IN THE MATTER OF SAN FRANCISCO COLLEGE OF MORTUARY SCIENCE,
Respondent.

Docket No. 92-8-ST
Student Financial Assistance Proceeding

DECISION

Appearances: Kelli Krummer, Esq., Dow, Lohnes and Albertson, for the San Francisco College of Mortuary Science.

Donald C. Philips, Esq., Office of the General Counsel, for the Office of Student Financial Assistance, United States Department of Education.

Before: John F. Cook, Chief Administrative Law Judge

I. PROCEDURAL BACKGROUND.

The Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (Department) issued a Notice of Termination and Fine as to the eligibility of the San Francisco College of Mortuary Science (SFCMS or College) 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. and 42 U.S.C. § 2751 et seq. (Title IV, HEA Programs) on December 26, 1991. A request for a hearing was filed by the College on January 22, 1992.

On March 12, 1992, OSFA filed its Initial Brief. OSFA followed its initial brief with a Motion for Termination of Proceedings and Entry of Judgment Against Respondent.

On April 13, 1992, OSFA filed its Reply Brief. On April 16, 1992, the College filed its Answer to Motion for Termination of Proceedings and Entry of Judgment Against Respondent.

On April 27, 1992, an Order Denying OSFA's Motion for Termination of Proceeding and Entry of Judgment Against Respondent and Setting a New Procedural Schedule was issued. Both parties filed initial briefs on May 21, 1992, and reply briefs on June 26 and 29, 1992. Additionally, the parties filed joint stipulations and a statement as to issues on August 6, 1992.

Notices of Hearing were sent to the parties on August 12 and 14, 1992, which set a hearing for September 24, 1992. On September 22, 1992, the College which had retained new counsel, filed a Motion for Continuance. On September 22, 1992, the judge issued an Order Granting Motion

for Continuance. On September 24, 1992, the judge issued a Notice of Hearing, which set the evidentiary hearing for October 8, 1992 in Washington, D.C.

On October 8, 1992, the parties submitted a joint motion proposing the waiver of a hearing and the filing of briefs and additional exhibits. Also as a result of telephone conferences held on October 19, 20, and 26, 1992, with counsel for the parties a schedule for filing exhibits and briefs was determined. Thereafter waivers as to the oral hearing were filed by each party.

OSFA filed a Supplemental Initial Brief on November 6, 1992. SFCMS filed its Initial and Reply Brief on November 25, 1992. OSFA filed its Supplemental Reply Brief on December 1, 1992.

II. ISSUES.

A. Biennial Audits.

1. Did SFCMS violate 34 C.F.R. § 682.612(e)(1985)See footnote 1 *1* as of February 1, 1986, for failure to submit an audit of the Guaranteed Student Loan (GSL) Program by January 31, 1986, for the award years 1983-84 and 1984-85?

2. Is OSFA time-barred by a statute of limitations from maintaining a termination or fine action for a biennial audit that was allegedly due prior to 1987?

3. Did SFCMS violate § 682.612(e)(1986) as of February 1, 1987, for failure to submit an audit or audits of the GSL Program by January 31, 1987, for the award years 1983-84, 1984-85, and 1985-86?

4. Did SFCMS violate § 668.23(c)(1988) as of February 1, 1989, for failure to submit an audit or audits of the GSL Program by January 31, 1989, for the award years 1983-84, 1984-85, 1985-86, 1986-87, and 1987-88?

5. Did SFCMS violate § 668.23(c)(1989) as of February 1, 1990, for failure to submit an audit or audits of the GSL Program by January 31, 1990, for the award years 1983-84, 1984-85, 1985-86, 1986-87, 1987-88, and 1988-89?

6. Did SFCMS violate § 668.23(c)(1990) as of February 1, 1991, for failure to submit an audit or audits of the GSL Program by January 31, 1991, for the award years 1983-84, 1984-85, 1985-86, 1986-87, 1987-88, 1988-89, and 1989-90?

7. Did SFCMS violate § 690.84(b)(1989) as of April 1, 1990, for failure to submit an audit of the Pell Grant (Pell) program by March 31, 1990, for the award years 1987-88 and 1988-89?

8. Did SFCMS violate § 690.84(b)(1990) as of April 1, 1991, for failure to submit an audit of the Pell program by March 31, 1991, for the award years 1987-88, 1988-89, and 1989-90?

B. Fiduciary Duties.

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

C. Consideration of Remedies and Penalties.

1. **Termination**.

a. Can the amendment to § 668.90(a) that became effective on September 14, 1991, be applied to the circumstances of this case if the institution has failed to comply with the requirements of § 668.23(c)(4) as of a period prior to April 1, 1991, such that the tribunal must find that a termination of SFCMS's eligibility to participate in Title IV, HEA Programs is warranted in this case?

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

2. **Fines**.

If SFCMS violated any of the regulations set forth above, do such violations warrant a fine or fines, and if so, in what amount?

III. LIST OF EXHIBITS.

A. OSFA's Exhibits.

ED Ex. 1. OSFA's December 26, 1991 notice of its intent to terminate San Francisco College of Mortuary Science (1363 Divisadero Street, San Francisco, California) because of the school's failure to submit required non-Federal audits when due.

ED Ex 2. Eligibility notice to San Francisco College of Mortuary Science, dated April 13, 1988.

ED Ex. 3. Institutional Data System (IDS) printout of Federal student financial assistance funding received by San Francisco College of Mortuary Science from 1984 through the present.

ED Ex. 4. Letter dated August 25, 1989 from the U.S. Department of Education's Office of Inspector General informing San Francisco College of Mortuary Science that the school's submission of a non-Federal audit of the Pell Grant program was rejected due to deficiencies in the quality of the audit work.

ED Ex. 5. Program Review Report dated June 21, 1990 which identified the fact that San Francisco College of Mortuary Science failed to file acceptable biennial audits in addition to other areas of regulatory and statutory non-compliance.

ED Ex. 6. Eligibility Notice to San Francisco College of Mortuary Science, dated October 31, 1984.

ED Ex. 7. Program Participation Agreement for San Francisco College of Mortuary College, executed July 1, 1987.

ED Ex. 8. Program Participation Agreement for San Francisco College of Mortuary College, executed April 25, 1988.

ED Ex. 9. Declaration of Ronald D. Lipton, dated October 14, 1992.

ED Ex. 10. Declaration of Dale G. Purifoy, dated October 13, 1992.

ED Ex. 11. Declaration of Donald C. Philips, dated October 14, 1992.

B. College's Exhibits.

Ex. R-1. November 1988 Auditor's Report.

Ex. R-2. August 1989 letter rejecting November 1988 audit.

Ex. R-3. September 1989 letter from auditor acknowledging deficiencies.

Ex. R-4. May 1990 SFCMS Board Meeting minutes (excerpted).

Ex. R-5. June 1990 Program Review (excerpted).

Ex. R-6. September 1991 letter to Ethelene Hughey, Audit Review Branch.

Ex. R-7. February 1992 letters to ED requesting documents.

Ex. R-8. May 1992 letter from Michael D. Manner, CPA.

Ex. R-9. October 1992 letter from Nancy Pelosi, Congresswoman

Ex. R-10. October 1992 letter from John C. Petersen (ACCJC)

Ex. R-ll. Declaration of Michael D. Manner, CPA

Ex. R-12. Declaration of former student, Earnestine Gildersleeve

Ex. R-13. Declaration of former student, Jautune Griffin

Ex. R-14. Declaration of former student, Paris Guinn

Ex. R-15. Declaration of former student, Letitia McKinney

Ex. R-16. Declaration of former student, Jennifer Sweeting

Ex. R-17. Declaration of former student, Bernadette Zachery

Ex. R-18. Declaration of Jacquelyn S. Taylor, President, SFCMS, (with incorporated Attachments I, II & III)

I. SFCMS Catalog for Academic Year 1992-93

II. SFCMS Self Study for Reaffirmation of Accreditation

III. SFCMS February 1992 letter to Steve Arena, CSAC
SFCMS February 1992 letter to Shirley Jackson, USDE
SFCMS February 1992 letter to Gary L. Grayton, USDE

Ex. R-l9. SFCMS Income Statement for the Period Ending June 30, 1992

Ex. R-20. March 27, 1990 SFCMS Board Meeting Minutes

Ex. R-21. SFCMS Projected Starts Report for October 8, 1992

C. Rulings as to Receipt of Exhibits in Evidence.

Neither party has objected to the authenticity of the exhibits submitted by the opposing party. OSFA has raised a general relevancy objection to Exhibits R-4, and R-6 through R- 21, inclusive and has set forth other objections at pages 19-23 of its Supplemental Initial Brief. SFCMS objects to the affidavit of Mr. Dale Purifoy in ED Exhibit 10 to the extent that he is attempting to provide evidence on pre-April 1989 activities in the RIGA San Francisco office.

In view of the fact that certain non-Federal biennial audits have not been filed pursuant to § 668.23(c)(4), which of necessity requires termination of the eligibility of SFCMS to participate in Title IV, HEA programs pursuant to § 668.90(a) (3)(iv), some of OSFA's objections will be sustained while others will be overruled.

OSFA's objections to the following proposed exhibits will be sustained on the ground that the documents are irrelevant because the termination of eligibility is automatically required: Ex. R-9, Ex. R-12, Ex. R-13, Ex. R-15, Ex. R-16, and Ex. R-17.

All other objections of OSFA are overruled because the

documents are relevant to the issues in this proceeding. Many of the documents are relevant as to the issues as to whether a fine should be levied and, if so, how much. Those documents generally contain information relating to the gravity of the violations or the size of the College.

