UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

IN THE MATTER OF
BLISS COLLEGE

Respondent.

Docket No. 93-15-ST

**Student Financial
Assistance Proceeding**

INITIAL DECISION

By letter-notice dated January 14, 1993, an administrative component of the Department of Education (ED) seeks to terminate the eligibility of Bliss college (Bliss) to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (SFA Programs). It is alleged that Bliss is failing to make required refunds in a timely manner, and is not financially responsible. ED also seeks to fine Respondent Bliss $197,500 as punishment for late refunds.

Oral hearing upon the ED charges against Bliss was held at Columbus, OH on June 3, 1993. Post-hearing briefs have been filed. Extensive use is made of them, particularly the opening and reply briefs of ED. Both parties also submitted letterarguments concerning hearing exhibits. The last such was filed by ED, under an August 12, 1993 date, although I did not receive it until August 17, 1993.

Bliss is operated by Bliss college, Inc., a wholly owned subsidiary of Fischer Educational Systems, Inc. (FES). Respondent's Exhibit R-2-2. 1 Bliss is an institution of higher education located in Columbus and Bliss participates in SFA Programs. E-2, E-3. As noted, on January 14, 1993, ED initiated an action to terminate Bliss' eligibility to participate in the SFA Programs. 2 E-l. In that same letter, ED initiated an action to impose a civil fine against Bliss in an amount of $197,500. Id. The termination is based broadly on two grounds, Bliss' failure to pay refunds in a timely manner to lenders and Bliss' failure to meet the financial responsibility condition for participation in SFA Programs. Id. The fine is based on the refund issue. Id. The size of the fine is based in part on the size of Bliss' participation in the SFA Programs. E-l-6. For the latest year for which complete data is available, 1990-91, Bliss received $2,999,980. E-l-108. The fine also is based on the asserted gravity of Bliss's violations. E-l-6.

Statement of Facts and Legal Considerations

A. Refunds

On July 21, 1992, FES, Bliss, and all of FES's other subsidiaries, together with FES's sole stockholder filed for bankruptcy protection. R-2-7, E-7, E-8. The immediate reason for filing for bankruptcy protection at that time was the impending enactment of the Higher Education Amendments of 1992 in which Congress made clear its intention that institutions that file for bankruptcy protection automatically would lose eligibility to participate in the SFA Programs, although it also must be assumed that there was sufficient financial cause for the bankruptcy filing. E-7-9. Incident to the bankruptcy filing, Bliss provided certain information to the Great Lakes Higher Education Corporation. E-l-8-88. The information concerned certain refund obligations Bliss owed to student lenders for Bliss students. Id. The information indicates that Bliss failed to make timely refunds to lenders in accordance with Federal regulations. Id. The testimony at the hearing further indicates that overdue refunds remain unpaid. Hearing Transcript at 291. 3 and 4 Even though pre-bankruptcy refund obligations remain outstanding, post-bankruptcy refunds are being made.

B. Financial Responsibility

The financial responsibility action began based on the latest Bliss financial data which ED had at the time it initiated the action. That data was set forth in the Consolidated Financial Statements of FES and its subsidiaries. E-4. On August 31, 1991, FES had more current liabilities than current assets, and therefore, Bliss assertedly failed to meet one of the standards of financial responsibility. Tr. 118 - 1263. However, Bliss, not FES, is the respondent herein.

In order to meet the financial responsibility requirement, an institution must be able to demonstrate to the Secretary of Education that it meets certain numeric tests set forth in 34 C.F.R. 668.13 (c). That paragraph states, in pertinent part:

(c) Notwithstanding paragraph (b) of this section, the Secretary considers an institution not to be financially responsible if--
(1) Under its basis of accounting, it--
(i) Has had operating losses over at least its two most recent fiscal years; or
(ii) Had, for its latest fiscal year, a deficit net worth. A deficit net worth occurs when the institution's liabilities exceed its assets;
(2) Under an accrual basis of accounting, it had, at the end of its latest fiscal year, a ratio of current assets to current liabilities of less than 1:1;

