of absence violations, plus $25,000 because there were hundreds of others which were fabricated. Additionally, II E (1) through 11 are not sufficiently supported among the sample files, although again there is independent evidence of YBI violations in these categories of recordkeeping. However, some of the proposed fines are student specific under stipulation. Thus, a $900 fine is warranted for this category. (OSFA PHB 40 at footnote 44.)

VI DISCUSSION AND CONCLUSIONS

OSFA has the burden of persuasion in this action, consistent with the governing regulation. 34 C.F.R. §668.88(c)(2). However, all evidence previously admitted is relevant to determine the appropriate sanction. Hearsay evidence is sufficiently connected to other evidence. Moreover, the evidence need not be limited solely to the Notice of Charges because YBI has offered affirmative defenses which go beyond the Notice. Consequently, the findings of other reviews of the school, and admissions to other violations must be considered in reaching the proper result.See footnote 20 [20] Furthermore, OSFA need not present everyone who was contacted during the audit nor all of the auditors. Receipt of evidence offered by a lead investigator and supported by other evidence is an acceptable practice.

The standard that governs a termination action is disputed by the parties. Contrary to YBI's insistence, there is simply no requirement that a school currently be in violation of its legal obligations or have committed a pattern of abuse to face termination.See footnote 21 [21] YBI failed to act as a fiduciary for the Department, YBI officials expressly admitted to this failure (Tr. at 594, 600-01, 705-06), and the proper sanction is termination, precluding receipt of yet additional student financial assistance funds.

Yorktowne submits the only evidence as to current compliance by the school and I accept that it is in substantial compliance. However, it also must be noted that the testimony of 3 current employees is somewhat self-serving. Also, Yorktowne had an obligation to file an independent program and compliance audit, but failed to do so. (Tr. at 764.) In short, even though in some circumstances a school's current operation can be a defense against termination, in this instance there has been long-term noncompliance with fiduciary duties. I have adopted mostly verbatim YBI's laudatory claims concerning its current operation (there was scant contrary evidence) but confess that the claim of absolute perfection appears exaggerated. Moreover, in submitting this post audit evidence, the school exposed its failure to file audits for 1989-90 and 1990-91. This independently could require termination. 34 C.F.R.§§668.23(c) and 668.90(a)(3)(iv) .See footnote 22 [22]

In summary, YBI failed to act in the capacity of a fiduciary for the Department for a several year period. Both sides agree with that contention. Currently, Yorktowne is in compliance with

the law according to unrebutted self-serving testimony. However, the school did not help itself by failing to provide a required independent audit of its program compliance.See footnote 23 [23] Simply, as a result of the school's long-term non-compliance, the school's affirmative defense of present compliance is insufficient to offset the requested sanction of termination.See footnote 24 [24]

The termination and fine action was based on an OIG inspection that concluded YBI failed to comply with its responsibilities to act as a fiduciary for the Department in numerous ways.See footnote 25 [25]

As noted the Secretary has established a standard of conduct for institutions that participate in the Title IV, HEA programs. When an institution participates in these programs, the institution acts in the nature of a fiduciary. In this capacity, an institution is subject to the highest standard of care and diligence in administering these programs and in accounting to the Department for the funds received therein. 34 C.F.R. §668.82(a),(b).

Pursuant to section 487(c)(1)(D) of the Higher Education Act, 20 U.S.C. §1094(c)(1)(D), the Department promulgated 34 C.F.R. §668.86(a) which provides that,

The Secretary may terminate ... the eligibility of an institution to participate in any or all Title IV, HEA programs if the institution violates any provision of Title IV of the HEA or any regulation or agreement implementing that Title.

Moreover, the Secretary has established that when an institution's statutory or regulatory violation amounts to a breach of its fiduciary duty to administer the Title IV, HEA programs in accordance with the highest standard of care and diligence, that breach constitutes grounds to terminate the eligibility of that institution to participate in those programs.

34 C.F.R. §668.82(c).

This provision was added to the Student Assistance General Provisions regulations, 34 C.F.R. Part 668, in 1983. See 48 Fed. Reg. 45670, 45676 (Oct. 3, 1983). When the Secretary explicitly established this new termination standard, he stated in the preamble to those regulations that,

A paragraph (c) has been added to that section to make clear, consistent with section 487(b)(1)(D) of the Higher Education Act, that an institution may have its eligibility to participate in the Title IV student financial assistance programs terminated solely because it failed to properly administer the programs, or account for the funds it received under the programs. The designated (Department) official need not show continuing inability or unwillingness of an institution to properly administer the program or account for funds.

48 Fed. Reg. 45673 (Oct. 3, 1983)(emphasis added). As such, to the extent that Yorktowne's conduct evidences a violation of its fiduciary duty during any period of time, termination of its eligibility to participate in the Title IV, HEA programs is appropriate. No further showing of any kind is required.See footnote 26 [26]

It is axiomatic that the standard of care required of a fiduciary is contravened by an institution that engages in fraudulent admissions practices or retains monies to which it otherwise would be unentitled through engaging in fraudulent acts. For example, students admitted on the basis of having the ability to benefit from the instruction provided are eligible to receive Title IV, HEA program funds only if the students demonstrated their aptitude on an ability to benefit (ATB) test. 34 C.F.R. §668.7(b)(1)(ii)(1987).See footnote 27 [27] It is elemental that if persons administering a test changed answers to assist students, graded tests incorrectly or allowed students to cheat during the taking of a test, then these students failed to demonstrate aptitude on the test and were not entitled to receive Title IV funds.

Similarly, to be an eligible student to receive assistance under the student financial assistance programs, a student must have demonstrated a financial need in accordance with the particular requirements of the Title IV program under which the student has applied for assistance. 34 C.F.R. §668.7(a)(10). No proper determination of need can be made if students are encouraged to falsify income and asset information on student aid applications .See footnote 28 [28]

Finally, institutions may grant no more than one leave of absence to a student in any given 12 month period. 34 C.F.R. §682.605(c). A leave of absence request must be in writing and generally may not exceed 60 days. 34 C.F.R. §682.605(c)(1) and (3)(i). A school that fabricates leave of absence forms without a request from students allows itself to retain funds to which it is unentitled for an additional period, contrary to its duty to serve as a fiduciary. (Tr. at 832-33.)

The Department may initiate a proceeding to terminate an institution's eligibility for any substantial misrepresentation made to a prospective student, regarding the nature of its educational program or the employability of its graduates. 34 C.F.R. §668.71(a). A substantial misrepresentation consists of any false, erroneous or misleading statement on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment. 34 C.F.R. §668.71(b). The fact that the making of substantial misrepresentations is identified as an independent grounds to justify termination highlights its inconsistency with the requirement to act as a fiduciary. 34 C.F.R. Part 668, Subpart F.

A fiduciary only retains for itself monies that it properly earns, and returns funds to which it is unentitled. Within the context of the student loan programs, a fiduciary must refund to lenders all money which it has not earned in proper payment of tuition and fees.

Specifically, within the context of the GSL programs, a student applies to a private lender for the loan. A guarantee agency guarantees the lender against default by the borrower and, if necessary, the Department reimburses the guarantee agency for all or part of any default claim it pays. 34 C.F.R. §§682.404, 682.405. In addition, the Department pays the lender interest that is due on most GSLs prior to repayment as well as a "special allowance" until the loans are repaid or go into default. 34 C.F.R. §§682.300, 682.302. The interest benefits and special allowance are based on the unpaid principal balance outstanding on qualifying loans, which is necessarily reduced when a tuition refund is paid to a lender and, conversely, not reduced when a tuition refund is not so paid. 34 C.F.R. §682.303(b)-(d).

