IN THE MATTER OF UNITED TALMUDICAL ACADEMY OF MONSEY, Monsey NY
Respondent.

Docket No. 93-11-ST
Student Financial Assistance Proceeding

DECISION

YOLANDA R. GALLEGOS, Esq., for Respondent

CAROL BENGLE, Esg., for Student Financial Assistance Programs of the United States Department of Education

Before Paul J. Clerman. Administrative Law Judge:

This proceeding was commenced December 20, 1992, by Ronald D. Lipton, Acting Director of the Compliance and Enforcement Division of the United States Department of Education (ED), who transmitted to Max Werczberger, the President of the United Talmudical Academy of Monsey (UTA or respondent), a letter/notice in which ED stated its intention to terminate the eligibility of UTA to participate in programs authorized under Title IV of the

Higher Education Act of 1965, as amended (HEA), 20 USC 1070 et seq. and 42 USC 2751 et seq., for reasons set out in Part I of the letter/notice, and in which ED stated its intention to fine UTA $120,000, for reasons set out in Part II of the letter/notice.

The Title IV HEA programs in connection with which ED intends to terminate UTA's eligibility to participate are: Federal Pell Grant, Federal Supplemental Educational Opportunity Grants, Federal Work-Study, Federal Perkins Loans, and the Federal Family Education Loan Program, which was formerly called the Guaranteed Student Loan Programs. Included also are the Stafford Federal Student Loan Program, the Federal Supplemental Loans for Students Programs, the Federal PLUS Programs, and the Federal Consolidation Loans Program.

The procedures being followed in this matter are those established by the Secretary of ED (the Secretary) and set out in 34 CFR Subpart G, specifically at section 668.86, as

amended, for initiating the termination of eligibility of educational institutions to participate in Title IV programs under HEA.

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This termination action is stated in the letter/notice to be based on respondent's failure to submit required audit reports in accordance with applicable regulations. These regulatory provisions, as cited in the letter/notice, require that an institution that participates in a Title IV HEA program must conduct a financial and compliance audit of its financial and program transactions for that program, and that such an audit must be performed at least once every two years

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and must cover the award years that have elapsed since the previous audit. Audits must be conducted by an independent auditor in accordance with audit standards and guidelines issued by the General Accounting Office and ED's Inspector General. An institution must submit its audit report by January 31 of the year following the last award year covered by the audit, except that if the institution received funds for certain programs (the Campus-Based programs,, as identified in the letter/notice), it is required to submit its audit report by March 31 of the year following the last award year covered by the audit.

The letter/notice specifies that: (a) UTA was required to submit an audit report for each Title IV program in which it participated that covered the biennial audit period July 1, 1985 through June 30, 1987. The deadline for this submission was June 15, 1988, as extended by ED. (b) UTA was required to submit an audit report for each Title IV program in which it participated that covered the biennial audit period July 1, 1987 through June 30, 1989. The deadline for this submission was January 31, 1990 (c) UTA was required to submit an audit report for each Title IV program in which it participated that covered the biennial audit period July 1, 1989 through June 30, 1991. The deadline for this submission was March 31, 1992, as extended by ED.

The letter/notice states that UTA did not submit any of these audit reports in compliance with the regulations. ED acknowledges that UTA submitted an audit report covering the

period July 1, 1985 through June 30, 1987, but alleges that this report did not comply with 34 CFR 668.23 because it was not timely submitted. ED states that it does not consider an institution to be in compliance with 34 CFR 668.23 with respect to any biennial audit report submitted unless and until ED has determined that each of the section 668.23 standards is satisfied. ED indicates that in the letter/notice that it has not yet been determined whether UTA's audit report for the period July 1, 1985 through June 30, 1987 complies with all of the provisions of 34 CFR 668.23. It is emphasized that as of the date of the letter/notice UTA had not submitted audit reports covering the biennial audit periods July 1, 1987 through June 30, 1989 and July 1, 1989 through June 30, 1991.

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The letter/notice states that the termination action is also based on UTA's failure to meet the standard of conduct required of a fiduciary, as set forth in 34 CFR 668.82. That section provides that in its administration of Title IV HEA programs a participating institution acts as a fiduciary, and that in that capacity the institution is subject to the highest standard of care and diligence in accounting for funds received under those programs. ED alleges that by its failure to submit the required audit reports UTA has failed to account for the funds received under Title IV HEA programs and thus has failed to conform to the regulatory requirements as a fiduciary.

Respondent was notified in the letter/notice that its eligibility to participate in Title IV HEA programs would terminate January 20, 1993, unless by that date UTA submitted a request for a hearing and/or written material indicating why the termination should not take place. On January 19, 1993, on behalf of UTA its counsel requested a hearing to contest the proposed termination and fine. I was designated the hearing official in this matter on February 9, 1993, and

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I subsequently issued a procedural order setting the matter for hearing, such hearing to consist of the submission by the parties of briefs, written materials and reply briefs. In due course such submissions were timely made by the parties. This matter is now ripe for decision.

On December 20, 1993, respondent's counsel notified me that she was withdrawing as counsel in this matter. On December 28, 1993, I wrote to respondent's president, requesting that he promptly notify me, and ED's counsel, as to whether he has retained or will be retaining counsel to represent UTA in this proceeding, and if so to identify that counsel. I indicated that pending receipt of a reply I would take no action in this case, but not for a period longer than fifteen days from the date of my letter. As of the date of this decision, which is more than fifteen days from the date of my letter, I have received no response from UTA nor has any counsel entered an appearance for UTA in this proceeding.