SFCMS's objections to ED Ex. 10 are overruled. The evidence is relevant and material to this proceeding.

It should be noted in passing that OSFA's counsel apparently still does not understand the reason why a letter had to be sent to both counsel on November 12, 1992, in order to clarify the status of exhibits as a result of the terminology that counsel used in setting forth certain objections in OSFA's brief filed on November 6, 1992. In footnote 7 of OSFA's Supplemental Reply Brief of December 1, 1992, OSFA's counsel has again set forth an erroneous premise as to the manner in which exhibits need to be proposed by counsel objected to by opposing counsel, and ruled upon by the tribunal, when the hearing is upon the written record without the benefit of an oral, evidentiary hearing.

Counsel stated as follows in Footnote 7:

> Counsel for OSFA received a letter from the administrative law judge dated November 12, 1992 concerning the issue of SFCMS's mitigating evidence. The letter described confusion created by OSFA's Supplemental Initial Brief. The confusion appears to have stemmed from a distinction between "evidence that is filed" and "proposed exhibits that are offered." The administrative law judge apparently was troubled by the fact that OSFA may have already concluded that the administrative law judge has admitted the evidence that the SFCMS offered in this matter. OSFA regrets the fact that its Brief created this confusion.
>
> The fact remains, however, that SFCMS has been allowed to offer these exhibits, whether as proposed exhibits or otherwise, that OSFA believes the law provides, should have been refused at the outset. The way matters now stand, SFCMS has had an opportunity to discuss these mitigating arguments (even though they should not be considered) and OSFA has been forced to address these claims in this reply brief. Had the administrative law judge ruled, at the outset, that, as stated in the preamble to and codified by the published Final Rule, his discretion was limited and there was no need to take up counsels' and this tribunal's time and resources considering any argument other than whether Respondent's audits had been submitted, the matter, OSFA submits, could have been resolved in a prompt and efficient manner.

OSFA Supplemental Reply Brief at 11.

In this statement counsel takes the position that certain SFCMS proposed exhibits "should have been refused at the outset."

By this statement counsel appears to be advocating a procedure whereby the tribunal would rule upon the admissibility of documentary evidence without giving either counsel the opportunity to present actual objections or responses to such objections. Counsel for OSFA joined with SFCMS's counsel in waiving an oral hearing and requesting the tribunal to issue a decision based upon the written record. By proposing such procedure, the time for ruling as to the admissibility of evidence by the tribunal must come after the attorneys for either side have had their opportunities to present written objections and responses thereto. To do otherwise would be to deny due process of law. On the other hand, if an oral, evidentiary hearing had taken place any objections to documentary or oral evidence could have been acted upon by the tribunal when such evidence was first proposed and if objections were sustained, then opposing counsel

would not have had to present any evidence to refute it. It is the act of counsel for both parties in wanting this hearing to be on the written record that has created the necessity for the present procedure. The fact that OSFA's counsel has made such a patently erroneous statement in the second paragraph of footnote 7 of OSFA's last brief has created a waste of valuable time since this is now the second time that such error had had to be corrected on the record.

IV. FINDINGS OF FACT AND OPINION.

A. Stipulations of Fact.See footnote 2 *2*

1. Respondent (SFCMS) participates in the student financial assistance programs (SFA Programs) authorized under Title IV of the Higher Education Act of 1965, as amended.

2. SFCMS's most recent Institutional Eligibility Notice is dated April 13, 1988. ED Ex. 2

3. This letter indicates that SFCMS is eligible to apply to participate in the following SFA Programs: Pell Grants, Supplemental Educational Opportunity Grants, Guaranteed Student Loan (GSL) Program, College Work Study Program, and Perkins Loan Program. Id.

4. On November 29, 1988, the accounting firm of Bacigalupi, Pignati & Co., Certified Public Accountants, performed an audit of SFCMS's Pell Grant SFA Program titled, "Statement of Changes in the Pell Grant SFA Program Fund balance for the year Ended

June 30, 1988 Auditor's Report." ED Ex. 4-3.

5. On August 25, 1989, the Department's Regional office of Inspector General for Audit returned the audit to SFCMS because the audit was not conducted in accordance with the requirements of the May 1988 Audit Guide for SFA Programs. ED Ex. 4-1.

6. The August 25, 1989 letter further notified SFCMS that the audit neglected to include the GSL program and that the time frame of the SFA Programs audited may not have been sufficient. Id.

7. On May 7-11, 1990, the Department conducted a review of the Pell Grant and GSL Programs administered by SFCMS. This review was memorialized in a program review report dated June 21, 1990. ED Ex. 5.

8. The first finding of this program review report was that SFCMS had not had an acceptable biennial audit of its Title IV programs for the 1986-1987 through 1987-1988 award years. ED Ex. 5-3.

9. The program review report required that SFCMS contract to have an audit performed by an independent auditor of its Title IV, HEA programs for the four year period, the 1986-87 through 1989-1990 award years. ED Ex. 5-4.

10. One of the three SFCMS Institutional Officials contacted during this review was Jacquie Taylor, Dean. ED Ex. 5- 3.

11. Since participating in the SFA Programs, SFCMS has received at least $2,238,791 in Title IV funds.

12. On December 26, 1991, The Department notified SFCMS that it intended both to fine SFCMS $40,000 and to terminate SFCMS's eligibility to participate in the SFA Programs because SFCMS had, as of that date, failed to submit required non-Federal audits when due. ED. Ex. 1.

B. Opinion and Additional Findings of Fact.

1. Failure to submit audits: Burdens of production and persuasion

Pursuant to the provisions of § 682.612(e), § 668.23, and § 690.84 SFCMS had a duty to submit to the department non-federal Guaranteed Student Loan (GSL) Program and the Pell Grant (Pell) Program audits at various dates starting with January 31, 1986 as relates to the GSL. Under the allegations set forth in the notice involved in this case other audits were due on January 31, 1987, January 31, 1989, January 31, 1990, March 31, 1990, January

31, 1991, and March 31, 1991.

OSFA argues that it has established a prima facie case that SFCMS has not submitted its required audits. OSFA contends that the standard for establishing a prima facie case, and thus satisfying the initial burden of production, is very low. OSFA asserts that it has to come forward only with sufficient evidence that could lead a reasonable person to conclude that SFCMS has not submitted its required audits. OSFA further claims that in determining whether OSFA has satisfied its burden of production, the tribunal must view the evidence most favorably to OSFA and give OSFA the benefit of all reasonable inferences. OSFA Supplemental Reply Brief at 2-6.

OSFA also asserts that it has met its burden of persuasion. According to OSFA, a prima facie showing creates an inference that, if not refuted, entitles the party who meets that burden to a presumption of the truth of the fact or facts offered. Here, OSFA alleges, SFCMS has offered no evidence that the missing audits have been submitted. Moreover, OSFA argues that the record contains evidence of the fact that SFCMS has not submitted any audit in compliance with federal requirements. OSFA Supplemental Reply Brief at 4-6.

In response, SFCMS argues that OSFA has the burden of proving that the College has committed violations worthy of termination. The school argues that OSFA must make a prima facie showing for each alleged violation. Furthermore, according to SFCMS, the total circumstances of each case must be considered. SFCMS claims that in order to terminate an institution, OSFA must prove that the school has committed consistent violations and that attempts to remedy have failed, which OSFA cannot do here, according to SFCMS. The College

points out that § 668.90(a)(2) allows the administrative law judge to impose lesser sanctions on an institution. Respondent's Initial and Reply Brief at 12-17.

Under the Administrative Procedures Act (APA), 5 U.S.C. § 556(d), the proponent of a rule or order has the burden of proof. The Department, which is the proponent of the rule or order in this type of proceeding, has the burden of production (of going forward) to establish a prima facie case. An agency meets its burden of production of a prima facie case if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established. State of Maine v. U.S. Dept. of Labor, 669 F.2d 827, at 829 (1st Cir. 1982); Hazardous Waste Treatment Council v. U.S. E.P.A., 886 F.2d 355, at 366 (D.C. Cir. 1989); In The Matter of Kentucky Polytechnic Institute, Dkt. No. 89-56-S, U.S. Dept. of Education (April 27, 1990) (Order); In The Matter of Sinclair Community College, Dkt. No. 89-21-S, U.S. Dept. of Education (May 31, 1991) (Decision); In The Matter of Stautzenberger College, Dkt. No. 90-102-SA, U.S. Dept. of Education (March 11, 1991) (Decision).

Therefore, OSFA will satisfy its burden of production of a prima facie case if the evidence presented is sufficient to enable a reasonable person to draw from it the inference sought to be established, namely that SFCMS has not submitted its required non-federal biennial audits.

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

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

Therefore, a review of the evidence is necessary. Here, the evidence of SFCMS's failure to submit its required non-federal biennial audits is extensive.

The Notice of Intent to Terminate and Fine issued by OSFA on December 26, 1991 and contained in ED Ex. 1 contains the following statement: "As of the date of this letter, the College has not submitted the biennial audits of its administration of the Guaranteed Student Loan Programs for award years 1983-84, 1984-85, 1985-86, 1986-87, 1987-88, 1988-89, and 1989-90, or audits of its administration of the Pell Grant program for award years 1987-88, 1988-89, and 1989-90, despite notices advising all institutions of the biennial audit requirements."

The program review report dated June 21, 1990 and contained in ED Ex. 5 and Resp. Ex. 5 (partial copy) included Finding 1. In Finding 1, the program reviewer states, "The institution has not had an acceptable biennial audit of its Title IV programs for the 1986-1987 through 1987-1988 award years."