The lender sends the check directly to the institution the student is scheduled to attend, and the institution pays the loan proceeds to the student, either directly or by crediting the student's tuition account. 34 C.F.R. §682.604.

To be eligible to participate in the Stafford Loan program, an institution must have a fair and equitable refund policy. 34 C.F.R. §682.606. If a student who received a loan is owed a refund under the institution's refund policy, the institution must pay the portion of the refund that is due to the lender within 60 days of the date the institution determined that the student withdrew. 34 C.F.R. §682.607(c).See footnote 29 [29] Retaining funds to which it is unentitled constitutes conversion and cannot be reconciled with the duties of a fiduciary.

As a fiduciary, an institution must exercise the highest standard of care and diligence in accounting to the Secretary for Title IV, HEA program funds received. 34 C.F.R. §668.82(b). Absent established and accurate recordkeeping procedures, an institution is not in position to "account" for the Federal funds it has received and disbursed. Moreover, an institution that cannot "account" at all for its disbursements violates its fiduciary responsibilities. Similarly, in order to meet the standards of administrative capability, an institution must establish and maintain adequate and auditable student and financial records. 34 C.F.R. §§668.14, 668.23(f).

Incident to these accounting and administrative requirements, accurate records reflecting student attendance and enrollment status likewise must be maintained by institutions. 34 C.F.R. §§668.23(f)(1)(i) and (ii), 682.610, 690.82.See footnote 30 [30] Proper student attendance records are essential to determine all aspects of disbursing financial assistance. For example, before a school makes a second Pell Grant disbursement or Stafford Loan payment, a student has to have reached the midpoint or second half of his or her academic year. 34 C.F.R. §§668.22(c), 690.3(b). Similarly, a school may not retain a student's entire loan proceeds or Pell Grant funds unless the student has reached the midpoint or second half of his or her academic year. 34 C.F.R. §§682.604(d)(4), 690.78. Without accurate and complete attendance records, an institution cannot know when payment periods have been satisfied.

Moreover, as previously discussed, if a student who has received a Stafford Loan withdraws from school, or is dropped from enrollment, a school is required to refund a percentage of the loan to the lender on behalf of the student, in an amount determined by the school's refund policy. 34 C.F.R. §§682.605, 682.606. Absent, accurate and complete attendance records, student withdrawal and/or drop dates are unknown. As well, an institution must return to the Department Pell Grant funds requested for a student who withdrew prior to the first day of class, 34 C.F.R. §690.78(c), and is liable for any overpayment of Pell Grant monies that it makes as a result of a failure to follow established disbursement procedures. 34 C.F.R. §690.79(a)(2).

Accurate attendance records are also requisite to determine whether students are making satisfactory academic progress. 34 C.F.R. §§668.7(c), 668.14(e). Students that fail to demonstrate such academic progress are ineligible to receive student financial assistance, and without proper attendance records, this determination cannot be made. 34 C.F.R. §§668.7(a)(5), 682.201(c)(1), 682.604(b)(2), 690.75(a)(1).

Not only must an institution establish and maintain student and financial records, 34 C.F.R. §§668.14, 668.23, such records must reflect all program transactions. 34 C.F.R. §§682.610, 690.81, 690.82. Obviously, to satisfy this requirement, the records must be accurate and complete.See footnote 31 [31] Given the multiple responsibilities that are contingent upon the proper maintenance of financial aid and attendance records, a failure to maintain such records is inconsonant with a school's fiduciary duty.

Only eligible students may receive Title IV, HEA program funds. 20 U.S.C. §1091 and 34 C.F.R. §668.7, 690.75, 682.201. Again, a fiduciary only seeks, receives and disburses monies to which it is entitled, and a school may receive student financial assistance only from eligible students.

Incident to such eligibility requirements, if a student previously attended another eligible institution, either the student or his or her current institution must request a financial aid transcript (FAT) from each institution the student previously attended. 34 C.F.R. §668.19(a)(1),(2). Until the FAT is received, an institution cannot release GSL proceeds to the student and may disburse Pell Grant funds to the student for one payment period only, providing the FAT has been requested. 34 C.F.R. §668.19(a)(3).

In addition, an applicant selected for verification is required to submit to the institution the documents necessary to verify information on the student's Application for Student Federal Aid used to calculate the student's expected family contribution. 34 C.F.R. §668.60(a). Until an applicant verifies or corrects the information, the institution may make only one disbursement of Pell Grant funds for the applicant's first payment period and may not process a GSL loan check. 34 C.F.R. §668.58(a)(2).

Similarly, in order to receive a Pell Grant, a student must submit a valid Student Aid Report (SAR) to an institution by June 30 of an award year or while he or she is still enrolled and eligible. 34 C.F.R. §690.61(b). An institution may make one disbursement of a student's Pell Grant without a valid SAR if certain conditions are satisfied, but the institution will be liable for the disbursement if the student does not submit a valid SAR for the award year. 34 C.F.R. §§690.61(a), 690.77. In order to be valid, an Electronic Student Aid Report must be signed by the student. 34 C.F.R. §690.2.

Moreover, in order to be eligible to receive a GSL, a student must be determined to have financial need in accordance with the requirements of the GSL program. 34 C.F.R. §668.7(a)(10). A school certifying a GSL application must provide the GSL lender with a statement evidencing a determination of that need and the amount of that need. 20 U.S.C. §1078(a)(2)(B), (F) and 20 U.S.C. §1087kk.

Married and single undergraduate students may be classified as independent for Title IV, HEA program purposes if certain statutory income tax dependency and self-sufficiency conditions are met. 20 U.S.C. §1070a-6(12); 20 U.S.C. §1087vv(d). Although a financial aid administrator may certify a student to be independent on the basis of a demonstration made by the student, no disbursal of an award can be made without documentation. 20 U.S.C. §1070a- 6(12)(D); 20 U.S.C. §1087 w (d)(4).

A student is also eligible to receive a GSL or Pell Grant only if enrolled on at least a half time basis. 34 C.F.R. §§682.201(a)(1), 690.75(a)(2). For each payment period, an institution may pay a Pell Grant to an eligible student only after it determines that the student has completed all the clock hours for the payment period for which he or she has been paid a Pell Grant. 34 C.F.R. §690.75(c). The amount of a student's Pell Grant is calculated by determining his or her enrollment status and referring to the Payment Schedule (full time students) or the appropriate Disbursement Schedule (part time students). 34 C.F.R. §690.63.

Finally, before an institution makes its first disbursement of a Perkins Loan to a student, the student must sign a Perkins promissory note and the original promissory note must be retained by the institution. 34 C.F.R. §§674.16(a)(1), 674.19(e).

Institutions must follow all of these regulatory requirements to satisfy the necessary preconditions that allow a student to receive Title IV, HEA program funds. Subsequent to making a proper eligibility determination, schools must disburse funds to these students in the manner established by law. Failure to follow those regulations results in ineligible students receiving funds in a manner inconsistent with the duties of a fiduciary.

To continue participation in any Title IV, HEA program, an institution must demonstrate to the Secretary that it is capable of adequately administering that program under the standards established by the Secretary in 34 C.F.R. §§668.14 and 668.15.