Counsel for the Student Financial Assistance Programs (SFAP) of ED contends on brief that the only issue to be addressed in this case is the factual issue of whether UTA failed to timely submit one or more biennial audit reports as required under 34 CFR 668.23. SFAP alleges in this regard that in the eight years of UTA's participation in Title IV HEA programs UTA has never submitted a biennial audit report on time. In support, SFAP introduced the declaration, dated June 25, 1993, of a Supervisory Auditor (Eisenberg) for ED's Regional Inspector General for Audit (RIGA) covering New York, among other States, in which Eisenberg states with regard to UTA's biennial audit reports:

(1) that for the biennial audit period July 1, 1985 through June 30, 1987 (the 85/87 report), which was required to be submitted by June 15, 1988, that report was not received until November 19, 1992;

(2) that for the biennial audit period July, 1, 1987 through June 30, 1989 (the 87/89 report), which was required to be submitted by January 31, 1990, that report was not received until March 26, 1993; and

(3) that for the biennial audit period July 1, 1989 through June 30, 1991 (the 89/91 report), which was required to be

submitted by March 31, 1992, that report was not received until May 17, 1993.

Eisenberg stated in his declaration that ED does not consider that an institution is in compliance with 34 CFR 668.23 until RIGA has accepted that institution's audit reports. According to Eisenberg, the 89/91 report has been accepted by RIGA, but the 85/87 and 87/89 reports have not been accepted as of the date of his declaration.

UTA confirmed on brief that its 85/87 report was submitted November 19, 1992, and stated that its 87/89 report and 89/91 report were submitted March 23, 1992, and May 10, 1993, respectively. Viewed from its own perspective, however, UTA

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stresses that it has submitted all required biennial audit reports for each award year from when its participation commenced in Title IV HEA programs. UTA takes the position, as later discussed, that ED is here seeking to terminate UTA's participation in Title IV HEA programs and to fine UTA solely because UTA did not submits its biennial audits in a timely fashion, and that there is no justification for such termination and fine.

The position taken by SFAP is that once it is established, as SFAP contends it has been established, that UTA has failed to comply within the regulatory time frame for submission of biennial audit reports as set forth in 34 CFR 668.23(a)(4), the sanction of termination is mandatory. SFAP relies on 34 CFR 668.90(a)(3)(iv), 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 hearing official must find that the termination is warranted;

That regulatory provision, herein sometimes referred to as subparagraph iv, was added to section 668.90 on July 31,

1991, in Volume 56, No. 147, at page 36698 of the Federal Register. SFAP makes reference to the comments of the Secretary (of ED) at page 36694 of that Federal Register in explanation of the rationale for this mandatory sanction, in part as follows:

> ...the Secretary considers that type of violation to be sufficiently detrimental to effective monitoring of an institution's title IV, HEA program activities to merit the placing of restrictions on [a hearing official's] discretion to modify the decision to terminate the institution's participation. The Secretary considers the fact that a large number of institutions have ignored deadlines and refused to take the simple steps to explain why those deadlines were ignored is a strong justification for adopting the changes in this section. Chances: Section 668.90(a)(3)(iv) is revised to provide that [a hearing official] must uphold any termination action imposed against an institution for a violation of the deadlines for submission of audit reports in 668.23(c)(4).

SFAP relies not only on the specific language of subparagraph iv and the Secretary's comments, but also on recent precedent. In particular, SFAP cites San Francisco College of Mortuary Science (SFCMS), Docket No. 92-8-ST, decided December 31, 1992, and affirmed on appeal March 26, 1993, by the Secretary. In SFCMS, as here, it was alleged, among other things, that an institution had failed to make timely compliance with section 668.23(c)(4), and there, as here, SFAP argued that subparagraph iv, effective 45 days after its Federal Register publication, allowed the hearing official no

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alternative but to terminate the institution's participation in Title IV HEA programs. The decision in SFCMS found that the language of subparagraph iv is very clear that if it is shown that an institution has failed to comply with the requirements of 668.23(c)(4), the hearing official must find that termination is warranted. That decision, which was

affirmed by the Secretary, concluded in this regard that "The words [of subparagraph iv] allow for no discretion."

SFAP also cites Romar Beauty Schools (Romar), Docket No. 90-90ST, decided July 6, 1993. After finding that the respondent institution had failed to submit timely biennial audits and thus had violated section 668,23(c)(4), the decision concluded that

subparagraph iv prescribes that the penalty for such violation is mandatory termination, and that the hearing official "has no discretion to order any remedy other than imposing termination." In a footnote to that conclusion the decision states, among other things, that:

> ...the compulsory language of Section 668.90(a)(3)(iv) means that the [Hearing Official] does not have the discretion to step outside of the regulation and countenance a different penalty. The regulation's restrictive language precludes considerations of equity, fairness or mitigating circumstances. [Footnote 710, page 251]

It is precisely these latter considerations, that is, equity, fairness or mitigating circumstances, that are the primary basis for UTA's opposition to ED's action to terminate UTA's participation in Title IV HEA programs. UTA contends that the hearing official is not required to terminate UTA automatically, that the hearing official must consider both mitigating circumstances to the violations as well as the equities of the situation. UTA alleges that it has been the published policy of the Secretary since at least 1977 that the termination of an otherwise eligible institutions's eligibility for students financial aid programs is an extremely serious measure, and that such an action will be taken only when: (a) an institution has consistently violated the statute and regulations governing student aid programs and standards of financial responsibility and administrative capability, and (b) attempts to remedy such a situation have failed. See 42 Fed.