The declaration of Ronald Lipton contained in paragraph 13 of ED Ex. 9-3 states, "During the entire period of its participation in the SFA Programs, SFCMS has failed to account for a single dollar of its funds through these audits."

The declaration of Dale Purify contained in ED Ex. 10-3 states in paragraph 5: "Schools that are located in the state of California are required to submit their nonfederal biennial audit reports

to the Department's RIGA in Dallas, Texas. Previously, institutions in California submitted their nonfederal biennial audit reports to the Department's regional office in San Francisco. However, in April, 1989, the place of receipt for these submissions was changed to the Dallas RIGA office." In paragraph 6, Mr. Purify states: "According to RIGA records, the San Francisco College of Mortuary Science ("SFCMS") is located in the state of California at 1363 Divisadero Street, San Francisco, California. Therefore, as of April, 1989, SFCMS's nonfederal biennial audits, if any, were required to be submitted to my

office." In paragraph 7, he continues: "As an institution that participates in SFA Programs, SFCMS has been required to submit its nonfederal audits to RIGA Dallas since April, 1989. If SFCMS had submitted an audit report prior to April, 1989, it would have been submitted to the San Francisco RIGA. In either case, the Dallas RIGA would have a record of the receipt and review of any such audit report." In paragraph 14, Mr. Purify declares that "As of the date of this Declaration, RIGA Dallas has not received any audit reports submitted from the SFCMS or SFCMS's auditors." This declaration alone is strong evidence of the fact that SFCMS had not submitted audits, the College's arguments at pages 34-35 of its Initial and Reply Brief notwithstanding.

The letter from the Department's Regional Inspector General for Audit to the accounting firm that conducted the November 1988 audit of SFCMS, contained in Resp. Ex. 2, is evidence of the fact that that audit was rejected by the Department. The same is true for the reply letter from the accounting firm to the RIGA for the Department in which the accounting firm acknowledged the deficiencies of the audit ("We now realize we did not comprehend the extent of the audit work required and that we have neither the personnel nor the expertise to perform student financial aid audits which demand special skills and training") and withdrew its audit. Resp. Ex. 3.

The September 24, 1991, letter from SFCMS to the Department, contained in Resp. Ex. 6, speaks of the College's goal of "making a full-fledged effort to resolve all the pre-existing issues involving our student financial aid program." This suggests problems with the program, as does the request in the February 26, 1992 letter from SFCMS to the Department, contained in Resp. Ex. 7, in which the College requests, inter alia, the "Inactive Documents Report as of or for the quarter ended June 30, 1983 and for each reporting period thereafter through current."

Resp. Ex. 8 is a letter from Michael D. Manner, C.P.A. to this tribunal in which the accountant discusses his need to apply the March 1990, May 1988, and March 1984 Student Financial Assistance Audit Guides. He also describes his close cooperation with the Department and states, "By this means I have ensured delivery on my client's behalf of [sic] a proper and comprehensive set of audit reports from the 1983/84 award year through June 30, 1991."

Resp. Ex. 11 is a Declaration of Michael D. Manner. Mr. Manner states, among other things, that "[i]n a telephone conversation with a representative of the Audit Review Branch, I was informed that the SFCMS needed to submit audits dating back to 1983-84." While this hearsay may not carry much weight by itself, other statements in the Declaration bolster it. For example, in paragraph 10, Mr. Manner describes the timeline for completion and delivery of his audit reports to the Board of

Directors of SFCMS, in which he lists audits reports for award years dating back to 1983-84. In addition, paragraph 7 contains the statement "[i]t appears the new administration and board of directors [of SFCMS] have been made responsible for cleaning up matters left unattended by their predecessors."

Finally, Resp. Ex. 18 is a Declaration of Jacquelyn S. Taylor, who is the president of SFCMS. In paragraph 8, Ms. Taylor admits that no acceptable biennial audits had been submitted by SFCMS when she states, "The May 1990 Program Review first brought to my attention and to the attention of the new administration and Board the fact that acceptable biennial audits had not been submitted for prior years." Similarly, in paragraph 12, she states, "once aware of the fact that audits were missing, the College immediately began the task of getting audits completed and submitted."

Taken together, this evidence, including the admissions by SFCMS, is persuasive of the fact that SFCMS has failed to submit acceptable non-federal biennial audits of its GSL or Pell Grant Programs for the award years 1983-84 through 1989-90.

This strong evidence notwithstanding, SFCMS alleges that on the record in this case, OSFA has failed to satisfy its burden of proof because 1) under the regulations and audit guide written by the Department, SFCMS was not required to submit an audit until 1988 at the earliest; 2) OSFA has failed to provide evidence sufficient to establish that the College did not submit any of the audits that might have been due prior to April 1989; 3) OSFA has failed to provide evidence sufficient to establish that the 1988 audit did not comply with audit requirements; and 4) OSFA has not established that SFCMS committed the type of violation that 34 C.F.R. § 668.90(a)(3)(iv) is intended to address. Respondent's Initial and Reply Brief at 31-40. The tribunal shall address each issue seriatim.

At pages 32-33 of its Initial and Reply Brief, SFCMS speculates that it did not begin participating in the GSL Program until 1984. SFCMS then argues that there is no requirement that the two-year audit period begin at the start of an award year, and that the period to be audited can be based on the entity's fiscal or program year. The College then contends that OSFA has not presented any evidence as to when SFCMS began to participate in the GSL program. SFCMS then speculates that even if it began to participate in the GSL program on January 1, 1984, the College's two period would run from January 1, 1984 to December 1985. SFCMS then claims that its audit would be due by January 31 following the end of the program year, which runs from July 1 of a given year until June 30 of the following year. Since the alleged period concluded on December 31, 1985, halfway through a program year that ended on June 30, 1986, SFCMS speculates that its first audit would be due no later than January 31, 1987.

SFCMS then argues that there was no requirement for the submission of biennial audits for the GSL program under the regulations in effect as of January 31, 1987. Therefore, SFCMS contends, its first audit was not due until 1988 at the earliest.

This argument is based upon inaccurate premises and speculation and therefore is misplaced. Based upon the evidence described supra, this tribunal finds that SFCMS began participating in the GSL program during the 1983-84 award year. Therefore, as SFCMS points out, its audit

would be due by January 31 following the end of the program year. ED Ex. 9-18. Since the program year ended on June 30, 1985, the College's first audit was due on January 31, 1986.See footnote 3 *3*

As explained supra, since SFCMS did not submit an audit for the 1983-84 to 1984-85 award years, an audit covering this period as well as the 1985-86 award year was due on January 31, 1987.

SFCMS also argues that there was no requirement for the submission of biennial audits for the GSL program under the regulations in effect as of January 31, 1987.

During the award years 1983-84 through 1985-86, the regulations governing the GSL program required biennial audits. This requirement was still in effect from July 1, 1986 through November 23, 1986. The applicable regulation provided that--

The school shall have an audit performed at least once every two years. Each audit must cover the entire period of time that elapsed since the last audit that was performed.

§ 682.612(e)(3) (1983-1986).

However, from November 24, 1986 through February 2, 1988, the regulations were void of any requirement that previously had been included in Subpart F of Part 682 of Title 34 pertaining to the GSL program. Cf. Part 682 (1986).See footnote 4 *4*

On December 1, 1987, the Secretary promulgated a new series of regulations under the Student Assistance General Provisions of Title 34, Part 668 that applies to both the GSL and Pell Grant programs. See § 668.1 (1988). These regulations became effective on February 3, 1988.See footnote 5 *5* Particularly applicable to this proceeding is § 668.23, which reinstated the requirement of biennial audits by providing--

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

. . . .

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

§ 668.23(c) (1988).

Therefore, SFCMS is partially correct in asserting that the regulations in effect on January 31, 1987 did not contain the requirement to submit biennial audits. However, it can be argued that since the requirement to submit audits was contained in § 682.612(e)(3) during the entire time period of the award years in question (1983-84 through June 30, 1986), SFCMS was officially on notice on June 30, 1986, the last day of the 1985-86 award year, that an audit would be due

within a reasonable period of time.See footnote 6 *6* Moreover, the Department's Audit Guide in effect at that time provided that--

If the institution does not receive Campus-based funds, the due date is January 31 following the end of the program year.

ED Ex. 9-18.

SFCMS did not receive campus-based funds. Therefore, the College had notice on June 30, 1986 that an audit would be due by January 31, 1987. It could have submitted that audit at any time after June 30, 1986 and before February 1, 1987. It can be argued that SFCMS acquired a legal duty as of July 1, 1986 to submit an audit within the next seven months, a legal duty that was not erased by the subsequent changes in the regulations. This position is bolstered by the fact that despite the subsequent gap in the regulations, at no time did the Department rescind the requirement in the Audit Guide of submitting the audit by January 31 of the year following the program year. The Audit Guide remained in full effect.

Furthermore, both parties to this proceeding have treated the application of the regulations as discussed above. Not only has the Department expected institutions to submit audits that became overdue during the period of the gap in the regulations, but SFCMS has acknowledged its responsibility to submit this audit and has admitted that it has not done so. See the discussion of exhibits supra.

Finally, § 668.12 remained the same throughout this audit period.See footnote 7 *7* This regulation states:

(a) If an institution participates in the . . . Guaranteed Student Loan (34 CFR Part 682) . . . or Pell Grant (34 CFR Part 69) Programs, it shall comply with the regulations for those programs concerning . . . biennial audits of institutional transactions . . .