One of the specific requirements of administrative capability is that schools administer the Title IV programs with adequate checks and balances in their system of internal controls and divide the functions of authorizing payments and disbursing funds so that no office has responsibility for both functions with respect to any particular student. 34 C.F.R. §668.14(d). Institutions must also develop and apply an adequate system to identify and resolve discrepancies in the information they receive from different sources with respect to a student's application for financial aid. 34 C.F.R. §668.14(f). Finally, to demonstrate administrative capability, institutions must not only establish adequate internal controls, but must not otherwise appear to lack the ability to administer competently the Title IV, HEA programs. 34 C.F.R. §668.14(i) .See footnote 32 [32]

II

Some schools fail to fully comply with certain regulatory requirements over a limited period of time and as a result of alterations in policies and personnel should potentially face only a limitation upon their continued receipt of Federal funds. Other schools exhibit a more general disregard for their fiduciary duties and regardless of internal changes that are made, must forfeit their opportunity to receive student financial assistance monies. Still others manifest a more extensive avoidance of their fiduciary responsibilities during a particular time so that even restructuring of their operation is unavailing. These schools lose their eligibility to receive Federal monies terminated and are fined. Yorktowne fits this latter category.See footnote 33 [33]

Yorktowne is an institution whose operation basically was dependent upon fraudulent practices. Students were duped into attending Yorktowne based on substantial misrepresentations

concerning the quality of the educational program provided (Tr. at 105-06; ED Ex. 84-9), and the employment prospects available for graduates. (Tr. at 104-05; ED Ex. 84-11.) The record contains substantial evidence that Yorktowne's recruiters between at least 1988 and 1990 routinely advised potential students that the school had a placement rate in excess of 90 percent. (Tr. at 301, 379, 514, 529.)See footnote 34 [34] Such misrepresentations resulted from the fact that recruiters were compensated primarily on a commission basis, had weekly quotas of enrollees to satisfy, and there was poor supervision. (Tr. at 306, 635-36.)See footnote 35 [35] It is clear that the school sought to increase enrollment so that it could increase profit, regardless of the trainability of the student or the marketability of the instruction offered.See footnote 36 [36]

Once Yorktowne had secured an expression of interest from prospective students, it engaged in a practice of altering admission test scores to insure that the revenue from the students would be realized. (Tr. at 307-08.) This egregious misconduct alone mandates the school's termination, even if there was perfect compliance with all other regulatory requirements, which there was not. The OIG found independent evidence within student files to corroborate the statements of a former admissions representative that tests were graded improperly.See footnote 37 [37] Among the sample student files, there is evidence of tests with questionable erasures, consistent with the kind of practice identified by the admissions representative. Consequently, there is substantial evidence to establish Yorktowne's maladministration of its ATB test.See footnote 38 [38]

In addition to altering ATB scores, Yorktowne's recruiters falsified information on student applications for Federal funds to insure that students maximized their receipt of these monies. This practice was so pervasive that Yorktowne's president had to concede that upon review of numerous applications over a period of months that the corporate parent observed the same information being inserted for virtually every student. (Tr. at 566, 637-38.) Although this abusive practice occurred prior to Ms. Hubert's tenure at Yorktowne (Tr. at 309.), it was not exposed until 15 months after she was at the school (Tr. at 566, 638.) It then involved all of the school's recruiters. (Tr. at 639.) It also strains credulity to suggest that the practice continued without detection.

Two other parts of Yorktowne's operation contained aspects of fraud. First, Yorktowne's registrar, Walter Cook, fabricated hundreds of leave of absence forms to prolong the enrollment of students. (Tr. at 66-67.)See footnote 39 [39] Beyond the shear duplicity involved, this practice also worked to the financial detriment of the Department, allowing the school to retain monies that should have been refunded during a time when the Department was paying interest and a special allowance on outstanding loan balances. (See Tr. at 832-33.)See footnote 40 [40] Second, Yorktowne's current financial aid director, Loretta Drummond, backdated a number of student documents to attempt to justify the disbursement of Federal funds. (Tr. at 80511, 814, 817.) These included an enrollment agreement, the absence of which would have precluded the school from receiving financial aid on behalf of the student. (Tr. at 713, 806-07.) While the school was not formally charged with this as a separate regulatory violation, its discovery impairs the school's claim of operating as a fiduciary following personnel changes.

In addition, Yorktowne failed to make or timely make tuition refunds when students dropped out of its program. It is not in dispute that Yorktowne failed to make all tuition refunds to GSL lenders on behalf of students when due, or that Yorktowne made refunds in an untimely

fashion.See footnote 41 [41] Yorktowne's response to the specific allegation of late refunds is that some of the particular refunds found by the OIG to be untimely were not late as alleged.See footnote 42 [42] Nonetheless, the matter is not as clearcut as Yorktowne asserts.See footnote 43 [43]

An institution pays a refund to a lender on behalf of a student when it determines that it did not earn a portion of the tuition and fees it previously had charged that student. When an institution ignores this responsibility, it retains for its own use and benefit money that belongs to someone else. Such conversions are a blatant violation of the fiduciary duty required of institutions who otherwise benefit from participation in the Title IV, HEA programs.

Beyond the foregoing, Yorktowne failed to keep accurate attendance records necessary to measure whether its students made satisfactory academic progress and to insure the timeliness of tuition refunds. Yorktowne's financial aid director conceded that upon her arrival at the school in June 1990 she found that the school lacked the proper capacity to measure attendance. (Tr. at 699.)See footnote 44 [44] The evidence further showed specific examples of inconsistent attendance records, which could not be explained by the school's educational director when he was asked to do so by the OIG. (Tr. at 88-90.) Attendance information reported on students' computer transcripts was not reliable and in several instances conflicted with individual attendance cards, class attendance sheets and other information in student files.See footnote 45 [45] These kinds of problems were found in approximately 50% of the student files reviewed by the OIG establishing the overwhelming significance of this violation. (Tr. at 83.)

Since Yorktowne's academic progress policy incorporates its attendance policy, the school's failure to accurately measure attendance precludes proper enforcement of its satisfactory academic progress policy. For example, it is not in dispute that Yorktowne's catalogues established that from 1989-1992 no student would be allowed to continue with less than 80 percent attendance a quarter. (ED Ex. 94-14; ED Ex. 95-14.)See footnote 46 [46] Obviously, if Yorktowne's attendance records were not accurate and accessible, there was no way to determine properly if a student satisfied the 80 percent attendance per quarter requirement. It was also determined that Yorktowne instructors fabricated grades, precluding a correct measurement of a student's grade point average pursuant to its satisfactory academic progress policy. (Tr. at 97; see aenerally, Tr. at 378, 528.)See footnote 47 [47]

Students who are not making satisfactory progress are subject to termination. Thereafter, that is after termination, unearned tuition and fees must be calculated and made to the Title IV, HEA programs and to lenders on behalf of students. Sixty days are allowed. This requirement was not faithfully observed by the school.See footnote 48 [48]

Attendance records were not the only documentation the OIG found was missing in student files.See footnote 49 [49] For example, the OIG found 3 instances where student files were incomplete in that they did not include student transcripts. (Tr. at 419-22; ED Ex. 28-2, 20, 26; ED Ex. 38-2, 8; ED Ex. 56-2, 9.) Absent these documents, the OIG could not determine whether program funds had been disbursed properly to these students. (Tr. at 419.) This is so even though the documentation was later supplied. (R-15-3-5; R-25-3-4; and R- 4-3-4.) Additionally, the OIG found 43 of the 67 student files required to have documentation of GSL exit counselling, did not

have this documentation.See footnote 50 [50] Likewise, the OIG found numerous instances where students had not received notification of Pell Grant awards. (Tr. at 426.)See footnote 51 [51]

Finally, Yorktowne failed to create adequate student and financial aid records for students that transferred to it from Chesapeake Business Institute (CBI). The evidence established that none of these students signed enrollment contracts at Yorktowne, yet many received student financial assistance, particularly GSLs. (Tr. at 427-37; ED Ex. 10.) The manner in which these students were handled is incorrect. (Tr. at 522-532.) The fact that these students were required to go deeper into debt to attend the institution without proper justification further supports Yorktowne's termination from receipt of Federal student financial assistance.See footnote 52 [52]

For a school to conduct itself as a fiduciary, it must act in a proper fashion throughout the entire time it receives Federal funds. It must disburse funds in a fashion that directly benefits only those students who are the intended beneficiaries.