Reg. 64567. UTA contends that the evidence in the instant proceeding falls far short of establishing that UTA's conduct in this case meets the two-prong test of the Secretary's policy, that is, that UTA's violations have been (1) continuous, and (2) unremedied despite efforts to do so. UTA contends that because it has submitted all of the required audits relied on in the letter/notice, SFAP can allege only tardiness of submission, and that this does not and cannot constitute a pervasive pattern of consistent and egregious violations sufficient to warrant termination under the Secretary's policy.

UTA states that in apparent recognition in the Secretary's policy on terminations that termination of an institution's

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eligibility is the most severe sanction and should be imposed only in extreme and extraordinary situations, the governing regulations at 668.90(a)(2) provide that in a termination proceeding the hearing official may impose a lesser sanction than termination, that is:

> ...the hearing official may, if appropriate, issue a decision to fine the institution or impose one or more limitations on the institution rather than terminate its eligibility to participate.

UTA alleges that termination actions in the past have been aimed at institutions that have either fraudulently violated statutes and regulations or have totally ignored their requirements, even after repeated warnings and attempts by ED to alleviate violations. According to UTA, this description does not fit this respondent, and neither does the sanction of termination.

UTA states that there exists no known reported case where an institution was terminated under the circumstances present in this case. To the contrary, according to UTA, data reported by the Secretary indicates that as of March 1989 some 1,500 institutions had not filed audits during a period going back to 1981, but the Secretary has not sought to terminate those

institutions. See 54 Fed. Reg. 11356. Also, according to UTA, an Ed report indicates that during the period October 1992 through June 1993 SFAP initiated 49 termination actions based, in part, upon the failure of institutions to submit audits on a timely basis. UTA notes that in half of those cases the payment of a fine was substituted for the termination penalty, and UTA speculates that many of the remaining cases may be resolved in a like manner. UTA speculates also as to the administrative burden that would ensue if a termination action were brought against every institution with missing or late audits, and UTA alleges that ED must as a practical matter, and probably already has, established criteria for determining which cases merit an action for termination and which do not. UTA believes that its own situation may well fit those criteria, but UTA contends that it cannot demonstrate that fact because those criteria have not been disclosed to UTA. To UTA the standards under which decisions are made to terminate or to not terminate constitute a body of "secret laws", the formulation and use of which has been condemned by the courts. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (1980).

In UTA's brief there is tacit recognition that the hearing official's discretion under section 668.90(a)(2) to impose lesser sanctions than termination is affected by the addition of subparagraph iv to the regulations. UTA contends, however, that subparagraph iv is inapplicable in this case. The reason for this, according to UTA, is threefold:

(1) The letter/notice in this case makes no mention of subparagraph iv.

TA points out that 34 CFR 668.86(b)(1)(i) requires that a termination notice must identify the alleged violations which

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constitute the basis for an action, and UTA contends that in this case the notice failed to comply with this requirement. UTA regards a termination notice as similar to an indictment, and contends that SFAP cannot now raise allegations based on subparagraph iv, which is not the termination notice.

(2) Application to UTA of the subparagraph iv requirements is contrary to the presumption against retroactivity.

Nothing in subparagraph iv or in the Secretary's comments thereon, according to UTA, gives any indication that this provision is intended to apply other than prospectively. UTA contends that court decisions are numerous in holding that regulations will not be applied retroactively without a clear indication that the administrative agency applying that regulation intended to diverge from the norm of acting prospectively. See Simmons v Lockhart, 931 F.2d 1226 (1991), for example. UTA asserts that retroactive application of this particular provision would impose manifest injustice on UTA because the tardy submission of audits results, in part at least, from inefficiencies on the part of ED in not keeping a closer control over this function.

(3) Application of subparagraph iv to audits due prior to the effective date of that provision

- violates the prohibition against Ex Post

Facto laws.

UTA alleges that ED was acting in a legislative capacity when it added subparagraph iv, because it changed the penalty for an existing violation by removing the discretion of the hearing official and imposing instead the penalty of mandatory termination. UTA acknowledges that termination was a possible penalty prior to subparagraph iv, but points out that subparagraph iv removes the possibility of a lesser penalty and thus operates to the detriment of UTA in that the standard of punishment under subparagraph iv is more onerous than the standard in effect when the alleged violations occurred. The termination of an institution's eligibility, in UTA's view, is clearly a punishment or penalty, particularly so when that termination is imposed, as here, in a summary fashion without prior consideration of mitigating or other equitable or fairness factors. Thus, UTA insists, subparagraph iv cannot be applied in this case without violating the constitutional prohibition against Ex Post Facto laws.

UTA regards it as its right to present and have considered mitigating factors and equitable circumstances in this matter. Termination of its eligibility would undoubtedly lead to the closing of the institution, according to UTA, and thus its situation here is not unlike that of a criminal defendant facing the death penalty. UTA insists that it has made good faith efforts to comply with all regulatory requirements, and that delays in filing audits resulted from extenuating circumstances, such as a change in administrators at the institution. With all of its audits filed, UTA contends that no harm to the public can result, and a lesser sanction than termination should be imposed. UTA notes that as recently as

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August 1988 when ED renewed UTA's eligibility for Title IV HEA participation, UTA was told that its eligibility would remain in effect so long as the institution "continues" to satisfy regulatory requirements, an indication according to UTA that it had previously satisfied those requirements.