This further supports the conclusion of this tribunal that the omission of a biennial audit provision in the 1987 Program regulations of Part 682, pertaining to the GSL program, appeared to be inadvertently deleted. The Federal Register lends credence to this position by not providing the rationale for the abandonment of this provision under the 1987 regulations.See footnote 8 *8*

In any case, even if SFCMS was not required to submit an audit by January 31, 1987, the subsequent addition of § 668.23 re-instated the requirement of submitting biennial audits for the GSL programs.See footnote 9 *9* Therefore, on January 31, 1989, since SFCMS had not submitted an audit since it began participating in the GSL programs, the College was required to submit an audit that covered the institution's activities for the 1983-84, 1984-85, 1985-86, 1986-87, and 1987-88 award years.See footnote 10 *10* Similarly, on January 31, 1990, since SFCMS had not submitted an audit since it began participating in the GSL programs, the College was required to submit an audit that covered the institution's activities for the 1983-84, 1984-85, 1985-86, 1986-87, 1987-88, and 1988-89 award years.See footnote 11 *11* Again, on January 31, 1991, since SFCMS had not submitted an audit since it began participating in the GSL programs, the College

was required to submit an audit that covered the institution's activities for the 1983-84, 1984-85, 1985-86, 1986-87, 1987-88, 1988-89, and 1989-90 award years.See footnote 12 *12*

Even though this tribunal has held in part 2., infra, that the biennial audit that was due on January 31, 1986, is outside the applicable limitations period, and even if the biennial audit that was due on January 31, 1987 were is not considered to have been required because of the gap in the regulations, the fact remains that the subsequent audits cited in the previous paragraph were due on the dates mentioned and were not submitted. Moreover, the College did not submit the required biennial audits of its Pell Grant program that were due on March 31, 1990 and again on March 31, 1991.See footnote 13 *13*

Nor is this tribunal persuaded by SFCMS's other arguments. SFCMS claims at pages 34-35 of its Initial and Reply Brief that OSFA has failed to provide evidence sufficient to establish that

the College did not submit any of the audits that might have been due prior to April 1989. Yet, as described above, the record contains substantial evidence of the fact that the College did not submit the required non-federal biennial audits from the 1983-84 award year through the 1989-90 award year.

SFCMS claims at pages 36-37 of its Initial and Reply Brief that OSFA has failed to prove that the 1988 audit did not comply with the audit requirements, and claims that OIG's rejection of the audit is no more reliable than the auditor's statement that the audits were in compliance. This tribunal must disagree. The College apparently ignores the auditor's statements in the reply letter from the accounting firm to the RIGA for the Department in which the accounting firm acknowledged the deficiencies of the audit ("We now realize we did not comprehend the extent of the audit work required and that we have neither the personnel nor the expertise to perform student financial aid audits which demand special skills and training") and withdrew its audit. Resp. Ex. 3. This statement alone is strong evidence that the audit did not comply with the audit requirements, SFCMS's argument notwithstanding.See footnote 14 *14*

Accordingly, this tribunal finds that OSFA has satisfied both its burden of production of a prima facie case and its burden of persuasion with respect to the fact that SFCMS has failed to submit acceptable non-federal biennial audits of its GSL or Pell Grant Programs. This more specifically relates to audits which were due on January 31, 1987, January 31, 1989, January 31, 1990, March 31, 1990, January 31, 1991, and March 31, 1991.See footnote 15 *15*

2. Statute of limitations.

SFCMS argues that under the relevant statutes of limitations, the school cannot be terminated or fined on the basis of its alleged failure to file any independent audit that was due before 1987. The College contends that 20 U.S.C. § 2462 requires such actions to be brought within five years from the date when the College was required to submit its audit. The audit for the 1983-84 to 1984-85 time period was due on January 31, 1986, after which the Department had five years to bring an action. Here, the termination action was not brought until December 26, 1991, which was beyond the five year limitation

period, according to SFCMS. Respondent's Initial and Reply Brief at 9-12.

The statute at issue reads as follows:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

20 U.S.C. § 2462.

OSFA argues that its termination action does not violate any limitations period. OSFA asserts that the fact that a violation first occurred on January 31, 1986, does not relieve SFCMS of its continuing obligation to account for these funds. Thus it argues that the College's continuing failure to submit the audit was an ongoing violation, and OSFA's termination action for this audit began within any such limitation period. Moreover, 20 U.S.C. § 2462 only requires enforcement of a civil fine, penalty, or forfeiture by a court within five years, according to OSFA. OSFA points out that the present action is not a federal court suit for enforcement of any fine, but an agency action to assess the fine. OSFA contends that until SFCMS is terminated and fined, the limitation period for the Department to bring an action to enforce the administrative law judge's decision does not start tolling. OSFA Supplemental Reply Brief at 7-8.

The language of the statute has given rise to an ambiguity concerning the meaning of the phrase "the date when the claim first accrued". This ambiguity has led to a split among the federal circuits.

In United States v. Core Laboratories, Inc., 759 F. 2d 480 (5th Cir. 1985), the Fifth Circuit held that a claim under this section accrues at the time of the underlying violation, rather than on the date of the final administrative order assessing the penalty. Id. at 483. The First Circuit declined to follow the Fifth Circuit, and held in United States v. Meyer, 808 F. 2d 912 (1st Cir. 1987), that "the statute of limitations prescribed by 28 U.S.C. § 2462 does not begin to run, so long as administrative proceedings have been seasonably initiated, until the same have been concluded and a final (administrative) decision has resulted." Id. at 922 (emphasis added). However, as indicated by the highlighted language, the Meyer court did not hold that administrative proceedings could be brought later than five years after the date of the underlying violation. Rather, it held that for purposes of the administrative proceedings brought by the

agency, a claim under 20 U.S.C. § 2462 accrues at the time of the underlying violation, as the Fifth Circuit had held. The First Circuit disagreed with the Fifth Circuit by also holding that for purposes of the action in federal court for enforcement of the administrative decision, a claim under 20 U.S.C. § 2462 accrues when the administrative proceedings that have been seasonably initiated, have been concluded and a final administrative decision has been issued. The Fifth Circuit had held that an action in federal court for enforcement of the administrative decision also had to be brought within five years after the date of the underlying violation.

Therefore, while OSFA correctly cites United States v. Meyer for the proposition that "the limitations period set forth in § 2462 as to a court remedy that requires 'enforcement,' of a civil fine, penalty or forfeiture", administrative proceedings have been concluded and have resulted in a final administrative decision (OSFA Supplemental Reply Brief at 8); it is disingenuous for OSFA to imply that Meyer stands for the proposition that the limitations period in § 2462 relates only to court remedies and that therefore administrative proceedings do not have to be brought within five years from the date of the underlying violation. The Meyer court did not disagree with the portion of the Fifth Circuit's holding concerning the limitations period as it applied to the initiation of administrative proceedings. Several of the court's statements make this clear. For example, the court states:

Both parties concede that, as applied to the EAA [Export Administration Act], this statute at least requires that any administrative action aimed at imposing a civil penalty must be brought within five years of the alleged violation. [footnote omitted] Although the analytical underpinnings of this interpretation seem somewhat wobbly, the view is eminently reasonable as a matter of policy and is supported by two distinct pronouncements of subsequent legislative committees that chose to comment on the matter.

Meyer at 914.

In the footnote to the above quoted text, the court elaborated as follows:

This interpretation finds substantial support in a decision of the Second Circuit interpreting 28 U.S.C. § 791, the forerunner to section 2462. In Lancashire Shipping Co. v. Durning, 98 F.2d 751, 753 (2d Cir.), cert. denied, 305 U.S. 635, 59 S.Ct. 102, 83 L.Ed. 408 (1938), the court held that the time requirement of the statute was satisfied when the administrative

proceeding--though not the judicial action--was brought within the prescribed limitations period . . . .

Id. at 914 (footnote 2).

The Meyer court further stated, "No one disputes that the limitations period on wholly administrative action runs from the time of the underlying violation rather than from the government's decision to prosecute the charge." Id. at 920. Finally, the First Circuit stated, "All in all, construing § 2462 to require the initiation of administrative proceedings within five years of the date of the alleged violation, see ante at 914 & n. 2, abundantly satisfies any legitimate concerns for repose, fair notice, and preservation of evidence." Id. at 922.

Therefore, this tribunal holds that for purposes of administrative proceedings brought by the Department in which it seeks termination and/or a fine, under 20 U.S.C. § 2462, this claim accrues at the time of the underlying violation. Accordingly, any administrative proceedings that are brought by OSFA based upon that claim must be brought within five years from the date of the underlying violation if, within the same period, the offender or the property is found within the United States.See footnote 16 *16*

However, this does not resolve the issue of when the claim first accrued as to the underlying violations by the College. OSFA argues that the failure to submit non-federal biennial audits was a continuing, ongoing violation that occurred each day
subsequent to January 31, 1986, and therefore is not barred by the limitations period. An analysis of the Core and Meyer cases lend support to this view. Both cases involved alleged violations of the antiboycott regulations relating to the Export Administration Act of 1979 (EAA). In both cases, the alleged violations occurred on specific dates or within a specified time period and did not continue beyond those dates.See footnote 17 *17* Therefore,

these two cases can be distinguished from the present proceeding in that respect, and it could be argued that the statute at issue does not apply to a continuous, ongoing violation that first occurred beyond the limitation period but continued to occur on subsequent dates that fall within the limitation period.