A school does not act as a fiduciary when its recordkeeping is not reconciled or current, even if a subsequent massive project to find documents brings certain previously missing materials to light.

In addition, Yorktowne failed to determine properly the initial eligibility of students to receive Federal funds in numerous cases. For example, Yorktowne did not possess required financial aid transcripts for all students (Student 19, Tr. at 393, ED Ex 32-2.) Yorktowne asserts that the Department, not YBI has the obligation to determine whether the prior school attended by Student 19 was an eligible institution. I disagree. YBI also failed to maintain adequate documentation to support verification of a student's financial need. (Student 36, Stip. of Fact 21.) The school additionally disbursed aid to students without a valid SAR. The SAR for Student 15 was signed after the student ceased to be enrolled. (Tr. at 401, ED Ex. 18-19, 34.) YBI asserts that there is a stipulation that the SAR was timely but such does not exist. Further, YBI is incorrect in asserting that SAR's need not be signed. It must be verified. YBI did not determine properly financial needs. Student 9's needs test is dated 8/5/89, even though his GSL was certified on 6/22/89, indicating that the loan was certified before the needs test was completed. (Tr. at 404-5, ED Ex. 22-18, 22-26.)See footnote 53 [53] On June 22, 1989, the family contribution was shown as $700 (R-9-5), but still the needs test was not done until later. (R-9-4.)

In conjunction with the duty to serve as a fiduciary, the initial requirement is that schools make a preliminary determination of student eligibility to receive Federal funds. To act as a fiduciary and exercise "the highest standards of care in the administration of Title IV Funds", an institution must disburse these funds only to students entitled to benefit from these monies. Again, Yorktowne officials admitted to the school's failure to seek and maintain all documents necessary to determine student eligibility for student financial assistance. (Tr. at 601.) As well, the OIG found evidence to corroborate the fact that essential documents were missing. As a result, termination of Yorktowne's institutional eligibility is warranted.

Yorktowne also proved itself incapable of administering the Title IV, HEA programs with the requisite checks and balances needed to protect Department monies. Clearly, one of the most egregious examples of Yorktowne's defiance of its fiduciary duties came from its refusal to

separate the functions of processing and disbursing GSLs which resulted in the theft of numerous GSL checks. Not only did Yorktowne have the explicit regulatory obligation to bifurcate these functions, but when Yorktowne chose to ignore this duty, its guarantee agency brought this misconduct to its attention so that Yorktowne would rectify it. (Tr. at 830-31; ED Ex. 128-2.) Nonetheless, Yorktowne continued in its irresponsible ways, until the Department was victimized by the theft of GSL funds.See footnote 54 [54]

Two other indicia of Yorktowne's administrative incapability were its failure to resolve discrepant information in student files, and its willingness to graduate students who had not completed the necessary course requirements. The former practice potentially results in students receiving financial aid to which they are otherwise unentitled, while the latter evidences the school's gross negligence, and inures to the disadvantage of students who do not receive training for which they have paid. There is substantial evidence to support the fact that both of these practices occurred. (Stips. of Fact 28 and 30.)

The Department is not in a position to monitor constantly the manner in which a school expends Federal funds which it has been entrusted to administer in the capacity of a fiduciary.See footnote 55 [55] Schools benefit from this Federal largesse on the express condition that they act as the Department's agent. The school is responsible for the conduct of its employees, particularly here where the same corporate parent has controlled the institution throughout. Moreover, the violations are not isolated instances of disputable validity, but repeated examples of gross negligence or outright fraud. It is also misconduct for which the school has been repeatedly cited. As a result, if Yorktowne is allowed to remain eligible to participate in the Title IV, HEA programs, then the requirement that institutions act as fiduciaries for the Department is rendered meaningless.See footnote 56 [56]

Yorktowne offers several alternatives to termination and also argues that the remedy of termination should not be selected for an initial violation when the school is in current compliance. However, the violations were long-standing and repetitive. The Department is entitled to an effective remedy, not one based upon short-term compliance.

III

In addition to being terminated from further participation in the Title IV, HEA programs, Yorktowne should be fined $214,900 for commission of these same regulatory violations. The violations that have been established by substantial evidence were volitional, repetitive and of a most serious nature. Consequently, the significant fine proposed should supplement the remedy of termination sought by OSFA.See footnote 57 [57]

The maximum possible fine is $25,000 per regulatory violation, 34 C.F.R. §668.84(a), and the amount of the fine is to reflect "(t)he gravity of the violation ... and (t)he size of the institution." 34 C.F.R. §668.92(a). The purpose of such a fine is to punish a school for its misconduct and to deter that school as well as others similarly situated who may hear of the fine, from committing like regulatory violations. (Tr. at 489.)

Yorktowne should be characterized as a large institution based on its consistent receipt of over $1.5 million in Title IV, HEA program funds per year. (Tr. at 491; ED Ex. 13; Stip. of Fact 4.) Given the severity of the violations and the size of the school, OSFA that it now seeks a total of $226,400 in fines (OSFA PHB at 38.) from Yorktowne. However, I compute a total of $215,400 as the amount presently sought by OSFA.

OSFA seeks $25,000 from Yorktowne because of its failure to properly administer its ATB test. Yorktowne's conduct described herein constitutes substantial and serious abuse of the ability to benefit examination process and has allowed students who did not have the ability to benefit from Yorktowne's training to receive Title IV, HEA funds to attend that institution. Specifically, it was a common practice for admissions representatives to alter ATB scores to secure student enrollment, conduct of the highest impropriety. (Tr. at 307-08.)

OSFA seeks $3,500 in fines for Yorktowne's failure to pay and timely pay tuition refunds.See footnote 58 [58] The failure to pay or timely pay refunds is a serious violation which harms students, lenders, guaranty agencies and the Department.

OSFA seeks $25,000 for Yorktowne's fraudulent admissions practices. There is nothing more offensive to the notion of fiduciary duties than the commission of fraud by an agent upon its principal. In this case, the actual dollar loss to the Department is unknown because the precise number of financial aid applications which were altered to reflect bogus income and asset information is undetermined. However, the scope of the problem was sufficiently pervasive that it was arguably exposed when the pattern of repetitive numbers became obvious to the institution. (Tr. at 566, 637-38.) Under these circumstances, a fine in the full statutory amount of $25,000 is warranted.

OSFA seeks $36,000 for Yorktowne's failure to correctly administer leaves of absence. This includes a request for $25,000 for the school's admission that it fabricated large numbers of leaves of absence consistent with normal school policy. (Tr. at 567.) It contains a separate request for an additional $11,000 at $1000 for each of the 11 instances where student files contained independent evidence of a leave of absence violation, as stipulated to by Yorktowne. (Stips. of Fact 15-18.) By placing a student on a leave of absence, a school can lengthen the time in which it must refund Title IV, HEA program funds to lenders on behalf of student borrowers, gaining unwarranted access to Federal dollars.See footnote 59 [59]

OSFA seeks $25,000 for Yorktowne's failure to maintain adequate attendance records. Attendance records are one of the most important student records because proper financial aid disbursements and tuition refunds are contingent upon such complete and accurate records. When records are either missing or inconsistent, then all other attendance records become suspect, and the Department has no way of determining whether any of its funds are being properly spent. In this regard, OSFA seeks an additional $25,000 for Yorktowne's failure to apply reasonable standards for academic progress. Failure to apply these standards results in students receiving Title IV, HEA program funds who are ineligible because they are not progressing towards completion of their educational program in a timely manner.