34 C.F.R. 668.13 (c).

After ED initiated the termination action, Bliss prepared a more recent audited financial statement, dated March 30, 1993. R-2. The audit is striking in that it contains no opinion by the auditor, which is unusual for an audit covering an entire year. This statement covers the year ending August 31, 1992, and contains a balance sheet that lists on its face total current assets of $2,642,705 and total current liabilities of $1,245,806. R-2-4. ED says that this representation is flawed because refunds payable of $216,897 are not included in the current liabilities. R-2-4 and -9. ED also says that the exhibit is flawed because there is listed as a current asset an intercompany receivable of $1,631,080. This intercompany receivable represents a claim by Bliss against FES for cash of $1,631,080. R-2-4, -8. This amount, $1,631,080, is almost two-thirds of Bliss' total revenues for the year ending August 31, 1992, and represent nearly two times Bliss' total net earnings for the same period. R-2-5. Without this intercompany receivable classified as a current asset, Bliss fails to meet the numeric tests of financial responsibility set forth in 34 C.F.R. 668.13(c), above. R-2-4.

R-2 is signed by Deloitte & Touche, but because of "uncertainties," no "opinion" was "expressed" on the financial statement. There was an audit but no certification of correctness. R-2-3.

As a part of an as yet unconfirmed Plan of Reorganization, affiliates such as Bliss (E-8-7), will take nothing from its claims against its corporate parent (FES) or its corporate siblings who owe Bliss the $1,631,080 intercompany receivable. 5

C. Legal Considerations

Under 34 C.F.R. § 682.607 (c), timely payment of refunds is defined as follows:

Timely payment. A school shall pay a refund that is due-- (1) Within sixty days after the earliest of the-
(i) Student's withdrawal as determined under § 682.605(b) (1) (1) or (b) (3);
(ii) Expiration of the academic term (e.g. semester, quarter, or trimester) in which the student withdrew, as determined under § 682.605 (b) (1) (ii)
(iii) Expiration of the period of enrollment for which the loan was made; or
(iv) The date on which the school makes a determination that the student has withdrawn under § 682.605(b) (1) (ii); or
(2) In the case of student who does not return to school at the expiration of an approved leave of absence under § 682.605(c), within 30 days after the last day of that leave of absence.

ED's review of Bliss' own information regarding refunds demonstrates that Bliss has not complied with this regulatory requirement.

A failure to pay refunds may constitute a sufficiently strong basis for termination of the institution's eligibility to participate in the SFA Programs. In the Matter of Southern Institute of Business and Technology, Dkt. No. 90-62-ST (May 3, 1991); In the Matter of Hartford Modern School of Welding, Dkt. No. 90-42-ST (January 31, 1991). Termination in such a circumstance is not necessarily punishment but instead may be a remedial action designed to spare Federal funds from continued waste.

According to Federal regulations, a fine, which is punishment, must be based on the gravity of the violation and the size of the institution. 34 C.F.R. 668.92 (a) states:

In determining the amount of a fine, the designated department official, hearing official and Secretary shall take into account--
(1) (i) The gravity of the institution's violation or failure to carry out the relevant statute, regulation or agreement; or
(ii) The gravity of its misrepresentation; and
(2) The size of the institution.

E-1-108 demonstrates that Bliss received almost $3 million for the latest year for which complete data is available (1990-91). The fines in this case are based also on unmade refunds. Therefore, the size of the fine has been set at $500 per occurrence for all 395 instances, or a total fine of $197,500.

Concerning termination, 34 C.F.R. 668.13(a) provides, "To begin and to continue participation in any Title IV, HEA program, an institution must demonstrate to the Secretary that it is financially responsible under the standards established in this section." Although termination for cause, such as repeated flagrant violation of ED requirements, is sometimes undertaken by ED, here the termination issue is related to eligibility or lack thereof. The wording of this provision requires that it is the institution's responsibility to demonstrate that it is financially responsible. At the same time, in this proceeding, ED has the overall burden of persuasion. In so doing, ED may use financial records of Bliss. It is, after all, the responsibility of Bliss to keep records which satisfy the requirements of 668.13.

Contentions of ED

ED believes that the record herein contains significant evidence concerning a failure by Bliss to make the regulatory required demonstration of financial responsibility. Bliss' latest financial statement discloses unpaid refunds in excess of $216,897. R-2-9. 34 C.F.R. 668.13(b) provides, in pertinent part,

In general, the Secretary considers an institution to be financially responsible if it is able to. . .
(3) Meet all of its financial obligations, including, but not limited to--
(i) Refunds of institutional charges; . . . .