Although this argument sounds appealing, it must fall in the face of the clear language of 28 U.S.C. § 2462. The statute says that such actions "shall not be entertained unless commenced with five years from the date when the claim first accrued . . . ." This appears to apply to situations, such as the one at issue here, where a claim arises on a given date and then continues or accrues on subsequent dates. In such cases, the action must be brought within five years from the date that the claim first arose.See footnote 18 *18*

Therefore, this tribunal holds that the five year limitations period contained in 28 U.S.C. § 2462 applies here to prevent OSFA from asserting its claim that SFCMS failed to submit its required non-federal biennial audit that was due on January 31, 1986 for the 1983-84 to 1984-85 time period.

However, the regulation in effect when SFCMS's first audit was due on January 31, 1986 is § 682.612(e) (1985),See footnote 19 *19* which stated as follows:

> The school shall have an audit performed at least once every two years. Each audit must cover the entire period of time that elapsed since the last audit that was performed.

Since SFCMS did not submit an audit for the 1983-84 to 1984- 85 time period, an audit was due by January 31, 1987 which

included the 1985-86 award year and the College was required to include in that audit the entire period of time that elapsed since the 1983-84 to 1984-85 period. Similarly, in later years, because the College still had not submitted an audit, SFCMS was required to submit an audit for the 1983-1984 to 1984-85 time period along with its audits that were due in subsequent years.

In conclusion, the five year limitations period contained in 28 U.S.C. § 2462 applies here to prevent OSFA from asserting its claim that SFCMS failed to submit its required non-federal biennial audit that was due on January 31, 1986 for the 1983-84 to 1984-85 time period. Nonetheless, on January 31, 1987 and in subsequent years, SFCMS was required to submit an audit for the 1983-1984 to 1984-85 time period along with its audits that were due in those subsequent years.

3. Fiduciary Duties.

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

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

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

§ 668.82(b).

§ 668.82 goes on to provide that:

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

The net effect of the violations of regulations set forth in paragraph 1 above is that SFCMS in the past has not acted as a fiduciary is required to act in administering the Title IV, HEA programs and therefore has also violated § 668.82. This is particularly true as relates to the failure to submit to the Department biennial non-federal audits as described in paragraph 1.

4. Termination Issue.

Application of changes to 34 C.F.R. § 668.90(a)

OSFA claims that the scope of review for termination is limited. On July 31, 1991, a Final Rule was published in the Federal Register, and this regulation became effective 45 days after its publication. Under this regulation, § 668.90(a)(3) (iv), in a termination action taken against an institution based on the grounds that the institution has failed to submit biennial audits, the administrative law judge must find that termination is warranted if the institution in fact has failed to submit those biennial audits. Here, the eligibility notice sent to SFCMS and the Program Participation Agreements signed by the College both require SFCMS to meet all statutory and regulatory requirements. One of these regulatory requirements is that SFCMS must submit biennial non-federal audits to the Department. § 668.23(c)(4). OSFA argues that SFCMS has admitted that it has not complied with this regulation. Therefore, according to OSFA, the tribunal must terminate the eligibility of SFCMS to participate in the Title IV, HEA programs. OSFA

argues that the regulations allow the judge no alternative but to terminate. OSFA Supplemental Initial Brief at 11-14.

OSFA further argues that the Department is not retroactively enforcing a requirement that SFCMS submit delinquent audits. OSFA contends that § 668.90(a)(3)(iv) is a procedural regulation and that it does not impose an obligation on institutions. Rather, it argues, the regulation imposes a restrictive requirement upon the action the tribunal must take if § 668.23(c)(4) has been violated. OSFA notes that institutions have always been required to account for SFA Program funds and to submit biennial audits.

OSFA also points to the recent decision by the United States Court of Appeals for the District of Columbia Circuit in Assoc. of Accredited Cosmetology Schools v. Alexander, No. 91-5332 (1992 WL 339386) F.2d , (D.C. Cir. Nov. 24, 1992) (hereinafter referred to as the AACS case), where the court held that member schools do not have a vested right to future eligibility to participate in the GSL program. OSFA Supplemental Reply Brief at 8-10.

SFCMS argues that the audit termination standard advocated

by OSFA may not be legally applied to SFCMS. The College offers several reasons. First, it contends that application of the automatic termination standard to SFCMS is contrary to the stated intent of the Secretary in enacting the regulation. Second, the school asserts that application of the automatic termination standard to SFCMS is contrary to the presumption against retroactivity. Third, the College claims that application of § 668.90(a)(3)(iv) to audits due prior to the effective date of the regulation violates the prohibition against ex post facto laws. Finally, SFCMS alleges that OSFA has not established that the College committed the type of violation that § 668.90(a)(3)(iv) is intended to address. Respondent's Initial and Reply Brief at 17-31, 37-40.

The regulation at issue is § 668.90(a)(3)(iv). That regulation currently states as follows:

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

§ 668.90(a)(3)(iv) (1992).

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

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

> (4)(i) If the institution receives campus-based funds, the institution shall submit the audit report to the Inspector General by March 31 of the year following the last award year covered by the audit.
> (ii) If the institution does not receive campus-based funds, the institution shall submit the

audit report to the Inspector General by January 31 of the year following the last year covered by the audit.

§ 668.23(c)(4) (1992).

This wording also existed in this same section of the regulations in 1989, 1990, and 1991.

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

by § 668.23(c)(4).See footnote 20 *20* Therefore, the language of § 668.90(a)(3) (iv) requires the administrative law judge to terminate SFCMS in this action if the audit regulation has been violated. The words allow for no discretion.

As described above, SFCMS raises the issue of whether § 668.90(a)(3)(iv) can be applied to the present proceeding. The parties have cited numerous cases, but only a few will be discussed here, because a recent decision by the United States Court of Appeals for the District of Columbia is dispositive.

At the outset, the tribunal rejects SFCMS's claim that application of the automatic termination standard to the College is contrary to the stated intent of the Secretary in enacting the regulation. As stated supra, the language of § 668.90(a)(3)(iv) is quite clear: "In a termination action taken against an institution based on the grounds that an institution has failed to comply with the requirements of § 668.23(c)(4), the administrative law judge must find that the termination is warranted." (emphasis added) The language is clear. It applies to termination actions based on the grounds that an institution has failed to comply with the audit requirements. The phrase "has failed" encompasses events that have happened in the past. The general rule of statutory construction is that there is no occasion for construction where the language is clear and unambiguous and does not lead to absurd or impracticable results. Kenai Peninsula Borough v. Andrus, 436 F. Supp. 288 (D. Alaska 1977) (citing Caminetti v. United States, 242 U.S. 470, 485 (1917)). An administrative regulation, like a statute, is subject to the normal rules of statutory construction. Harnischfeger Corp. v. U.S. Environmental Protection Agency, 515 F. Supp. 1310, 1314 (E.D. Wis. 1981). See also Rucker v. Wabash R.R. Co., 418 F.2d. 146, 149 (7th Cir. 1969). Accordingly, further speculation as to what the Secretary intended is not warranted.

In support of its argument that application of the automatic termination standard to SFCMS is contrary to the presumption against retroactivity, the College points to the Supreme Court's 1988 decision in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). In Bowen, the Court stated that:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . . Even where some substantial justification for retroactive rulemaking is presented, court shoulds be reluctant to find such authority absent an express statutory grant.

Bowen at 208.

However, a different line of Supreme Court cases has consistently upheld the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974). See also Thorpe v. Housing Authority of the City of Durham, 393 U.S.

268, 281 (1969).See footnote 21 *21*

In order to better comprehend the recent cases that interpret and distinguish the Bradley/Thorpe line of cases from the Bowen case, further analysis of Thorpe and Bradley is necessary.See footnote 22 *22*

However it should be pointed out at this stage that the analysis of Bradley/Thorpe is not actually necessary since the AACS case decided in November of this year by the United States Court of Appeals for the District of Columbia (which will be discussed later) completely resolves any issue that may arise in this case as to retroactivity or ex post facto prohibition. In that case the Association of accredited Cosmetology Schools also relied upon the Bowen case. Therefore it is not necessary to analyze the facts of this case in light of the principles in Bradley/Thorpe.

However, despite the fact that the AACS case is dispositive of our case those principles in Bradley/Thorpe will be discussed.

In Thorpe, the Court stated:

"[i]t is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

Thorpe at 282 (quoting Marshall, C.J. in United States v. Schooner Peggy, 1 Cranch 103, 110, 2 L.Ed. 49, 51 (1801)).

The Thorpe Court then continued, "[t]his same reasoning has

been applied where the change was constitutional, statutory, or judicial. Surely it applies with equal force where the change is made by an administrative agency acting pursuant to legislative authorization." Thorpe at 282 (footnotes omitted).

In Bradley, the Court stated, "we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." Bradley at 715. The Court also elaborated as to when the application of the law in effect at the time that a court renders its decision would result in manifest injustice, and thus be inappropriate. The Court stated, "[t]he concerns . . . relative to the possible working of an injustice center upon

(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Bradley at 717.

The Bradley Court then considered each of these concerns. Regarding the nature and identity of the parties, the Court stated, "[a]pplication of [the statute] to such litigation would thus appear to have been anticipated by Mr. Chief Justice Marshall in Schooner Peggy when he noted that in 'great national concerns . . . the court must decide according to existing laws.'" The Court stated that the circumstances surrounding the passage of the statute which, amongst other things, related to the recovery of attorney fees in a civil rights case, and the numerous expressions of congressional concern and intent with respect to the enactment of that statute, all proclaim its status as having to do with a "great national concern." Bradley at 719. Regarding the nature of the rights of the parties, the Court stated, "[t]he Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional . . . We find here no such matured or unconditional right affected by the application of [the statute]." Bradley at 720.