OSFA seeks $25,000 for Yorktowne's failure to establish and maintain adequate student and financial records. There was a nearly systemic failure on the school's part to satisfy requirements in this regard, culminating in the school's total failure to properly account for funds disbursed to students it was teaching-out for CBI. (Tr. at 426-37.) Again, the statutory maximum is sought given the pervasive nature of this problem which indicates the school's cavalier disregard for its duties.

Finally, OSFA seeks $50,000 for the substantial misrepresentations Yorktowne made to students; $25,000 for misrepresentations concerning job placement. (Tr. at 301, 379, 514, 529), and $25,000 for misrepresentations concerning the quality of the educational program. (Tr. at 367-68, 378-79, 512, 524.) A school must be held accountable for the means by which it induces student enrollment.

All totalled, a fine of $214,900 is appropriate for the varied and repeated regulatory violations committed by Yorktowne during the award years reviewed by the Department.

As a final topic, in letter dated February 22, 1993, Yorktowne objects to the existence of footnotes in the post-hearing reply brief of OSFA. The objection is overruled for the reasons stated by OSFA in a letter dated February 23, 1993.

FINDINGS AND ORDER

Yorktowne is not fit to receive Title IV, HEA program funds. It repeatedly failed to act as a fiduciary for the Department and has committed fraud in numerous ways. The violations cannot be excused. Yorktowne's termination from further participation in the Title IV, HEA programs is ordered. A fine of $214,900 is imposed and must be paid by Yorktowne upon final adoption of this order by the Secretary.

Dated this 10th day of March, 1993.

Paul S. Cross
Administrative Law Judge
Office of Higher Education Appeals
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-3644

SERVICE LIST

Russell B. Wolff
Counsel for OSFA
United States Department of Education
Office of the General Counsel
400 Maryland Avenue S.W.
Washington, D.C.
20202-2110

Leslie H. Wiesenfelder, Esq.
DOW, LOHNES & ALBERSTON
1255 Twenty-Third Street, N.W., Suite 500
Washington, D.C. 20037

Footnote: 1 [1] *1 At the time, the term GSL referred to four different Federal student loan programs established by Title IV of the HEA. These are the Stafford Loan program, the Supplemental Loans for Students program, the PLUS program and the Consolidation Loan program.*

Footnote: 2 [2] *2 The inspection was conducted primarily at Yorktowne between February 12, 1991 and March 8, 1991. (Stip. of Fact 6.) The OIG issued a report of its findings on May 30, 1991, and sent a copy of the report to the school. (Stip. of Fact 7.)*

Footnote: 3 [3] *3 Yorktowne was chosen for this inspection given problems of regulatory noncompliance identified in previous audits and reviews performed at the school. (Tr. at 25;,see, e.g. ED Exs. 118, 119, 128.)*

Footnote: 4 [4] *4 At the time of the hearing, Yorktowne consisted of a single campus in Landover, Maryland.*

Footnote: 5 [5] *5 Katherine Hubert, school president since June 1990, erroneously testified that this conspiracy did not occur during her tenure. (Tr. at 594.) However, 9 of a total of 15 fraudulent checks were processed subsequent to her arrival at the school. (ED Ex. 129.) Moreover, Ms. Hubert was aware that Ms. Wilkerson had previously written checks to herself from the school's petty cash account, which may have contained proceeds of student loan checks. (Tr. at 595-96.) Rather than firing Ms. Wilkerson for this initial theft, Ms. Hubert testified that "she assumed she believed" Ms. Wilkerson's story that she was only taking "loans" from petty cash. (Tr. at 596.) Ms. Hubert stated that she continued to employ Ms. Wilkerson because she was the only person locally available to train the new financial aid director. (Tr. at 597-98.)*

Footnote: 6 [6] *6 The termination and fine notice identifies a number of specific areas in which Yorktowne failed to document properly student eligibility or status or otherwise lacked proper student financial records, or improperly retained or disbursed student funds (ED Ex. 83-5-10, 12-14). The parties have stipulated to Yorktowne's noncompliance with regulatory requirements concerning numerous students. (Stips. of Fact 13, 15, 16, 17, 21, 25, 28, 30.) On the other hand, OSFA has agreed that Yorktowne subsequently produced sufficient documentation to justify disbursements on behalf of other students previously believed to be ineligible.*

(Stips. of Fact 19, 22, 23, 24, 27.) The specific students over whom the parties still have a dispute no longer require resolution, given the admissions that student files were in disarray. Because many documents were missing from student files that the school was unable to act as the Department's fiduciary. (Tr. at 601, 694-95, 705-06.)

Footnote: 7 [7] *7 School officials also conceded that attendance could not be determined in a readily acceptable manner. (Tr. at 699.)*

Footnote: 8 [8] *8 The school submitted to the Department two inconsistent lists of untimely made refunds in response to other reviews of the school. For example, the Department conducted a program review at the school in July 1990 and determined that the school made untimely tuition refunds. (ED Ex. 119.) In its response to this program review, the school was required to identify all late Title IV refunds during award years 1987-88, 1988-89 and 1989-90. (Id.) Such a list was prepared and submitted. (ED Ex. 120, attachment B.) While it is not certain who prepared this document, it seems that in spite of her denial, Loretta Drummond, the school's current financial aid director, did the necessary analysis. (Tr. at 696, 753.) Approximately 11 months later, on November 12, 1991, Connie Hipp, the school's comptroller, submitted a list to the Department of the school's untimely made refunds during 1987-88 and 1988-89. (ED Ex. 121.) This latter document contains a substantially different number of late paid refunds, and each document contains names not on the other. (ED Ex. 120; ED Ex. 121.)*

Footnote: 9 [9] *9Ms. Hunt has approximately 15 years of experience in the area of federal student financial aid, a Masters degree in student personnel work from the University of Tennessee, and s a member of the National Association of Student Financial Aid Administrators and also the Tennessee Association of Student Financial Aid Administrators. (Tr. 722-723.) Ms. Hunt is a member of the Fischer corporate management team, assisting in the formulation of policy in the areas of financial aid and school administration, and is responsible for the overall administration of all Federal student financial aid programs at each school in every location. Ms. Hunt supervises a staff of internal auditors and works with the financial aid staff at individual schools and locations. (Tr. 723.)*

Footnote: 10 [10] *10At the time she became Director, Ms. Hubert already had 12 years of experience in the proprietary sector and 22 years of experience owning and operating a live-in facility for adult mentally disabled children. (Tr. 538.) She came to Washington with her husband who was a Secret Service agent when he was transferred to Washington in 1980. (Tr. 539.) She worked for approximately nine years for National Business Schools, which ultimately owned four different proprietary trade schools. Ms. Hubert was responsible for all of the operations of all of the schools, including compliance with all federal, state, and accrediting agency rules and regulations. (Tr. 540-541.) When National Business Schools closed its four schools, she was recommended to YBI by Mr. Michael Beck, a licensing representative for the State of Maryland. (Tr. 541-542.)*

Footnote: 11 [11] *11 Since YBI stipulated to 11 of the 23 examples cited within the termination notice of specific LOA violations, there is no need to analyze the remaining instances. (Stips of Fact 15-18.) For purposes of argument, it may be assumed that all or most of the remaining 12 examples are not chargeable.*

Footnote: 12 [12] *12 In fact, the school's own student status change notice provided that the student certify the initial request for a LOA. (See, e.g., R-34-2.) This is the document the school's*

registrar, Walter Cook, was signing, purportedly without any knowledge of wrongdoing, yet without obtaining the student's certification.