Bliss' own financial statement recognizes that Bliss has not met all of its financial obligations, including, refunds of institutional charges.

Similarly, ED called two witnesses to testify that Bliss, through its financial statements, did not demonstrate that it was financially responsible. Those witnesses, Kistler and Selepak opine why Bliss should not be considered financially responsible.

Bliss' position, as articulated at the hearing, is that it wishes to pay refunds identified in the financial statement, but is being precluded from doing so by the bankruptcy court. Tr. 291.

The bankruptcy code does not relieve Bliss of its obligations under the Higher Education Act of 1965, as amended (HEA). Section 487(a) (22) of the HEA (20 U.S.C. 1094(22)) requires Bliss to make refunds to its students in accordance with its refund policy. R-2-9 demonstrates that Bliss currently owes refunds in violation of its refund policy. Because of this debt, ED contends that Bliss does not meet the condition of financial responsibility for participation in Federal programs.

The automatic bankruptcy stay of 11 U.S.C. 362 does necessarily change this obligation. The two statutory provisions, one to pay all refunds when they are due and the other, not to make pre-petition refund payments while operating under the bankruptcy code, are in potential conflict.

When confronted with two sets of Congressional statutes that are potentially in conflict, "it is the duty of Federal agencies, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984).

The protective provisions of Federal bankruptcy law have not changed since 1989 when Congress amended the Bankruptcy Code effective 1990. However, changes in Federal statutes reflect a congressional intent, at least in matters related to the SFA Programs, that the rehabilitation of the debtor need not be the primary goal, or even, currently, any goal at all, of the code under which ED is empowered. Thus, for example, congressional disapproval of such decisions as In re The Bible Speaks, 69 B.R. 368 (Bkrtcy. D. Mass. 1987) led, first, in 1990 to amendments made by Pub. L. 101-508 to 11 U.S.C. 362(b) and 541. New subsections were added to section 362 (b). These are subsections (14), (15), and (16) expressly exempting from the automatic stay provisions of the bankruptcy code, eligibility revocations by the Department of Education. Language was added to 11 U.S.C. 54, which eliminates arguments that eligibility and accreditation are the property of the debtor's estate.

Through these actions, ED says that Congress made clear that the policies of Title 11 now include deference to eligibility revocations by the Department. ED argues that if Bliss wished to, it could petition the bankruptcy court with the assertion (which ED Department would confirm) that failure to pay the pre- petition refunds is placing Bliss at risk of losing its single largest source of funding, its access to the Federal Treasury. In this connection ED argues that Bliss has not done so because it would impinge on the cash flow of FES and FES's sole stockholder. Furthermore, ED asserts that its contract with Bliss, E-3, requires Bliss to comply with all appropriate statutes and regulations. Failing to make pre-petition refunds is said to be a breach of that contract for which ED's remedy is termination. ED believes that the bankruptcy code cannot be used to subvert this remedy, lest the contractual relationship lose its bilateralism whereby ED will be performing and Bliss will not. Stated differently, ED argues in effect that it is not to be treated as if it were an airline employee such as have been divested of contract right in times past by bankruptcy courts. In any event, in my view, the entitlement of ED to any administrative relief herein, must be based on statute and regulation, and upon the evidence of record.

ED believes that the intercompany receivable listed on Bliss' balance sheet will not be paid under Bliss' own Plan of Reorganization (Plan). E-7, E-8. As a debt owed to an insider or affiliate (by FES to Bliss), the Plan contemplates paying such insiders and affiliates nothing. E-8-41. 6 If this provision of the Plan is confirmed by the Bankruptcy Court, FES will be discharged of its obligation to pay its subsidiaries any of the intercompany receivables, which as of August 31, 1991 totalled $5.3 million (infra.).7 Since the Plan is the statement of the Debtor's intentions, ED can envision no creditor (other than itself) objecting to a provision that strips the subsidiary schools of cash for the benefit of creditors. ED asserts, therefore, that any plan will contain this provision.