Finally, the Court stated:

[t]he third concern has to do with the nature of the impact of the change in law upon existing rights, or, to state it another way, stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard.

. . . .

The availability of § 718 to sustain the award of fees against the Board therefore merely serves to create an additional basis or source for the Board's potential obligation to pay attorney's fees. It does

not impose an additional or unforeseeable obligation upon it.

Accordingly, upon considering the parties, the nature of the rights, and the impact of § 718 upon those rights, it cannot be said that the application of the statute to an award of fees for services rendered prior to its effective date, in an action pending on that date, would cause "manifest injustice," as that term is used in Thorpe, so as to compel an exception of the case from the rule of Schooner Peggy.

Bradley at 720 to 721.

Given the fact that both the Bowen and the Bradley/Thorpe lines of cases are still valid law, courts have grappled with the application of these precedents to situations in which a statute or regulation has changed subsequent to the relevant actions of the parties involved.[See footnote 23](#) *23*

In Wisdom v. Intrepid Air-Sea Museum, No. 91 Civ. 4439 (1992 WL 168224) (S.D.N.Y. June 26, 1992), the district court, in grappling with this issue, admonishes:

[T]he Supreme Court has emphasized that it is not within the province of the courts of appeal to determine when Supreme Court decisions in one line of cases effectively overrule Supreme Court decisions in another line of cases. Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989). This admonition to the circuit courts should apply with equal, if not greater, force to the district courts. Accordingly, the Court adopts an analysis under which the tension between Bradley and Bowen may be reconciled."

Wisdom at 4.

The Wisdom court then engages in an excellent analysis in which it reconciles Bradley and Bowen, as follows:

Some light is shed on the "apparent tension" between Bradley and Bowen by Bennett v. New Jersey, 470 U.S. 632 (1985). In Bennett, the Court ruled that substantive provisions of the 1978 amendments to Title I of the Elementary and Secondary Education Act did not apply retroactively to require the defendant to repay funds which were allegedly misused in 1970-1972. The Court reasoned that by its terms, the Thorpe-Bradley presumption of retroactivity does not apply when retroactive application "would infringe upon or deprive a person of a right that had matured or become unconditional." Bennett, 470 U.S. at 639. Importantly, the Court observed that the Bradley limitation "comports with another venerable rule of statutory interpretation, i.e. that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." Id. (emphasis added).

Bennett has been interpreted to stand for the proposition that "statutory provisions impacting substantive rights and obligations will not be applied retroactively." Mozee, 963 F.2d. 929, at 936. The policy interest behind a presumption against retroactivity is that: it is unfair to hold private parties accountable for rules which were not in effect at the time which the parties' relevant conduct took place. As such, the better and more fair rule is to hold parties accountable for only those acts that were in violation of the law at the time the acts were performed.

Id. (citing Bonjorno, 494 U.S. at 855 (Scalia, J., concurring)). Retroactive application of purely procedural rules, however, does not contravene that policy interest. As the court in Mozee observed with regard to the 1991 [Civil Rights] Act:

The trial court's application of the trial procedure in effect at the time of the trial does not seem to raise the same concerns as the retroactive application of provisions defining a party's substantive rights and obligations. That is, procedural rules generally regulate trial proceedings, and these rules are not generally targeted at proscribing unwanted conduct. Therefore, it does not seem unfair to require parties to comply with the rules of procedure applicable at the time in which they begin a new trial proceeding, especially considering that most persons and entities are not likely to conform their conduct in light of a slight change in the procedure that will be rendered if they violate the law. 963 F.2d. 929, at 939.

Thus, Mozee suggests that the presumption against retroactivity need not apply when the intervening change in law is procedural rather than substantive. C.f. Vogel, 959 F.2d. at 598 (noting that rule in Bradley should not be applied where substantive rights and liabilities would be affected).

At least one court of appeals has extended the principle articulated in Mozee regarding Procedural changes of law to also Apply to "remedial" changes of law. In Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990), the court considered whether to give retroactive application to the Civil Rights Restoration Act of 1987. Because that statute was intended to overturn the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984), the court found that it was remedial in nature. Lussier, 904 F.2d at 665. Noting that, "'statutory changes that are procedural or remedial in nature apply retroactively,'" the court gave the statute retroactive application. Id. (quoting United States v. Vanella, 619 F.2d 384, 386 (5th Cir. 1980)). The provisions of the 1991 Act at issue here, enhancement of the damages available to victims of intentional discrimination and the addition of the right to a jury trial, are either procedural or remedial in nature. The right to compensatory and punitive damages is a remedial modification of Title VII.

Wisdom at 5 [footnotes omitted].

Here, it can be argued that § 668.90(a)(3)(iv) is a procedural regulation. As OSFA states:

34 C.F.R. § 668.90(a)(3)(iv) is a procedural regulation. It imposes constraints the administrative law judge's discretion [sic] to hear mitigating circumstances offered by an institution that is subject to losing its eligibility to participate in the SFA Programs. It does not, as SFCMS alleges, impose an obligation on institutions. Throughout the course of SFCMS's participation in the SFA Programs, it was required to account for its SFA Program funds. 34 C.F.R. § 668.90(a)(3)(iv) does not change that obligation. Throughout the course of SFCMS's participation in the SFA Programs, it was subject to termination action if it failed to account for its SFA Program funds. 34 C.F.R. § 668.90(a)(3)(iv) does not change that remedy. All that this new regulation does is require the administrative law judge to terminate an institution's eligibility to participate in the SFA Programs if he hears a termination action based on an institution's failure to submit its biennial audits. Without any new requirement on the participating institution's obligations for continued participation in the SFA Programs, there is no basis for a claim that this new regulation improperly imposes fatal requirements on an institution.

OSFA Supplemental Reply Brief at 8-9 (footnote omitted).

The above quoted statements are correct. It is clear that the subject regulation places no new obligation upon the College

and it does not change the fact that since it first failed to file required audits, it could be subjected to a termination action as to its eligibility to participate in Title IV, HEA programs. All that has changed is the fact that the tribunal must now find that termination is warranted.

It can be argued that this is actually not a retroactive act. This is a case of a present action being taken pursuant to a law which has been effective for more than a year. It is an action as to the present status of the college's eligibility but the norm upon which the present action is based relates to a past action of the school in failing to submit the required audits. A past action which could also have resulted in a present termination of eligibility even if the new regulation at § 668.90(a)(3)(iv) had never been enacted.

As stated previously, because the AACS case is actually dispositive of this case it is not necessary to apply the Bradley factors here to determine the applicability of the ruling in that case to this one.

Nevertheless an analysis of the Bradley factors will be made to determine whether applying the law currently in effect would work a manifest injustice. In doing this we will also refer to an analysis of the Bradley factors made in the Wisdom case since as to the first factor the terminology has evolved to the point of being more appropriate than that used in the 1801 Schooner Peggy case.See footnote 24 *24* In Wisdom, the court stated that the first Bradley factor distinguishes litigation involving only private parties from that involving a public entity. Then the court further considered whether the subject was a matter of substantial public concern such that the court must decide according to existing laws. Here, the case involves the U.S. Department of Education and an institution that has failed to account for over $2,000,000 in federal funds that it administered over approximately a 7 year period. In addition it concerns a regulation which was designed to help the Department tighten up enforcement as to the requirement that institutions participating in the Title IV, HEA programs file non-federal audits on a biennial basis. The Notice of Proposed Rule Making for that regulation stated, in part, as follows:

> These audits are critical to the enforcement of Title IV, HEA program requirements, yet many school have not submitted the audits, some for as many as six years. The Department of Education recently developed a computer system to track the submission of required
>
> biennial non-Federal audits. This system had identified over 1,500 schools with overdue audit reports for the award years 1981-85.
>
> . . . .
>
> The Secretary believes that an institution that fails to meet the audit report deadlines and fails to provide the responses required by regulations to the subsequent notices from the designated department official or an institution that has a record of consistently failing to submit its audit reports by the applicable deadlines should be subject to termination from participation in the Title IV, HEA programs.
>
> 54 Fed. Reg. 11356 (March 17, 1989).

This is not a mere private case between two individuals, but is a matter of substantial public concern.

The second Bradley factor to determine is whether applying the present regulation to the pending proceeding would infringe upon or deprive a person of a right that had matured or become unconditional. In Association of Accredited Cosmetology Schools v. Alexander, No. 91-5332 (1992 WL 339386) F.2d (D.C. Cir. Nov. 24, 1992), (the AACS case), the D.C. Circuit held that "[m]ember schools have no 'vested right' to future eligibility to participate in the GSL program." Id. at 6. Therefore, applying the current § 668.90(a)(3)(iv) to the present proceeding

would not infringe upon or deprive SFCMS of a right that had matured or become unconditional, because it has no vested right to future eligibility to participate in the GSL program.

The third Bradley factor to consider is the nature of the impact of the change in law upon existing rights, or, the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard. As stated supra, the AACS case held that member schools have no vested right to future eligibility to participate in the GSL program. Therefore, no existing rights have been impacted. Moreover, no new or unanticipated obligations have been imposed upon SFCMS. Prior to the changes in § 668.90(a), the College had a duty to account for its SFA Program funds. § 668.90(a)(3)(iv) does not change that obligation. Prior to the changes in § 668.90(a), the College was subject to termination action if it failed to account for its SFA Program funds. § 668.90(a)(3)(iv) does not change that remedy. However it does require the tribunal to find that termination is warranted if an audit filing violation has occurred.