Footnote: 13 [13] *13 Similarly, YBI did not address the fact that it had no enrollment agreements for the students it taught-out from Chesapeake Business Institute, while receiving Federal student financial assistance on their behalf. (Tr. at 427-37; ED EX. 10; ED Ex. 114.) This provides independent evidence of the school's failure to maintain required documentation of student eligibility for Title IV funds.*

Footnote: 14 [14] *14 In addition, files at YBI were missing other important documentation. Student files did not include evidence of GSL exit counselling, a fact admitted by YBI's submission of stamped envelopes on behalf of more than 30 students who were counselled a year or more after the time period required by regulation. 34 C.F.R. §682.604(g). (See, e.q., R-7-10; R-9-7; R-10-11.) In fact, all of these notices were sent in either March or April 1992, after the termination action was initiated!*

Footnote: 15 [15] *15 See also the testimony of Kathy Knight concerning the school's failure to track properly student attendance and concomitantly, satisfactory academic progress. (Tr. at 152-55.)*

Footnote: 16 [16] *16 Four students testified that they were told at different times, and by different admissions representatives, that Yorktowne had a placement rate of more than 90 percent. (Tr. at 301, 379, 514, 529.) This placement rate was false. Moreover, these students testified that if they knew then what they know now concerning placement, they would not have attended the school. (Tr. at 302-03, 383, 514-15, 529-31.)*

Footnote: 17 [17] *17 A similar finding is appropriate concerning the other alleged misrepresentation involving the provision of quality instruction. (See OSFA's PHB at 22, n.l9.) YBI's evidence from three satisfied students is not convincing. The fact that some students were satisfied with the training provided, does not dispel the fact that substantial misrepresentations were made to students, including those who testified for OSFA.*

Footnote: 18 [18] *18 In addition, see also Stips. of Fact 28, 30. Moreover, YBI cited its 1989 GSL default rate of 20.8 percent as evidence of its administrative capability. (YBI's PHB at 128.) While this level is high, it should be compared with its 1990 default rate of 37.9 percent. (Tr. at 610.) Both rates however, provide specific evidence of impaired administrative capability. 34 C.F.R. §668.15(a)(1).*

Footnote: 19 [19] *19 YBI's argument that since Donnie Hayes was not actually a student, this regulation was not violated, is absurd. (YBI's PHB at 129-30.) The violation occurred because YBI failed to divide the functions of authorizing and disbursing funds for all students, which permitted the theft of funds by a non-student.*

Footnote: 20 [20] *20 YBI's objection to certain testimony is misguided. The regulations governing a termination hearing are very clear. 34 C.F.R. §668.88(c)(1). Any objection now made that evidence previously admitted failed to fully satisfy the Federal Rules of Evidence must*

be summarily rejected. The only permissible bases to exclude evidence are if it was irrelevant, immaterial or unduly repetitive. 34 C.F.R. §668.88(c)(4). The Department's regulation governing the admissibility of evidence expressly complies with the Administrative Procedure Act, 5 U.S.C. §556(d), which pointedly omits hearsay from the list of evidence which should not be received. As with any admissible evidence, the only question is the weight to be given such testimony.

Footnote: 21 [21] *21 See OSFA's Post-hearing Brief (PHB) at 7-9 for a discussion of the legal standard for termination which I adopt.*

Footnote: 22 [22] *22 Beyond the fact that the testimony YBI offered was self- serving and uncorroborated by an audit, the record casts some doubt upon the credibility of the representations made by each of these employees. For example, Ms. Hubert testified at length as to the exemplary quality of the babysitting services provided by YBI (Tr. at 616-19). A differing portrayal was provided by the OIG which investigated the school's babysitting services upon a complaint filed by one of the students, and the disruption caused by these children. (Tr. at 827-29.) The character of the on-site babysitting service was also noted by one of the students who testified during the proceeding. (Tr. at 516.) In addition, Ms. Hubert expressed ignorance concerning YBI's non-filing of its program and compliance audit. (Tr. at 609-10.) Ms. Hubert's attempt to rationalize her own behavior concerning the retention of Felicia Wilkerson (Tr. at 595-98), also is suspect. Ms. Drummond was not truthful when she testified she never backdated student documents after affirming that she would have remembered such an act given its clear illegality. (Tr. at 71415.) YBI did not deny this occurrence, but said it merely reflected "bad judgment." (YBI's PHB at 51-2.) It is not surprising that YBI endeavors to dismiss this as a one-time mistake but it is serious. Moreover, Ms. Drummond altered the date on the enrollment agreement, the fundamental document necessary for student financial assistance eligibility, after the student attempted to fill-in the correct date. (Tr. at 806.) Ms. Drummond also denied completing a tabulation of unmade student refunds, contrary to the testimony of Patricia Hunt, corporate financial officer. (Cf., Tr. at 696, 753.)*

Footnote: 23 [23] *23 E.g., YBI had an high drop-out rate for 1987-88 and 1988-89, in excess of 50 percent. (ED Ex. 118 at 16; see 34 C.F.R. §668.15(a)(3). Ms. Hubert proclaimed her belief that today the drop-out rate is 25-30 percent (Tr. at 606-07). Unfortunately, absent the conduct of an independent audit, there is no other evidence of this decrease.*

Footnote: 24 [24] *24 One other related aspect of YBI's case requires brief mention. YBI argued that Prince George's Community College (PGCC) may not be a viable alternative for all currently enrolled YBI students. (YBI's PHB at 23-26.) Such a statement is undoubtedly true. However, identifying a precise location to teach-out all current students is not a prerequisite to termination. Rather, teach-out arrangements are the responsibility of the state of Maryland, and recent Federal legislation establishes that students who are unable to complete their education, receive forgiveness of their student loan obligations. Section 437(c) of the Higher Education Act of 1965, as amended by section 428 of Pub. L. 102-325 (July 23, 1992, 106 Stat. 448, 551.) The relevance of eliciting any evidence concerning PGCC was to rebut Ms. Hubert's assertion that there is really no alternative educational opportunity for YBI's students. (Tr. at 585.) To the*

contrary, there are any number of alternative schools (Tr. at 649), one example of which is, in fact, PGCC.

Footnote: 25 [25] *25 This conclusion was reached as a result of the conduct of more than 30 interviews with students and employees (Tr. at 85-88), and the review of 69 student files. (ED Ex. 1.)*

Footnote: 26 [26] *26 The Secretary previously indicated that an institution's eligibility should be terminated if the institution has consistently violated applicable statutes and regulations. 42 Fed. Reg. 64566, 64567 (Dec. 23, 1977). Yorktowne erroneously cited this standard in its prehearing brief and opening statement to contend that termination is precluded absent evidence of a pattern of abuse by an institution. (Yorktowne Prehearing Brief at 6; Tr. at 17-18.) While the evidence presented in this case demonstrates such repeated misconduct, Yorktowne is wrong as a matter of law as to what is required to justify termination. Termination of a school's eligibility may result the first time a school fails to administer properly program funds. Moreover, there is no requirement to establish current, on-going violations, nor, in fact, could there be. The Department has limited resources to supervise the extent to which a school complies with its fiduciary duty and cannot be expected to return to a school time and time again for updated reports on its current compliance with the law. Once the Department has established that a school has chosen to ignore its fiduciary duties, it must seek that school's termination. It can be expected that during the lengthy process leading up to a hearing a school will seek to improve its behavior.*