At the hearing, the Department's expert witness/employee, Keith Kistler, provided a detailed discussion of the meaning of Bliss' financial statement. Tr. 149, 214. Mr. Kistler opines why in this case it is necessary to look beyond the numbers set out on the page of the Balance Sheet. Of equal importance are the notes to the statement and the lack of an auditor's opinion letter.

Looking both at and beyond the bare statement, Mr. Kistler testifies that the intercompany receivable is not a current asset for the Department's analysis of the financial statement.

My opinion is that I do not believe the company the parent has the wherewithal to honor those receivables; therefore, they could be considered to be non-current assets. And the financial information that I have seen, along with the statements issued by the auditors, and looking at the statement of cash flows which shows the reader the cash that is generated from an operation, I don't believe the company can honor that 1,631,000. . . . [W]hen you look at the total picture, the parent [FES], the subsidiaries and so forth, the intent is not there and the ability is not there to pay that number. And we believe in Education that it should not be considered a current asset, that it should be considered something other [than a current asset].

Tr. 212 - 213.

ED asserts the right to look behind the balance sheet, if there is sufficient basis for doing so. In the Matter of Hartford Modern School of Welding, supra, at 10-11 (Decision). In that case, the institution's financial statement did not provide the reader with an accurate picture of the institution's financial condition. According to ED, Mr. Kistler offers a similar analysis in the instant case.

Without additional information concerning the intercompany receivable, ED says that Bliss' classification of the asset as "current" and, therefore, likely to be repaid (in full) in the current operating cycle (12 months) is not reliable. In the circumstances, ED seeks to discount or remove entirely the intercompany receivable from the current assets of Bliss.

FES's subsidiaries have intercompany receivables and payables listed at E-4-16-29. Netting these payables and receivables leads to a deficit of $5.3 million. The only other intercompany entity this money could be received from is the corporate parent, FES. As of August 31, 1991, FES owed its subsidiary corporations $5.3 million. This is roughly the same amount FES's sole stockholder owes FES. Similarly, the $5.3 million also is the amount of an IRS assessment against FES and its subsidiaries.

In response to ED's testimony from Messrs. Selepak and Kistler, FES's Chief Financial Officer Kenneth Harb submits a paper that someone else prepared showing that sizeable amounts of the receivable were being paid to Bliss. However, Mr. Harb was unable to describe the current amount of the receivable at the time of the hearing. Equally, important, Mr. Harb's evidence, R-3, does not display a net effect to the intercompany receivable. [8]

Contentions of Bliss

Bliss argues that the proposed ED remedy, termination, is a sanction or punishment. Respondent cites Gulfcoast Trades Center, Docket No. 89-16-S (Final Decision of the Secretary, March 7, 1991), in which the Secretary found:

Any type of termination requires the most exhaustive examination of the myriad of tangible and intangible factors present in the given case and serious consideration as to whether the totality of the circumstances present sufficient cause to impose such a sanction.

(at 3) (emphasis added).

Bliss says that limitations other than termination must be considered. The respondent notes that "[t] ermination of eligibility is a severe penalty, effecting not only the institution but the current students and future needs of the community as well." Caguas College of Technology and Science, (ALJ Decision, Oct. 25, 1988) (at 5)- The school believes that the applicable standards and relevant factors in a termination case were well stated in Matter of First School for Careers, Student Financial Aid Proceeding, Initial Decision, February 27, 1987, aff'd and adopted by the Secretary, August 3, 1989:

Section 487(c) (1) (D) of the Act (20 U.S.C.A. § 1094), permits the Secretary of Education to prescribe necessary regulations to authorize termination of the eligibility of an otherwise eligible post-secondary educational institution to participate in student financial assistance programs under Title IV, after a hearing on the record. Regulations have been promulgated and exist at 34 C.F.R. Part 668. Section 668.86 (a) provides that after a hearing on the record,

The Secretary may terminate . . . the eligibility of an institution . . . if the institution violates any provisions of Title IV of the Higher Education Act or any regulation . . . implementing that Title.

Section 668.90 (a) (2) provides that the Administrative Law Judge hearing such proceeding may terminate eligibility or if appropriate, impose a limitation or fine in lieu thereof, and that the Administrative Law Judge's decision "must state whether the imposition of . . . termination . . . is warranted, in whole or in part."