Assuming, arguendo, that subparagraph iv is applicable in this case, UTA contends that the hearing official is not required to automatically impose the penalty of termination if he finds a lack of compliance with section 668.23(c)(4), but is required to find only that termination is warranted. UTA points out in this regard that subparagraph (a)(2) of section 668.90 is written, plainly and specifically, in terms of imposing sanctions, while in (a)(3)(iv) of that same section there is only the phrase "must find that the termination is warranted." UTA states that ED is capable of providing for the automatic imposition of the penalty of termination if it intends to do so, and contends that in fact ED has not so provided. According to UTA, ED may not ignore the plain meaning of subparagraph iv as it must be construed under the ordinary rules of statutory construction, and cannot simply misconstrue that regulation to suit its views in this case. UTA maintains that subparagraph iv permits, indeed requires, the hearing official to consider mitigating circumstances and the equities of the situation, and a range of sanctions other than termination. In support, UTA cites other comments of the Secretary in the Federal Register at 56 Fed. Reg. 36694 (July 31, 1991), in which the Secretary stated:

The proposed 668.90, while not actually providing for the automatic termination of an institution for a violation of the audit report deadlines...

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...the Secretary is persuaded that the fine. limitation, suspension, and termination proceedings in [sections] 668.83, 668.84, 668.85, and 668.88 provide a broad and effective range of sanctions to deal with violations of the deadline...

UTA takes the position, in fact, that the Secretary made clear his intent that the new termination standard alleged by SFAP to have been created in subparagraph iv should not be applied to institutions in UTA's situation. UTA notes that in the same issue of the Federal Register the Secretary stated:

...proposed 668.90 seemed to state that a termination would result whenever an institution missed a deadline...Under the changes made to the proposed 668.90, the requirement for [a hearing official] to uphold a termination could apply to an institution that misses a single audit report deadline, but only if the Secretary believes that the circumstances surrounding the violation justify the Secretary's bringing a

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- termination action against the institution.

Ordinarily, disputes concerning violations of

that nature are resolved long before the dispute reaches the stage of a proceeding under subpart G.

According to UTA, the thrust of the Secretary's comments is that the circumstances surrounding a violation must justify the initiation of a termination action. UTA contends that such justification is not shown here.

SFAP has alleged also that in failing to timely submit its biennial audit reports UTA failed to meet the standards of conduct required by 34 CFR 668.82 of a fiduciary in the administration of Title IV HEA programs. That section provides that a participating institution acts in the nature of a fiduciary in its administration of Title IV HEA programs, and that 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. That section also provides that an institution's

failure to administer such programs or to account for funds received under such programs in accordance with the highest standard of car and diligence required of a fiduciary constitutes grounds for a fine, or the suspension, limitation or termination of the institution's eligibility to participate in those programs. SFAP alleges that UTA has blatantly and repeatedly violated fiduciary standards by failing to submit its required audits to the Secretary when due, to account for its expenditures of Title IV HEA funds. Such violation, according to SFAP, constitutes an independent and additional ground warranting termination of respondent's eligibility to participate in Title IV HEA programs.

UTA notes in reply that precisely the same acts or failures to act are relied on by SFAP as grounds for the alleged violation of both subparagraph iv and section 668.82, the alleged breach of fiduciary duty. UTA states that it has shown that untimeliness in the submission of audits is not of itself a sufficiently serious violation to warrant the

extreme penalty of termination, and UTA contends that untimeliness in the submission of audits does not in any way establish a breach of fiduciary duty or constitute a violation of such seriousness as to warrant a termination of eligibility.

Responding to issues raised in SFAP's brief, respondent moves that ED's action to terminate and fine be dismissed, or in the alternative that this proceeding be stayed until: (a) RIGA completes its review of UTA's biennial audit reports, and (b) SFAP discloses to UTA the standards employed in ED to determine whether to pursue the penalty of termination against institutions generally, and UTA in particular, accused of failing to submit audits or of submitting late

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audits. Respondent requests that after the RIGA review is completed and after SFAP discloses the standards, UTA be given the opportunity to present evidence in this matter at an oral hearing. At such an oral hearing, also, UTA would offer evidence that the fine imposed by ED is in excess of the statutory maximum for fines.

In setting the amount of the fine to be imposed on an institution in the circumstances described in this decision, ED takes into consideration both the institution's size and the gravity of the institution's violations. SFAP regards an institution's failure to comply with audit regulations as an extremely grave violation. SFAP states that an audit is an external means of evaluating the accuracy of an institution's determinations of student eligibility, and of evaluating the institution's awarding and disbursing student aid funds and its refunds of unearned tuition and other costs. SFAP contends that an institution's failure to submit an audit hampers ED and increases ED's costs in

determining whether and to what extent liabilities exist.

In the letter/notice respondent was informed by Lipton in Part II that Title IV HEA program regulations permit a fine of

$25,000 for each violation, and that in determining the size of an institution ED bases its determination on:

...the amount of Title IV, HEA program funds received by or on behalf of students for attendance at that institution during the award year(s) in question.