Footnote: 27 [27] *27 The Department considers Yorktowne to be an eligible institution based upon Yorktowne's satisfaction of the definitions of a proprietary institution of higher education and a vocational school. 34 C.F.R. §§600.5 (1988), 600.7 (1988). (Stip. of Fact #2.) In order to maintain institutional eligibility prior to January 1, 1991, if a proprietary institution of higher education or a vocational school admitted as a regular student a person who did not have a high school diploma or its equivalent, the institution was required to determine, at the time of admission, whether the person had the ability to benefit from the education offered. 34 C.F.R. §§600.5(b) (1988), 600.7(a)(2) (1988), 600.11(a) (1988).*

Footnote: 28 [28] *28 There is an additional requirement that schools report to the OIG false statements of income that the school becomes aware of in connection with student applications for financial aid. 34 C.F.R. §668.14(g)(1)(v).*

Footnote: 29 [29] *29 From December 25, 1986 to July 20, 1989, institutions had to make refunds to lenders within 30 days of determining that a student had withdrawn. 34 C.F.R. §682.607(c) (1988).*

Footnote: 30 [30] *30 A student is eligible to receive Title IV, HEA program funds only if the student is a regular student enrolled or accepted for enrollment in an eligible program. 34 C.F.R. §668.7(a)(1)(i). If an institution cannot document that a student attended the institution, all Title IV, HEA program funds disbursed to that student must be returned to the relevant Title IV, HEA program. See 34 C.F.R. §§668.21, 682.604(d)(4).*

Footnote: 31 [31] *31 There also exist specific requirements concerning certain other student and financial aid documents which a school must maintain. For example, institutions are required to counsel borrowers about their loan obligations before the borrowers cease to attend school at least half-time, and must maintain documents substantiating the occurrence of this counselling. 34 C.F.R. §682.604(g).*

Footnote: 32 [32] *32 Separate and apart from the need to be administratively capable, to continue to participate in the Title IV, HEA programs, an institution must demonstrate to the Secretary that it is financially responsible under the standards set forth at 34 C.F.R. §668.13. One of these standards is that an institution must be able to provide the services described in its official publications and statements. 34 C.F.R. §668.13(b)(1). Another is that the institution must meet all of its financial obligations, to include making refunds of institutional charges. 34 C.F.R. §668.13(b)(3)(i).*

Footnote: 33 [33] *33 Although Yorktowne attempted to make much of its changes in staff and personnel since late 1990 and 1991, it needs to be emphasized that the corporate parent has remained unchanged throughout the school's existence. Consequently, when the school admits o widespread regulatory violations prior to 1991, it concedes that all of the Federal money that was improperly obtained, benefited the same corporate structure. (Tr. at 750-51.)*

Footnote: 34 [34] *34 The record is devoid of any evidence to the contrary.*

Footnote: 35 [35] *35 Even after the school instituted "changes" in its operation subsequent to Ms. Hubert becoming school president, the school still paid its admission representatives on commission with a weekly quota of recruits. (Tr. at 635-36.)*

Footnote: 36 [36] *36 Former students testified that the school was "chaotic" and more like a high school (Tr. at 516); and that teachers either did not show up for class (Tr. at 369, 382, 525), or provided incomprehensible or outdated instruction. (Tr. at 369, 382, 512, 526.) Similarly, equipment was either unavailable or broken. (Tr. at 513, 527.) All of this occurred in spite of misrepresentations made to these students that they would receive quality instruction. (Tr. 367-68, 378-79, 512, 524.) In this regard, the testimony of certain individuals that they are satisfied with the instruction provided fails to rebut the fact that other students attended the school only because recruiters lied to them about the school's training program.*

Footnote: 37 [37] *37 In addition, unrebutted testimony established that students were given the opportunity to help each other during the taking of the test (Tr. at 380), and were provided answers prior to taking the test. (Tr. at 372.)*

Footnote: 38 [38] *38 As to the OIG's finding in this regard, Yorktowne alleges apparently that any misadministration of the ATB test was irrelevant since ultimately these students were found to be high school graduates whose successful completion of an ATB test was not required. (Yorktowne Prehearing Brief at 8.) While of course, students that are high school graduates do not need to take an ATB test, if a school administers such a test, it has to be conducted in a lawful manner, particularly in a case like this when it appears that the violations were committed by admissions representatives who were seeking to secure their quota of enrollees. Yorktowne's*

argument really goes to whether any liability could be assessed for a student who was admitted after failing an ATB test, but subsequently was found to possess a high school diploma. In that case, no liability may be appropriate. However, in this case, liabilities are not sought, but rather the school's termination is required for failure to act as a fiduciary for the Department. When a school alters students' ATB scores or otherwise violates the integrity of the testing process, it ignores its duty to act as a fiduciary, whether or not it turns out that these students would have been eligible to receive Title IV funds. An example of this occurrence is Student 61. This student was administered an ATB test in March 1989 (ED Ex. 74-6), and signed an enrollment agreement on May 17, 1989 (ED Ex. 74-5), for entry in August 1989. At the time she took the test, she scored below the required amount for admission. (ED Ex. 74-6.) Subsequently, Yorktowne submits that she was graduated from high school. (Yorktowne Pre-hearing Brief at 8; R. Ex. 61-1.) Even assuming that this contention was correct, it does not change the fact that her admission was improper given her initial failing ATB score. The school's impropriety does not disappear if the student later happened to be a graduate from high school.

Footnote: 39 [39] *39 Again, the OIG found evidence to corroborate this party admission in that numerous student files contained student status change forms with Mr. Cook's signature, and without a student's signature. (ED Ex. 47-15; ED Ex 51-16.) Moreover, Ms. Hubert admitted that she observed Mr. Cook about to falsify a large stack of leaves of absence "since that is the way they had always done it." (Tr. at 567.) It is not possible to contend, as Ms. Hubert did, that there was no fraudulent intent when someone places students on leaves of absence with no evidence that such a leave has been requested. (Tr. at 603-04.)*

Footnote: 40 [40] *40 In addition to the fabrication of leaves of absence, albeit potentially in conjunction with their falsification, the OIG found evidence within student files of numerous regulatory violations involving the processing of leaves of absence. For example, the parties have stipulated that Students 6, 15 and 23 were put on leaves of absence more than once during a 12 month period (Stip. of Fact 15), Students 23, 54 and 58 did not sign leave of absence requests for their leaves of absence (Stip. of Fact 16), the file for Student 11 was missing a leave of absence form (Stip of Fact 17) and Students 6, 15, 23 and 54 had leaves of absence for periods of time in excess of that allowed under the regulations (Stip. of Fact 18.) In addition, the record shows that several other students received leaves of absence in a manner contrary to the regulations. For example, Student 28, [student name] is cited for multiple leave of absence violations. Initially, he took three leaves of absence. His file contained one leave for 6/30/8910/2/89 (ED Ex. 41-39), a student status change notice indicating a return from a second leave dated 2/14/90 (ED Ex. 41-41), and a third leave for 9/07/90-9/24/90. (Ed Ex. 41-47.) In addition, since there was no actual leave form for the second leave, it represents an unsigned leave of absence. Consequently, Yorktowne's response to this issue in its initial submission which ignores this middle leave of absence fails to respond to either violation. (See Yorktowne Pre-hearing Brief at 12.)*

Footnote: 41 [41] *41 Yorktowne stipulated that students 16, 19, and 41 were due GSL refunds at the time of the inspection. (Stip of Fact 13.) In addition, the school has responded to previous reviews identifying numerous late made refunds for award years 1987-88, 1988-89 and 1989-90. (ED Ex. 120; ED Ex 121.) School officials have further admitted to the untimeliness of their GSL refunds (Tr. at 150-51, 698).*