ED established its basic policy on termination in the preamble to its final regulations issued in 1978 [42 Fed. Reg. 64567 (1978)]. That policy is:

The termination of an otherwise eligible institution's eligibility for student financial aid programs is an extremely serious measure. As a general matter, this procedure will be undertaken only when (1) an institution has consistently violated the statute and regulations governing the aid programs and the standards of financial responsibility and administrative capability, and (2) attempts to remedy this situation have failed.

Of equal, if not greater seriousness, is the fact that termination of an institution's eligibility may result in severe hardship to the very class of individual the legislation was intended to benefit. Loss of an institution's eligibility results in a severe detriment to current students. Depending upon the location and other factors, it may result in severe hardship and loss to possible future students, who will find themselves without the availability of an educational institution which can meet their needs and accordingly, reflect negatively upon one or more entire communities.

(Emphasis added).

Therefore, Bliss asserts that, as a matter of law, termination is a sanction that cannot be imposed except for a most serious violation of law and regulation which must be weighed in the balance of the public interest.

In this regard, Respondent points out that it offers associate degrees, diplomas and certificate programs. Bliss offers an associate degree in court reporting, sales and marketing, and accounting. It offers diplomas in sales and marketing, accounting, word processing, legal and medical secretary, and medical assisting. Bliss' current enrollment is approximately 370 students. Tr. 220.

The primary goal of Bliss is to make a student successful and, to that end, the role Bliss plays is to enable students to acquire skills that will allow them to obtain employment in their chosen field. In addition, Bliss seeks to develop a student beyond those skills by attempting to provide the student a sense of pride, positive attitude and self-worth. Tr. 226.

The College stresses attendance as a important factor for the sake of dependability in general and to show the importance of dependability on the job. The College is trying to train its students not just for an initial job but for long-term employment. The College asserts that it develops "a sense of self-esteem and . . . the whole student, not just the educational wing, if you will, of that student." Tr. 226.

Small class sizes and individualized attention from instructors are key elements of Bliss' claim of achievement. Many of its students come from situations in the past that have not been rewarding for them academically. For others, it has been a very long time since they were in a classroom, and these students particularly need to feel a personal relationship with their education and to have extra encouragement. Tr. 227. This individualized attention is said to be built into the structure of Bliss. (Id.)

The average age of students at Bliss is approximately 28 and the majority of the student population is female. Tr. 221.

The student population of Bliss typically has found a need to be trained later on in life than individuals who have just graduated from high school or they are in need of re-training. One reason so many of its students are female is that they have found themselves in a situation where they have become the sole support of the household or their household situation has changed, to require a second income. Tr. 221.

Two students testified on behalf of Bliss. One student, Vena Triggs, is currently a student of Bliss seeking an Associate Degree in sales, marketing and advertising. Tr. 70. Because class size and individual attention were very important to Ms. Triggs, before she enrolled in Bliss she visited the campus. She found that the classes were small enough, that she could get individual attention, and that if the student needed more than that, that is, additional assistance outside of class, "there's always somebody there on Friday to help you if you need individual attention, on any subject." Tr. 72.

Ms. Triggs rejected Franklin University and Columbus State College in favor of Bliss because of the small class size and individual attention. Tr. 72-73.

Ms. Triggs would not have been able to afford to attend Bliss if Title IV funds had not been available to her. Tr. 73.

In response to the question as to how Bliss had measured up to Ms. Triggs' expectations based upon the reasons that she decided to attend Bliss, she testified:

Fantastic I wouldn't trade Bliss for any other small college in the city or in the state. You couldn't pour [sic., force] me into any other college. I think with the hands-on teaching and also any time the student wants to come back to Bliss just to get a brush-up or to want answers to questions, they can always walk in Bliss' front door and get the answers. The instructors are there to give you any answers you need.

Tr. 73-74.

As evidence of her belief in the value of the educational opportunities Bliss provides to its students, Ms. Triggs has recommended to others that they consider attending Bliss and requested that Bliss set up a table at a festival conducted by the Godman/Gill Community Center of which Ms. Triggs is Vice President and on the Board of Trustees (Tr. 71, 74)' which Bliss did. Tr. 74.