UTA was further informed that in accordance with applicable regulations ED uses a fine schedule for failure to submit audit reports that, as here pertinent, provides for a fine of $25,000 where the "Amount of funds received/by program/by 2-year period" exceeds $1 million, and a fine of $20,000 where the amount of funds is between $750,001 and $1 million. Based on data derived from ED's Institutional Data System, Lipton calculated and fixed the amount of fine for each audit period as follows:

UTA Failure to Submit Timely Biennial Audit Reports

for Pell Grant Program	for Guaranteed student Loan Program	Fines Imposed
Award yrs 1985/86 & 1986/87		$25,000
	Award yrs 1985/86 & 1986/87	20,000
Award yrs 1987/88 & 1988/89		25,000
	Award yrs 1987/88 & 1988/89	25,000
Award yrs 1989/90 & 1990/91		25.000
Total	120,000	

UTA assails the $120,000 fine, calling it excessive, arbitrary and capricious, and arguing that for a total of only three biennial audits ED is seeking to impose a total of five fines.

For the late submission in the same award years of audit reports in different student aid programs, Pell and Guaranteed Student Loan, according to UTA, ED is imposing separate fines, and UTA regards such "double fining" as inappropriate. UTA considers that these are single violations in these award years and not two separate violations under Pell and under GSL. UTA also considers these fines, $45,000 for the award years 1985/86 and 1986/87 as calculated by ED, and $50,000 for 1987/88 and 1988/89, to be well in excess of the statutory

maximum fine of $25,000 per violation. In support UTA cites the Judge's decision in Hartford School of Modern Welding, No. 90-42-ST, decided January 31, 1991.

Primarily, UTA is critical of ED's method of determining the size of an institution for the purpose of calculating the dollar amount of the fines to be imposed. UTA notes that ED purports to measure an institution's size by totaling the amount of applicable Title IV funds received by the institution during the award years in question. According to UTA, however, the amount of Title IV funds received by an institution, and by UTA in particular, cannot with any degree of accuracy reflect the size of the institution for the purposes of 34 CFR 668.92(a)(2), which mandates that in determining the amount of a fine the Secretary and the hearing official shall take into account the size of the institution. UTA states that institutions generally and UTA in particular rely on Title IV funds. For UTA, it contends, which is highly reliant on such funds, ED's method of determining size on the basis of the amount of such funds inevitably falsely inflates the result.

UTA appears to be critical, also, of ED's motivations and procedures in calculating the amounts of fines to be imposed in proceedings of this nature. UTA points out in this respect that the Acting Director, Lipton, testifying in Southern Vocational College, No. 90-41-ST (decided November 19, 1992), acknowledged that determining the amount of the fine to be imposed in cases such as this is an "extremely inexact science", and that the matter of the size of an institution for purposes of imposing fines for violations of filing requirements "is not spelled out in the regulations." See the discussion in that decision at pages 117 to 120. Lipton's testimony in that case is construed by UTA as indicating, among other things, that in the process in which the amounts of fines to be imposed is calculated by ED, it is contemplated that the amounts of such fines that may ultimately be approved and imposed in proceedings, such as this, before tribunals may be lower in amounts than the amounts initially sought by ED, so that ED's practice in this regard is "setting this amount at higher than we can actually receive as far as a fine..." See Southern Vocational College,

supra., at 118. There seems to be the implication, by UTA at least, that the amount of the fine set out in Part II of the letter/notice is no more than the opening ploy of an ongoing negotiating process.

GENERAL DISCUSSION

I find as a fact, at the outset, that respondent, an educational institution that participates in student financial assistance programs under Title IV HEA, has failed to make timely submission of biennial audits in each of the

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Title IV HEA programs in which it participated for the periods July 1, 1985 through June 30, 1987; July 1, 1987 through June 30, 1989; and July 1, 1989 through June 30, 1991. I find that the failure on the part of

respondent to submit timely biennial audits is contrary to the requirements of the governing regulations in 34 CFR Subpart B. I also find, as a matter of fact and law, that such failure to submit timely biennial audits constitutes non-compliance with and violation of the said regulations.

I perceive in this record no serious dispute to the above findings.

True, as pointed out on brief by respondent, there was a time period during which there existed what has been referred to by SFAP as a "gap in the regulations", that is, a time period during which the regulations in effect so far as concerns the Guaranteed Student Loan program did not contain the requirement that institutions must submit timely biennial audits. This was a time period, specifically from November 24, 1986 through February 2, 1988, in which there occurred a recodification of regulatory provisions, and during which the biennial audit provision in the 1987 program regulations of 34 CFR Part 682, pertaining to the Guaranteed Student Loan program, appeared to have been, in the words of SFAP, "inadvertently deleted." See the discussion commencing at page 14 in the Judge's decision in SFCMS. It was found in

that decision that the effect of the inadvertent deletion of audit requirements in the Guaranteed Student Loan program was eradicated by regulations in force both before and after the filing deadline, January 31, 1987. A like finding is warranted, and is made, in the instant proceeding.

I further find on this record, as a matter of fact and law, that based on its failure to make timely submission of required biennial audit reports, respondent failed to properly account for funds it received under Title IV HEA programs, and as a fiduciary in its administration of Title IV HEA programs failed to exercise the highest standard of care and diligence required of a fiduciary, in violation of 34 CFR 668.82, as alleged in the letter/notice dated December 30, 1992.