Accordingly, although this determination is unnecessary because of the decision in AACS, it is found that application of

the current § 668.90(a)(3)(iv) is warranted under the Supreme Court's test in Bradley.

As stated previously, the recent decision by the D.C. Circuit in the AACS case mandates the application of § 668.90(a)(3)(iv) in the instant case. In that case, the Association of Accredited cosmetology Schools (AACS) challenged the constitutionality of the Student Loan Default Prevention Initiative Act, 20 U.S.C. § 1085(a) (1988 Supp. II), and the implementing regulations. AACS's primary argument was that the Act and the implementing regulations were retroactive because they made past default rates grounds for termination from the GSL program even though those rates were permissible under prior law. Just as in the present proceeding, the schools cited Bowen as preventing such an application of new statutes and rules. Just as OSFA is arguing in the present proceeding, the Secretary of Education in AACS argued that neither the Act nor the regulations were retroactive because they did not in any way effect member schools' past eligibility for GSL program participation, but merely required the Secretary to consider schools' past default rates in determining future eligibility for GSL program participation.

The D.C. Circuit agreed with the Secretary. The court stated:

> We agree with the Secretary that the Act and the regulations are not retroactive. A law is "retroactive" if it "'takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.'" Neild v. District of Columbia, 110 F.2d 246, 254 (D.C. Cir. 1940) (quoting Society for Propagating the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.)). Member schools have no "vested right" to future eligibility to participate in the GSL program. Although we do not doubt AACS's submission that the schools expected to be eligible in the future, such an expectation did not constitute vested interest. Nowhere in the Program Participation Agreements are member schools promised or even led to believe that there will be no background changes in the federal law governing the GSL program. The Agreements explicitly provide that participating schools must "comply with all the relevant program statutes and regulations," Program Participation Agreement, Art. II, § 1, and that each Agreement (hence

each school's eligibility) "automatically terminates . . . [o]n the date the institution no longer qualifies as an eligible institution." Id. at Art. X, § 2(a). Therefore, AACS's member schools had no vested right to future

eligibility for the GSL program.

AACS at 5.

The D.C. Circuit distinguished Bowen and similar cases, and then stated:

Instead of undoing past eligibility, as in Georgetown Univ. Hosp. and National Wildlife Fed'n, the Act and the regulations merely require the Department to look at schools' past default rates in determining future eligibility for the GSL program participation. [In the present (SFCMS) case the regulations require the Department to look at a school's past audit submittal status in determining future eligibility for GSL and other program participation.] We regard this requirement as no different in substance than a lender's rule against extending credit to applicants with negative credit histories. Several cases have established that such a requirement does not operate retroactively. See Reynolds v. United States, 292 U.S. 443, 449 (1934) (holding that "[a] statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment"); Neild v. District of Columbia, 110 F.2d 246, 255 (D.C. Cir. 1940) (holding that a law is not retroactive simply because it depends on "'antecedent facts for its operation'") (quoting Lewis v. Fidelity & Deposit Co., 292 U.S. 559, 571 (1934)).

In Davis v. City and County of San Francisco, 976 F.2d 1536 (1992 WL 251513) (9th Cir. 1992), the Ninth Circuit held that except as otherwise specifically provided, the Civil Rights Act of 1991, including the Act's express authorization of expert fee awards in employment discrimination cases, applies retroactively. The court discussed the Bradley and Bowen cases and in citing the Bonjoro case pointed out that the Supreme court noted that the views articulated in Bradley and Bowen concerning the applicability in time of new enactments are an "apparent tension." The court then went on to find that it did not "need to choose between the Bradley and Bowen presumptions regarding retroactivity in deciding whether the Civil Rights Act of 1991 applies to pending cases. Reliance on a presumption is unnecessary, because the language of the Act reveals Congress' clear intention that the majority of the Act's provisions be applied to cases pending at the time of its passage." Davis at 22.

Ex Post Facto Law.

SFCMS argues that the application of § 669.90(a)(3)(iv) to

audits due prior to the effective date of the regulation violates the prohibition against ex post facto laws.

In making this argument SFCMS cites a number of cases most of which are criminal in nature. One case cited, Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966 (2nd Cir. 1985), is

not a criminal case, however, it too is criminal in nature because the court apparently considered it a civil case where the civil disabilities disguise criminal penalties.

As stated previously, since the AACS case is actually in point and closely fits the factual situation in the instant case, and since this is strictly a civil penalty case, it is considered that the AACS case should be followed here and any reference to other cases involving retroactive applications of law will not be considered controlling here.

However there are other factors involving the Vuitton case which also detract from its applicability. At page 972 the court stated: "We do not decide that retroactive application of this statute would violate the ex post facto prohibition, only that it would raise the issue." It is interesting that the District Court in the Vuitton case relied upon the Bradley case in making its decision and found in that case that the statute in question could be construed to have only prospective effect. The Second Circuit Court of Appeals stated at page 972:

If a statute "changes the legal consequences of acts completed before its effective date," id. at 31, it may run afoul of the Ex Post Facto Clause. Although the prohibition generally applies to criminal statutes, it may also be applied in civil cases where the civil disabilities disguise criminal penalties.

The present case is a civil penalty case and is controlled by the decision in AACS.

5. Consideration of Remedies and Penalties.

a. **Termination Issue**.

Because of the determination, made above, that the provisions of § 668.90(a)(3)(iv) must be applied to the instant case, and since there has been a violation of § 668.23(c)(4), it follows that this tribunal must find that termination of the eligibility of SFCMS to participate in Title IV, HEA programs is warranted.

b. Fines.

Under § 668.92 the decision maker is required to take into account the gravity of the institution's violations or failure to

carry out the relevant statute, regulation or agreement, or the gravity of any misrepresentation and also the size of the institution.

Although it could be argued that during five different years non-Federal audits should have been submitted to the Department by SFCMS, OSFA in its notice of termination requested fines as to only four different audits during three different years. Therefore the consideration of fines will relate only to those four audits.

Size

The first factor we will consider is size. The latest complete figures as to financial aid processed for SFCMS students relates to the year 1990. Pell grant awards were $58,634 and GSL disbursements were $279,713. The total number of students during 1989 was about 150. Between 1990 and October 1992, the College qraduated about 140 people. The net income of the College for the year ending June 30, 1992, was about $70,000.00. This therefore should be categorized as a very small college.

Gravity

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

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

SFCMS was required to submit an audit of its administration of the Title IV, HEA Programs for award years 1983 through 1985 by January 31, 1986 As stated above, the statute of limitations had run as to this responsibility before this proceeding was commenced. Therefore no fine could be assessed. However as of

January 31, 1987, SFCMS should have filed an audit concerning the GSL award years 1983 through 1986 since none had been filed previously. Because of the fact that from November 24, 1986 through February 2, 1988, the regulations were void of any requirement for audits as to the GSL program the next date by which SFCMS should have filed an audit was January 31, 1989. This should have covered the GSL award years 1983 through 1988 since no audits had ever been filed previously. Finally, to complete the periods involved in OSFA's request for fines, an audit should have been filed by January 31, 1990 to cover the GSL award years 1983 through 1989. Although this proceeding does encompass the period covered by the next award year, OSFA has not requested a fine as to that period. OSFA however has requested a fine as to a Pell Grant Program audit which covered the award years 1987 through 1989 which apparently should have been submitted by March 31, 1990.

OSFA has requested a fine of $5,000.00 for failure to submit a Pell Grant audit for the period 1987 through 1989. In the termination notice it has also requested a fine of $35,000.00 for failure to submit GSL program audits for the three periods 1983 through 1985, 1985 through 1987, and

1987 through 1989. Since recovery for the period from 1983 through 1985 is barred by the statute of limitations, OSFA's surviving request for fines as to GSL audit violations is about $23,000.00.

Although it is considered that the failure to submit required biennial audits is a very serious violation, the determination as to an appropriate fine must take into consideration the fact that the College's eligibility to participate in Title IV, HEA programs will be terminated. This is the most severe penalty that can be rendered as relates to the College. Therefore since this is a very small college it is considered that a fine of $2,000 per violation is appropriate for the violations in each of the three years which OSFA has addressed as to requested fines. For this purpose since the Pell Grant audit for the period of 1987 through 1989 should have been included with the GSL audit for the same years it is not considered that a separate fine should be assessed for the Pell Grant audit. Therefore the total fine for the 3 periods highlighted by OSFA will be $6,000.00.

V. CONCLUSIONS OF LAW.

A. San Francisco College of Mortuary Science is an otherwise eligible postsecondary educational institution authorized to participate in student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended.

B. **Biennial Audits**.

1. SFMS violated § 682.612(e)(1985) as of February 1, 1986, for failure to submit an audit of the Guaranteed Student Loan (GSL) Program by January 31, 1986, for the award years 1983 through 1985, however OSFA is time-barred by a statute of limitations from maintaining a termination or fine action for any biennial audit that was due prior to 1987.

2. SFCMS violated § 682.612 (e)(1986) as of February 1, 1987, for failure to submit an audit or audits of the GSL Program by January 31, 1987, for the award years 1983 through 1986.

3. SFCMS violated § 668.23(c)(1988) as of February 1, 1989, for failure to submit an audit or audits of the GSL Program by January 31, 1989, for the award years 1983 through 1988.

4. SFCMS violated § 668.23(c)(1989) as of February 1, 1990, for failure to submit an audit or audits of the GSL Program by January 31, 1990, for the award years 1983 through 1989.