A graduate of Bliss, Randell Hamilton, also testified. Mr. Hamilton received an Associate Degree in Business Administration and a diploma degree in Accounting from Bliss, graduating in April 1993. Tr. 141.

Mr. Hamilton returned to school after an injury which required him to give up doing physical work in favor of office work for which he needed training. Smaller classes and individual attention from instructors were very important factors to Mr. Hamilton in determining which school to attend. Tr. 142. Mr. Hamilton rejected Columbus State College because he did not believe he would get the individualized attention he desired. Id..

Bliss met his expectations in terms of individualized attention, smaller class size and instructors. Tr. 142-143.

Mr. Hamilton would not have been able to attend Bliss without the availability of Title IV funds. Tr. 143.

Mr. Hamilton would recommend Bliss to others and has received considerable assistance from Bliss in attempting to find employment. Tr. 143-144. Mr. Hamilton received value from Bliss for the time and money that he invested. Tr. 144.

According to Ms. Triggs, "Bliss College has a reputation all over the city of Columbus as being one of the best business colleges in the city, bar none." Tr. 79.

The import of the testimony from the students "was to the effect that it would be a loss to the community if Bliss were closed." Tr. 225.

Approximately 85 percent of Bliss students receive some form of Title IV financial assistance, and the majority of those students would be unable to attend Bliss at all if Title IV funds were no longer available. Tr. 221-222.

Bliss would not be financially viable if it lost its eligibility to participate in Title IV. Tr. 221-223.

Bliss has been current in paying all refunds accruing since it filed for bankruptcy on July 21, 1992. Tr. 270.

For purposes of determining financial responsibility, the financial statement that ED looks at is the most current audited financial statement (Tr. 137-138), which in this case is Exhibit R-2, the audited financial statements for Bliss for the period ending August 31, 1992.

Bliss goes on to argue that it is financially responsible as a matter of law.

Bliss says that it is aware of only one decision in which an Administrative Law Judge went behind an audited financial statement. However, in that case, In re Hartford Modern School of Welding, Docket No 90-42-ST (Initial Decision January 31, 1991), Hartford had made "false entries in the general ledger sheet regarding . . . 42 [refund] checks, [and] also omitted . . $80,000 liability in its financial statement for the fiscal year ended June 30, 1989. Moreover, it also omitted in this statement at least $126,000 in outstanding liabilities for unpaid refunds due to lenders..." (at 5). Therefore, Bliss argues that on the basis of Hartford, ED cannot look behind Bliss' Balance Sheet (R-2-4) for the purpose of disagreeing with the 1992 Bliss financial statements in the absence of fraud, material omission or misrepresentation, all of which were present in Hartford, but none of which is present here.

Therefore, according to Bliss as a matter of law, the question of whether Bliss meets the numeric tests of financial responsibility in this case begins -- and ends -- with R-2 and 34 C.F.R. § 668.13(c) (1)-(2), which provides as follows:

(c) Notwithstanding paragraph (b) of this section, the Secretary considers an institution not to be financially responsible if --

(1) Under its basis of accounting, it --

(i) Has had operating losses over at least its two most recent fiscal years; or

(ii) Had, for its latest fiscal year, a deficit net worth. A deficit net worth occurs when the institution's liabilities exceed its assets;

(2) Under an accrual basis of accounting, it had, at the end of its latest fiscal year, a ratio of current assets to current liabilities of less than 1:1;

(Emphasis added).

Indeed, Bliss contends that it would be wholly circular to on the one hand require audited financial statements and on the other hand attempt to go behind those audited financial statements in an attempt to argue that what Deloitte & Touche or any other independent auditor has classified as a current asset was improperly so classified.

Bliss points out fact that there are well established standards governing audited financial statements that must be met before Deloitte & Touche could sign and issue R-2. The purpose, Bliss opines, of having audited financial statements prepared in accordance with Generally Accepted Accounting Principles ("GAAP") is that individuals who read audited financial statements can rely on their having been prepared in accordance with those standards and interpret them accordingly. In other words, the "explanation" of an audited financial statement is found in the Statement itself, its footnotes and the application of GAAP.