The finding above that respondent, as a fiduciary, failed to exercise the highest standard of care and diligence, is indeed, as contended by UTA, predicated on precisely the same conduct that is the basis of my earlier finding. The parties do not disagree on this, but they view it from different perspectives. SFAP regards this as an additional ground for termination of UTA's eligibility. UTA declares, on the other hand, that inasmuch as the failure to submit timely audits is not sufficiently serious in and of itself to warrant a termination of eligibility, neither can any breach of fiduciary duty based on the same conduct support a termination, or for that matter a fine.

It is very clear that the issue before me in this proceeding is not whether respondent has failed to comply or to comply

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fully with the governing regulations; the record before me establishes, and I have found, that respondent has failed to comply therewith, as alleged in the letter/notice. The issue before me is what are the sanctions, under the regulations and precedent, that should or must be imposed as a result of this non-compliance. As articulated by SFAP the selection of sanctions is extremely limited--the hearing official may impose a fine and must find that termination of eligibility

is warranted. Respondent, on the other hand, sees other, lesser sanctions available.

Once it is found by the hearing official in a proceeding such as this that an institution has failed to comply with the requirements of section 668.23(c)(4), the language of subparagraph iv, on its face, precludes consideration by the hearing official of mitigating circumstances or other like factors and impels the finding that termination of the institution's eligibility is warranted. This is in accord with and is supported by the published comments of the Secretary and precedent. In Romar the judge noted that the failure of an institution to submit timely audits as required under 668.23(c)(4) is not simply a technical or procedural matter, but rather is a serious regulatory violation which under subparagraph iv requires mandatory termination of eligibility, and in SFCMS the judge, and the Secretary, affirmed that the wording of subparagraph iv allowed for no discretion on the part of the hearing official, that upon finding violation of audit regulations the hearing official must terminate the institution's eligibility. In neither decision was a distinction recognized, as is here alleged by UTA, between a mandatory finding that termination is warranted and the mandatory imposition by the hearing official of the sanction of termination.

The Secretary's comments as of July 31, 1991, at 56 Fed. Reg. 36694 are significant. In comments addressed to the text of subparagraph iv as it was simultaneously adopted, the Secretary alluded to the text of that provision as it had been previously published and commented on by others, and the Secretary noted that the prior text did not actually provide for the automatic termination of an institution for violation of audit deadlines. The Secretary went on to state that various steps were being taken to make the failure to submit audit reports a rarity, including improvements in monitoring those filings. The Secretary stated that routine procedures in subpart G offered to institutions ample opportunity to demonstrate those factors that caused failure to meet regulatory deadlines, and gave the

Secretary discretion to seek those sanctions suitable to the severity of the violations, sanctions ranging from fines all the way to termination. The Secretary further indicated the anticipation that rarely will violations of deadlines be so flagrant as to justify the sanction of termination, but that when institutions ignore deadlines and refuse to explain why, such violations are considered by the Secretary to be sufficiently detrimental to effective monitoring of Title IV HEA programs as to merit the placing of restrictions on a hearing official's discretion to modify the Secretary's decision to terminate an institution's participation in those programs. The Secretary made it quite clear that subparagraph iv, in the text concurrently adopted, did so restrict the

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hearing official's discretion to modify.

I conclude, accordingly, that under regulation and precedent the time to offer evidence of mitigating circumstances and the like is before the matter comes to hearing, and that the hearing official, at and after such hearing, has not the discretion to consider such evidence since the amendment of section 668.90.

Respondent has alleged, as previously noted, that subparagraph iv, even if it is construed to mandate the sanction of termination, for several reasons may not be applied in this case. First, according to UTA, subparagraph iv is inapplicable because "it is not cited" in the letter/notice. Stated otherwise, under 34 CFR 668.86(b)(1)(i) ED must notify UTA of its intention to terminate UTA, identify the alleged violations which are the basis for that action, and cite the consequences of that action; the letter/notice purported to accomplish that; and subparagraph iv, which is not "identified" in the letter/notice, is thus beyond the parameters of the issues that may be raised by ED in this case. As pointed out by SFAP, however, the letter/notice did in fact notify UTA of ED's intention to terminate eligibility, did identify the alleged violations which are the basis of the action, and did set out the consequences of the action, namely, termination and fine. The letter/notice was sufficient in form and content to satisfy all of the elements of notice that are required by regulation and to constitute adequate notice to respondent. Compare the judge's ruling on notice in. SFCMS, and see also the decision

in Institute of Multiple Technology, No. 92-26-ST, decided September 30, 1992. UTA's argument in this regard is rejected.

Respondent has alleged that application to the facts of this case of the requirements of subparagraph iv would have retroactive effect, contrary to the presumption that regulations are adopted by administrative agencies to apply prospectively and not retroactively. UTA sees nothing in subparagraph iv or in the

related comments of the Secretary that demonstrates any intent that this provision is to be applied other than prospectively, and UTA compares subparagraph iv with other regulations in which the intent is clearly evident that such regulations are to be applied other than prospectively. As noted, Simmons v. Lockhart, supra., is cited to the effect that administrative agencies usually act prospectively, setting general rules for future conduct, and that courts will not apply regulations retroactively in the absence of clear indication that an administrative agency intends in a particular regulation "to diverge from the norm" of acting prospectively. Yakima Valley Cablevision v. FCC, 794 F.2d 737 (1986) is cited to the effect that when administrative rules are sought to be applied retroactively, agencies so applying such a rule must explain why, so that reviewing courts can determine whether such application of the rule is rational.