Footnote: 42 [42] *42 For example, Yorktowne shows that the OIG relied upon the check cleared date, rather then the check payment date, to determine the timeliness of refunds. This approach may be appropriate since there is no basis to know whether a check is mailed the date it is written. Reliance upon the check cleared date may represent the accepted method for determining refund timeliness in independent program audits. (Tr. at 439-40.) However, here I accept the YBI version that the tardy date was caused by banks, not by the school.*

Footnote: 43 [43] *43 For example, the OIG found that of those student files reviewed, it took Yorktowne as long as 209 days to determine a student's withdrawal date. (ED Ex. 116.) Even Yorktowne's own financial aid director, Loretta Drummond, testified that anything over 30 days was excessive. (Tr. at 203.)*

Footnote: 44 [44] *44 The evidence further shows that when the OIG requested attendance records from Yorktowne, in many cases such records were not produced. (Tr. at 82-83, 280-81, 699.) Some of these records subsequently were produced incident to the oral hearing. This represents an admission that the school lacked the necessary internal controls to locate and evaluate student records in the on- going fashion required to administer properly Title IV, HEA program funds.*

Footnote: 45 [45] *45 For instance, Student 9's computer transcript indicated that his last date of attendance was November 20, 1989. The transcript also showed 5 absences in one class and no absences in another class, both of which ended December 22, 1989. (ED Ex. 22- 19.) He received grades in each class, indicating that he completed them. (Id.) His attendance card had no absences marked at all during the Fall 1989 quarter. (ED Ex. 22-20.)*

Footnote: 46 [46] *46 During 1988-89, the requirement was 90 percent attendance. (ED Ex. 96-13.)*

Footnote: 47 [47] *47 A student had to have a grade point average of 2.0 at the end of each quarter to be making satisfactory academic progress. (ED Ex. 94-14; ED Ex. 95-14.)*

Footnote: 48 [48] *4a Student 35's last date of attendance was November 22, 1989. (ED Ex. 48-37.) She was not, however, terminated for lack of satisfactory progress after having missed 20 percent of her class time. Instead, she received a "B" in her Accounting I course for the term that ended December 22, 1989, with perfect attendance. (Id.) Her GSL refund was due on 1/21/90, but did not clear the bank until 5/2/90. (ED Ex. 48-3; Tr. at 340-42.)*

Footnote: 49 [49] *49 There are basically two types of documentation the OIG found missing from student files. The first kind are those records that must be maintained subsequent to a student's admission to justify further receipt and disbursement of Federal funds on behalf of the student. The second are those records that a school must acquire and maintain to initially determine a student's eligibility for Federal aid. It is the former category that is addressed here; the latter category is addressed subsequently.*

Footnote: 50 [50] *50 OSFA agreed that Yorktowne has documentation for students 2 and 39 that indicate proper exit counselling occurred. (Stip. of Fact 27.) Yorktowne further submitted into evidence copies of numerous envelopes and certified mail receipts primarily from late 1991 and 1992 to support the argument that exit counselling had been satisfied. These documents are unavailing in light of the fact that these are students who withdrew in 1989 and 1990, and who would already have been in repayment prior to receipt of the exit counselling form. Yorktowne's financial aid director, Ms. Drummond, testified that at the time of her arrival the school had in place a system to provide all students with exit counselling within the required 30 day time period. (Tr. at 709-11.) Obviously, this system malfunctioned based on the evidence Yorktowne submitted.*

Footnote: 51 [51] *51 OSFA agreed that Yorktowne produced 35 of 58 Pell Grant notifications that were initially reported as missing. (Tr. at 426.) Yorktowne further produced copies of such notifications for 21 other students which were unsigned. (See Yorktowne Pre-hearing Brief at 25-26 and accompanying exhibits.) Although as Yorktowne pointed out, the regulations do not specifically require that Pell notifications be signed, absent a student signature, there is inadequate verification that notification has been given to the student.*

Footnote: 52 [52] *52 Existing CBI records are collected at R-73. However, Yorktowne produced no evidence whatsoever to refute the charge that former CBI students were improperly charged for their education.*

Footnote: 53 [53] *53 In addition, SEOG funds were disbursed to Student 39 subsequent to her last date of attendance (Tr. at 412-13, ED EX. 52-37, 47, 43.) Student 16 received a second Pell Grant disbursement before the work paid for by the first Pell Grant disbursement was completed. (Stip. of Fact 25.) Yorktowne also does not currently have a Perkins Loan promissory note for Student 28. (Stip. of Fact 26.)*

Footnote: 54 [54] *54 It is true that after the OIG discovered the scam, the school fired the guilty parties. This reflects the school's perceived self-interest. Noteworthy is the fact that this was not the first time that Yorktowne was aware of Felicia Wilkerson's potentially criminal conduct, and only this time, in the presence of the OIG, was action taken. (Tr. at 595-98.) Moreover, in spite of Ms. Hubert's denial to the contrary, this was an on-going criminal conspiracy, which operated undetected for more than a year by either Yorktowne or the corporate parent. (Tr. at 594; ED Ex. 129.)*

Footnote: 55 [55] *55 One of the most important ways in which the Department monitors school compliance with its regulatory duties is the requirement that institutions file biennial program and compliance audits. 34 C.F.R. §668.23. The audit filed by Yorktowne for award years 1987-88 and 1988-89 showed considerable abuses of its fiduciary duties. (ED Ex. 118.) Compounding this, in spite of acknowledging its importance (Tr. at 609, 755-56), Yorktowne never filed its biennial audit for award years 1989-90 and 1990-91, an audit that was due on June 30, 1992. (Tr. at 764.) This requires termination of Yorktowne's eligibility to continue to receive Title IV, HEA program funds. 34 C.F.R. §668.90(a)(3)(iv). Moreover, it impairs Yorktowne's claim to be in total current compliance with regulatory provisions. An inference may be drawn that the*

school has refused to file because it has more to hide. It knew of this proceeding for 9 months and still failed to comply with its obligation.

Footnote: 56 [56] *56 As previously explained, Yorktowne also failed to demonstrate financial responsibility in that it failed to provide services described in its official publications and statements, and failed to meet all of its financial obligations, including making refunds of institutional charges. 34 C.F.R. §668.13(b)(1), (3)(i). This is particularly regretable in light of the high cost of attending Yorktowne. ($5275 for a 26 week course, Tr. at 645.)*

Footnote: 57 [57] *57 The ultimate collectability of the fine may be effected by the school's current status in bankruptcy.*

Footnote: 58 [58] *58 Given the numerous serious violations, for purposes of expediency and judicial economy, OSFA now seeks fines for only those individual student violations where Yorktowne has stipulated to its misconduct. As such, Yorktowne has stipulated to its failure to pay 3 GSL refunds at the time of the inspection (Stip. of Fact 13), and has agreed in general that it has not made refunds in a timely manner. OSFA thus seeks $1000 per unmade refund, and $500 for any single refund the tribunal finds Yorktowne made in an untimely manner consistent with all of the evidence submitted. (ED Ex. 116.) I understand the 3 GSL refund stipulation, but do not grasp the meaning of the $500 fine. Lacking understanding, I pass on the latter amount. As to the $3,000, YBI says that it has paid a fine for the unmade refunds but no details are given. The $3,000 amount is warranted on the basis of the evidence of record.*

Footnote: 59 [59] *59 OSFA also seeks $900 for Yorktowne's improper disbursements of Title IV, HEA program funds as reflected by Stips. of Fact 21, 25, and 26.*