Thus, the school, for example, believes that since Deloitte & Touche issued the 1992 Bliss financial statements (R-2), at a minimum, it is clear that Deloitte & Touche agreed with the classification of the items contained in R-2, including the classification of items on the Balance Sheet (R-2-4). The argument goes on that if that were not so, that is, if Deloitte & Touche did not agree that, for example, the $1,631,080 Intercompany Receivable was fairly characterized as a current asset, Deloitte & Touche would had to have stated its disagreement. Stated another way, Respondent insists that the absence of an adverse opinion means that Deloitte & Touche agreed with the classifications in the 1992 Bliss financial statements.

Bliss further argues that even ED's expert witness herein agrees that the school is financially fit.

ED's witness, Mr. Kistler answered "yes" to the following question:

Q. [By Mr. Wiesenfelder]. So, therefore, why can't you just answer yes to the simple question, based upon the opinion -- these audited financial statements, that Deloitte & Touche concluded that there were not material errors or omissions? They either would have had to stop work or issued an adverse opinion and they didn't do either. Therefore, it follows, as a matter of their professional requirements, that they determine that there were errors or omissions in the financial statements.

Tr. 201-202; Tr. 202-205.

The following exchange also occurred:

Q. [By Mr. Wiesenfelder]. Mr. Kistler, is it fair to conclude that Deloitte concurred in characterizing the inter-company receivable of $1,631,080 as a current asset?

A. [By Mr. Kistler]. Yes.

Tr. 205.

Furthermore, with respect to the key Intercompany Receivable of $1,631,080 shown on Bliss' Balance Sheet as a Current Asset (R-2-4), Mr. Kistler also testified:

[T]heoretically they [the intercompany receivable of $1,631,080] meet the standards to be considered current assets. The intent is there. They're going to be paid within a year. From the just oblique opinion, just skimming the surface, they meet the standards. Tr. 212.

Mr. Kistler also testified:

When they [Deloitte & Touche] prepare a classified balance sheet, such as this, R-2-4, they are required to determined whether the items are current or non- current or long-term, based on the criteria established by the AICPA and the Financial Accounting Board.

Tr. 209.

Bliss additionally contends that Mr. Kistler's testimony defined what is a current asset or a current liability; namely, that "if it is due within one business cycle and if the intention is there for it to be paid, then it would be considered a current asset or a current liability." Tr. 176. Similarly, ED's witness, Mr. Selepak testified that "current assets are those assets that an institution can be expected to receive within the next business operating cycle, usually a year. A current liability is a liability or payment that an organization, a business, is expected to have to pay within the current operating cycle." Tr. 92.

It is true, that the $1,631,080 intercompany receivable shown on the balance sheet for Bliss represents excess cash over expenses that have been paid through FES' clearinghouse account which is being held for the benefit of Bliss as of August 31, 1992. Tr. 240-241. Classifying that intercompany receivable as a current asset ordinarily is supported by the amount of money that flows through the centralized cash management system to Bliss from FES, as documented in Exhibit R-3, and by ED's observation that with respect to FES' clearinghouse account, " [t] he cash, we know, is there." Tr. 264 (emphasis added).

Clearly, FES has a centralized cash management system utilizing a clearinghouse account, which "is an account where the funds are transferred in and expenses are transferred out" and is used by FES to pay ongoing operating expenses of Bliss and other FES schools. Tr. 238-239.

Also true, although the extent of it is far from clear, is that the clearinghouse account for transactions by FES on behalf of Bliss was active both prior to the time that Bliss and FES filed for bankruptcy protection on July 21, 1992 (Tr. 97), and after July 21, 1992, with dollars going through that account.

The major secured creditor of FES, First American National Bank, is aware of the existence of this clearinghouse account and how it operates and appears not to have raised any objections to the bankruptcy court regarding continuation of this account. Tr. 240. In fact, the bank administers the account (Tr. 268), which FES' other creditors also are aware of. ..ID..

The existence of intercompany payables or intercompany receivables on the balance sheets of the individual subsidiaries of FES has been a standard practice of FES. Tr. 241. In fact, even Mr. Kistler conceded that " [m] ost companies with subsidiaries will use intercompany accounts to record transactions." Tr. 211-212.