According to SFAP, on the other hand, the courts have construed a retroactive law or regulation to be one that, as here pertinent, takes away or impairs a party's vested right. This was discussed at length in SFCMS, and the judge there

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concluded that an institution participating in Title IV HEA programs has no vested right in continuing or future eligibility to participate in such programs, and that in SFCMS and like proceedings application of subparagraph iv does not infringe upon or deprive an institution of any vested right. The judge in his decision in SFCMS regarded as dispositive on the issue of the alleged retroactivity of

subparagraph iv a recent decision (November 24, 1992) of the United States Court of Appeals for the District of Columbia Circuit, Association of Accredited Cosmetology, 979 F.2d 859 (AACS). The court in AACS reviewed an ED regulation that required that in determining the future eligibility of an institution to participate in a Title IV HEA program ED must look at the institution's past default rates. The court relied on federal precedent to the effect that a law is not retroactive simply because it depends on "antecedent facts" for its operation, and found that ED's regulation was not retroactive. In so finding, the court made it clear that participating institutions possess no vested right to future eligibility to participate in Title IV HEA programs.

I conclude and find here that respondent had no vested right to continued or future eligibility to participate in Title IV HEA programs, and that, as a consequence, application of subparagraph iv to the facts of this case had no retroactive or unlawful effect as alleged by respondent. I conclude and find, similarly, that application of subparagraph iv to UTA's untimely-submitted biennial audit reports did not constitute a violation, as alleged by UTA, of the "Prohibition Against Ex Post Facto Laws."

The prohibition relied on by UTA is found in Section 9 of Article 1 of the Constitution of the United States, namely, "No...ex post facto Law shall be passed." Section 10 of Article 1 provides that "No State shall...pass any...ex post facto Law... n . Blacks Law Dictionary (3rd ea.) in its definition of the phrase ex post facto states that in the Constitution that term extends to criminal and not to civil cases. Under that definition a law is an ex post facto law if it: (1) punishes a person for doing that which was innocent when done, (2) increases the malignity of an offense after it was committed, (3) adds to the punishment after the offense was committed, and (4) retrenches the rules of evidence after an offense is committed so as to make conviction easier. The dictionary indicates that the terms ex post facto and retrospective are not convertible terms, that the latter is a term of wider significance than the former, and includes it.

UTA recognizes that the ex post facto doctrine applies only to "criminal or penal law", but contends that the threatened termination of UTA's eligibility would be injurious to the public and that the termination thus would be a penal matter, endangering UTA's very existence. As seen, in UTA's view subparagraph iv purports to change the punishment for a violation after the violation was committed by removing the discretion of the hearing official to determine the appropriate sanction to be imposed. It follows, according to UTA, that subparagraph iv cannot be applied in this case without violating the prohibition against ex post facto laws. A like argument was made on behalf of the involved institution in SFCMS. The judge there, in somewhat similar circumstances, concluded that termination is a civil penalty, and that

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application of subparagraph iv to the facts of the case does not violate the constitutional prohibition against ex post facto laws. Compare, also, the decision in AACS. A like conclusion is reached on the instant record.

Cognizance is taken at this point of UTA's allegation that ED, in electing to bring this termination action against UTA and not against other like institutions that also failed to submit timely audits, may have established and used its own criteria for determining which cases merit an action for termination and which do not. UTA characterizes these criteria as a body of "secret laws", and contends that such secret laws have been condemned in the courts. UTA offered no evidence, however, that such a body of laws has been formulated or used, nor is there any showing that UTA was singled out or that the action against it was initiated on any other basis than the belief by ED's officials that UTA's alleged violations merit such an action. It is a matter of common knowledge that numerous termination actions have been brought by ED and that many are pending. This proceeding is not before me for the purpose of enquiring into the overall

efficiency of ED's enforcement operations, or to determine whether, in attempting to deal with the 1,500 or more institutions that are said to be in various stages of delinquency in the submission of biennial audits, ED should have proceeded with some other case or cases than this one. All that is before me is whether in the instant case there is shown justification for this termination action, and I have already found that there is. I conclude that UTA's allegations with regard to the "secret laws" constitute no more than speculation, and they will not be further considered.

Under 34 CFR 668.34 the Secretary may impose a fine of up to $25 000 on an institution that violates any provision of Title IV HEA or any regulation implementing that title. Section 668.92 directs the Secretary, and the hearing official, in determining the amount of a fine to take into account the gravity of the institution's violation and the size of the institution. Subparagraph (b) of the latter provision permits the Secretary, upon the request of the institution, to compromise the fine. Turning once again to Black's Law Dictionary, the term "compromise" is defined in its usual sense as the settling of a dispute on the basis of what the parties regard as acceptable terms. It is apparent on this record that no compromise has been reached or made with respect to the fines here involved.

It is well established that fines are imposed to punish an offender, to discourage future offenses by that offender, and to serve as a warning to other potential offenders. In this case, as seen, the fine under consideration is to be accompanied by the termination of this particular offender's ability to offend again, so that punishment of the offender and warning to others are the only purposes to be served by the fines. The fines to be imposed should be high enough in amount to effectively serve those purposes. But if higher in amount than they need be, the fines tend to become arbitrary or capricious, and thus unreasonable. As has been

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acknowledged by knowledgeable persons, the process of determining the appropriate amount of a fine in particular circumstances is far from being an exact science. This is confirmed in many of the decisions that were cited on brief by both parties.