5. SFCMS violated § 668.23(c)(1990) as of February 1, 1991, for failure to submit an audit or audits of the GSL program by January 31, 1991, for the award years 1983 through 1990.

6. SFCMS violated § 690.84(b)(1989) as of April 1, 1990, for failure to submit an audit of the Pell Grant (Pell) program by March 31, 1990, for the award years 1987 through 1989.

7. SFCMS violated § 690.84(b)(1990) as of April 1, 1991, for failure to submit an audit of the Pell program by March 31, 1991, for the award years 1987 through 1990.

C. Fiduciary Duties.

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

D. Termination Issue.

The amendment to § 668.90(a) that became effective on September 14, 1991, must be applied to the circumstances of this case since the institution has failed to comply with the requirements of § 668.23(c)(4) as of a period prior to April 1, 1991. Therefore, the tribunal must find that a termination of SFCMS's eligibility to participate in Title IV, HEA Programs is warranted in this case.

E. Fine.

A fine of $6,000.00 against SFCMS for violations found herein is appropriate.

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

The College and OSFA have filed briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VII. ORDER.

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

ORDERED, That the eligibility of San Francisco College of Mortuary Science to continue participation in student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, be terminated, and it is further ORDERED, That San Francisco College of Mortuary Science immediately and in the manner provided by law pay to the United States Department of Education a fine in the sum of $6,000.00.

John F. Cook
Chief Administrative Law Judge

Issued: December 31, 1992
Washington, D.C.

S E R V I C E L I S T

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

Kelli J. Krummer, Esq.
Dow, Lohnes and Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

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

Carol Sperry
Acting Director, Institutional Participation Division
Office of Student Financial Assistance
U.S. Department of Education
Room 3919, ROB-3
7th & D Streets, SW
Washington, D.C. 20202-5254

Ron Lipton
Acting Director, Compliance and Enforcement Division
Office of Student Financial Assistance
U.S. Department of Education
Room 3919, ROB-3
7th & D Streets, SW
Washington, D.C. 20202-5255

Footnote: 1 1 Unless indicated otherwise all citations as to Code of Federal Regulations will be from 34 C.F.R.

Footnote: 2 2 This portion of the findings of fact is based upon the joint statement of stipulations and issues filed by the parties.

Footnote: 3 3 See the discussion in part 2, infra, concerning the statute of limitations as applied to this audit report. There it is pointed out that a proceeding for the enforcement of a penalty as to the biennial audit that was due on January 31, 1986, is barred by the applicable limitation statute.

Footnote: 4 4 On November 24, 1986, the provisions of § 682.612 were recodified under § 682.610. See 51 Fed. Reg. 40886, 40888, 40923 (1986). See also 52 Fed. Reg. 14245-6 (1987) (changes to Part 682 became effective on November 24, 1986). The new regulations located in § 682.610 did not contain the requirement of

submitting biennial audits.

Footnote: 5 5See 52 Fed. Reg. 45712, 45733 (1987). See also 53 Fed. Reg. 13744 (1988) (changes to Part 668 became effective on February 3, 1988).

Footnote: 6 6 See In Re Hartford Modern School of Welding, Dkt. No. 90- 42-ST, U.S. Dep't of Education (Decision) (January 31, 1991) at 12 (since § 682.612(e) requires submission of an audit but does not establish a specific date for submission, it is consistent with the regulation to require the submission of the biennial audit within a reasonable period of time following the end of the last fiscal year).

Footnote: 7 7§ 668.12 was amended with the changes published in 52 Fed. Reg. 45712, 45727 on December 1, 1987. As stated above, these changes became effective on February 3, 1988. See 53 Fed. Reg. 13744 (1988) (changes to Part 668 became effective on February 3, 1988).

Footnote: 8 8 Under Part 668, no comments addressed the change in the regulations central to the issue for resolution before this tribunal. See 51 Fed. Reg. 40886, 40947 (1986). It was provided, however, that in order to reduce the unnecessary duplication of regulations, a number of provisions under Part 682

were deleted and replaced with cross-references to the Student Assistance General Provisions under Part 668.

The General Provisions, however, did not include the biennial audit provision until February 3, 1988, providing only that § 668.23 was promulgated to reflect a new provision of the HEA made by the Higher Education Amendments of 1986. See 52 Fed. Reg. 45718 (1987).

Footnote: 9 9 See supra note 6 and surrounding text.

Footnote: 10 10 See § 668.23(c)(3) and (4)(ii)(1988).

Footnote: 11 11 See § 668.23(c)(3) and (4)(ii)(1989).

Footnote: 12 12 See § 668.23(c)(3) and (4)(ii)(1990).

Footnote: 13 *13 See § 690.84(b).*

Footnote: 14 *14 SFCMS claims at page 37 of its Initial and Reply Brief that "the auditor, after threats from the OIG made an attempt to withdraw the audit."*

Footnote: 15 *15 It is worth noting that the tribunal has found no evidence in the record that indicates that SFCMS has submitted a single acceptable audit.*

Footnote: 16 *16 The Fifth Circuit in Core stated that in certain situations, "[t]he government may . . . be entitled to invoke the equitable powers of the Court to toll the § 2462 limitations period . . . . If it were shown, for example, that the government's failure to file its action within the limitations period was caused by improperly dilatory tactics of [the appellee], tolling might be appropriate." Here, OSFA has not raised the issue by requesting this tribunal to invoke equity.*

Footnote: 17 *17 See Meyer at 913: "During a period of time commencing on or about January 18, 1978 and concluding on or about September 21, 1978, Robert E. Meyer, appellee herein, allegedly disobeyed a series of antiboycott regulations promulated under the Export Administration Act (EAA) . . ." [emphasis added]*

See also Core at 481: "The Commerce Department charged Core Laboratories, Inc. (Core) with violating these provisions [of the
EAA] on various dates, the last alleged violation occurring on August 1, 1978." [emphasis added]

Footnote: 18 *18 It could also be argued that even if the duty to submit the required audits first accrued before the five year limitations period, the continuing failure to submit those audits was a breach of the institution's fiduciary duty that continued on a daily basis and thus occurred within the limitations period. However, it is more appropriate to reserve discussion of this separate issue for paragraph 4, the portion of the decision concerning termination.*

Footnote: 19 *19This regulation is now contained in § 668.23(c)(3) (1991), which is essentially similar.*

Footnote: 20 *20 To the extent that SFCMS argues at pages 37-38 of its Initial and Reply Brief that because § 668.90(a)(3)(iv) explicitly refers to violations of § 668.23(c)(4), it does not apply to the failure to submit audits as required in general, such argument is rejected.*

If the tribunal were to accept this argument, it would slice the law so exceedingly thin as to render it meaningless and absurd. § 668.23(c)(1) contains the requirement that institutions that participate in the GSL program shall have performed a financial and compliance audit. § 668.23(c)(3) explains how often the institutions must submit these audits (every two years) and the period of time that these audits must cover (the institution's activities for the entire period of time since the preceding audit). Similarly, § 668.23(c)(4) explains when these audits must be submitted. The wording of § 668.23(c)(4) is adequate to embody the audit violations which occurred in this case since January 31, 1989, since that regulation requires the institution to "submit the audit report to the Inspector General by January 31 of the year following the last

year covered by the audit."

In any case, the tribunal notes that not only has SFCMS violated § 668.23(c)(1) by failing to submit audits altogether, the College has also violated § 668.23(c)(4) by failing to submit those audits altogether and in a timely manner.

The tribunal also notes SFCMS's argument that because § 668.90(a)(3)(iv) refers to § 668.23(c)(4), this must imply that § 668.90(a)(3)(iv) does not apply to termination actions taken against an institution that has submitted an audit that was rejected because the audit failed to satisfy the quality requirements contained in § 668.23(c)(1); SFCMS argues that the defective audit dated November 29, 1988 falls into this category. This argument is of no consequence since there are so many other audit deadlines which were violated and which come within the coverage of § 668.23(c)(4). Any one of the violations brings into operation of requirements of § 668.90(a)(3)(iv). However the fact remains that once that audit, which in fact was defective, was rejected on August 25, 1989, the prior status of lack of submittal of an audit was restored. A proper audit would have had to be submitted thereafter in order to resolve that specific violation.

Footnote: 21 21 In SFCMS's Initial and Reply Brief, counsel for SFCMS states in footnote 11 on page 25 that "[e]arlier cases provide split authority on this issue. [citing Bradley]" This could be construed to imply that Bradley is no longer good law. This would be in error. The Court did not overrule Bradley in Bowen. Moreover, as will be explained in the text, the Bradley/Thorpe line of Supreme Court cases has been cited approvingly by the Court in cases decided after Bowen. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 661-662 (1989).

Footnote: 22 22 For a more thorough analysis of the Bowen and Bradley lines of cases, see Wisdom v. Intrepid Sea-Air Museum, No. 91 Civ. 4439 (1992 WL 168224) (S.D.N.Y. June 26, 1992).

Footnote: 23 23 In Wisdom v. Intrepid Sea-Air Museum, No. 91 Civ. 4439 (1992 WL 168224) (S.D.N.Y. June 26, 1992), the United States District Court for the Southern District of New York noted that in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990), the Supreme Court observed that the rules of Bradley and Bowen are in "apparent tension," but declined to explain the tension of the two approaches. Justice Scalia wrote a concurring opinion in which he stated that Bradley and Bowen are not in "apparent tension," but in fact were in "irreconcilable contradiction." Bonjorno at 855 (Scalia, J., concurring).

Footnote: 24 24 In the Schooner Reggy case the term "great national concern" was used since the case concerned the relationship of the United States and France.