UTA disputes that a fine should be imposed in this case, but does not dispute that if a fine is imposed the guidelines appear in section 668.92, that is, that there must be taken into account the gravity of the violations and the size of the institution. As to the former factor, the gravity of the violations, it has been previously noted that UTA views untimeliness in the submission of biennial audits as a violation of little gravity, in fact of very little gravity. However, there is ample

authority to the contrary. In Maurice Charles Academy of Hair Styling, No. 91-18-ST, decided May 17, 1993, it was stated that:

> The failure to submit audits is an extremely grave violation as it increases ED's costs and hampers its determination of whether an institution is properly administering the financial assistance programs...

See, also, Hartford School of Modern Welding, supra., and SFCMS.

Primarily, it is ED's calculations under the second prong of the 668.92 test, the size of the institution, with which UTA takes issue. The standard for size used in this case, that is, determining the size of the institution based on the amount of Title IV HEA funds received by the institution during the award years, is assailed by UTA as prejudicial to UTA as an institution. UTA alleges that the fine imposed by ED is unrelated to respondent's actual size and therefore excessive, and as noted, is inflated also by "double fining", and by inaccurate calculation of the amounts of Title IV HEA funds received by UTA. The scale by which ED determines whether particular institutions are deemed to be small, medium or large is assailed by UTA, which construes Lipton's testimony in Southern Vocational College, supra., as indicating that the scale is not used consistently. UTA argues that a scale that is not used consistently is no scale at all, and makes a sham of ED's method of assessing fines. UTA does not suggest an alternate methodology for assessing fines that could be

applied uniformly and fairly to all institutions. UTA points out, however, that in a decision in Bnai Arugath Habosem, No. 92-131-ST, decided March 2, 1993 (a bench decision) the judge stated that hearing officials should look to the decisions of other hearing officials "which represent the views of the Secretary once they become final."

For the purpose, among others, of assessing fines the decision in Bnai Arugath Habosem, supra., noted that in Hartford School of Modern Welding, supra., and in Southern Institute of Business and Techmology, No. go-62-sT, decided May 3, 1991, an institution that received Title IV HEA funds of between $1.2 and $1.4 million was deemed to be a school of small-to-medium size; that an institution that received about $100,000 in

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Title IV HEA funds (Katie's School of Beauty Culture & Barbering, No. 90-68-St, decided March 27, 1991) was a small school; and that an institution that received $12 million in such funds was a large school. In Hartford the fine imposed on account of an audit submitted nine months late was $10,000, and for an audit 33 months late it was $18,000. In Katie's the fines imposed were

$1,000 for a 10-months late audit and $2,000 for an audit that was 32 months late.

The amounts of the fines imposed for failure of institutions to timely submit biennial audits do vary widely. In SFCMS, deemed to be a very small institution, the fine was 5,000 per violation. The decision in that case also found that failure of an institution to submit Pell grant and Guaranteed Student Loan audits for an award period constitutes not separate but a single violation. In this regard see also Southern Institute of Business and Technology, supra. In both decisions it was stressed that determination of the amount of a fine should be made in light of the fact that termination of eligibility is being concurrently imposed. In Southern Institute the decision noted that termination "is the severest of penalties and little purpose would be served by imposition of an additional significant financial penalty

absent unusual circumstances." In that case a fine of $15,000 was imposed, with the condition, however, that the fine "shall be annulled" if the institution submits its audit within 45 days after the decision issues.

In the latter decision the judge noted in footnote 11 at page 14, that an ED official performs various functions in connection with student financial assistance programs, one of which is to determine the amount of the fine specified in the letter/notice sent to the institution. The judge emphasized, however, that:

> Where the fine has been appealed to this tribunal, it is the tribunal, not the designated departmental official, which has the authority to determine the amount, if any, of the fine.

In Romar, which was decided some two years after Southern Institute, and in which, as previously noted, the hearing official found that subparagraph iv mandated termination of the institution's eligibility, the decision assessed no specific fine for the late submission of biennial audits.

I have considered the facts of this case and the regulations applicable thereto. I conclude and find that justification is shown on this record to require the termination of respondent's eligibility to participate in Title IV HEA programs, and that, in fact, in light of the facts of record, such a finding is mandated by subparagraph iv. I conclude and find, also, that in view of the foregoing, that is, the imposition of the most severe remedy that can be imposed under the regulations, justification is not shown for the added penalty of a monetary fine in the circumstances of record. Accordingly, no fine will be imposed.

Other allegations and issues discussed on brief by the parties have been considered, and are found not relevant or essential to the disposition of this matter.

I have also considered UTA's request that this proceeding be stayed, and that respondent be given the opportunity to present additional evidence at an oral hearing in this matter. Sufficient justification has not been shown for the actions requested by respondent, and those requests are denied.

Based on all of the evidence of record and the findings of fact and conclusions of law hereinbefore made, it is ORDERED that the eligibility of the respondent, United Talmudical Academy of Monsey, to participate in student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, shall be, and it is hereby, terminated.

By Paul J. Clerman, Administrative Law Judge.

March 14, 1994, at Washington, D.C.