At the time of the filing in bankruptcy on July 21, 1992 (Tr. 97), all of the funds in the clearinghouse account were transferred into the FES Debtor-in-Possession account in its entirety. None of those funds were held back from the clearinghouse account. Tr. 242-243.

At the time Deloitte & Touche issued the 1992 Bliss financial statements, Deloitte & Touche had ED Exhibit 7, the First Amended Plan of Reorganization, and, at least in draft form, ED Exhibit 8, which is the Second Amended and Restated Disclosure Statement. Tr. 243-244.

The Plan of Reorganization for FES and its subsidiary corporations has not been confirmed by the Bankruptcy Court and will not be confirmed during the current operating cycle for Bliss, that is, the 12-month period ending August 31, 1993. Tr. 244. This is so because the IRS has asserted a claim against FES in the amount of approximately $5 million and the hearing in Bankruptcy Court on that claim is not scheduled until October 1993. Mr. Harb testified that " [u] ntil that issue is resolved, it's not feasible to have a Plan of Reorganization confirmed." Tr. 244.

Deloitte & Touche may have known when it issued Exhibit R-2 that the Plan of Reorganization would not be confirmed during Bliss' current fiscal year, that is, prior to August 31, 1993. Tr. 246. In addition, Deloitte & Touche had information about the transactions through and the existence of this clearinghouse account during the time it was preparing Exhibit R-2, the 1992 Bliss financial statements. Tr. 240.

The transactions that went through the clearinghouse account that resulted in the subject Intercompany Receivable of $1,631,080 were made in the ordinary course of business. Tr. 241.

Between September 1, 1992, and February 28, 1993, $1,060,000 was paid by FES on behalf of Bliss through the clearinghouse account. Exhibit R-3; Tr. 242.

Deloitte & Touche may have been aware of all of the payments reflected on Exhibit R-3 as of the time that Deloitte & Touche issued the 1992 Bliss financial statements, Exhibit R-2, which is dated March 30, 1993. Exhibit R-2-3; Tr. 242. Bliss goes on to argue that the "Student refunds payable" on R-2-9, and included on the Balance Sheet as a liability, are not current liabilities.

Kenneth V. Harb, Executive Vice President and Chief Financial Officer of FES testifies that it was not the intention of FES for these refunds that are subject to the automatic stay of the bankruptcy code to be said within that one year business cycle because FES expected that the Plan of Reorganization first would be confirmed and that would not occur within that one year business cycle. Tr. 287. Moreover, Deloitte & Touche may have known that the $216,897 in student refunds subject to the automatic stay would not be paid until the Plan of Reorganization was confirmed by the bankruptcy court and that the bankruptcy court would not confirm the Plan of Reorganization until after there was a resolution of the IRS claim, which was not scheduled far trial in the bankruptcy court until October 1993, after the August 31, 1993, close of the one year business cycle for Bliss. Tr. 243-244.

Mr. Kistler testifies that the student refunds payable in the amount of $216,897 shown on the 1992 Bliss financial statements in Note 5 (R-2-9) should be classified as a current liability rather than a long-term liability "[b]ecause refunds are due and payable immediately, fall well within the guidelines as established by the standards of the industry, and that in this case they have not been included in the current liability section." Tr. 173. However, on cross-examination, because the subject refunds are subject to the automatic stay provisions of the bankruptcy code, Mr. Kistler conceded as follows:

A. [By Mr. Kistler]. Well, I think the refund issue can be debated within the guidelines as established by the generally accepted accounting principles.

Q. [By Mr. Wiesenfelder]. So if they are debatable, they can be classified either as current or non-current, correct?

A. I believe that if it is a current liability [interrupted].

Q. Please, we're going to get through this a lot faster if you just answer the question I ask. The question I asked was, based upon your observation that you thought it was debatable, therefore, am I correct, that it can either be characterized as a current liability or not a current liability?

A. It could be categorized as either.

Tr. 207-208.

Bliss also argues that even though a significant number of refunds to Bliss students were already overdue prior to Bliss and FES filing for Chapter 11 bankruptcy protection on July 21, 1992, the amount of such refunds is greatly overstated by ED.

Finally, Bliss argues that even if 34 C.F.R. § 668.13(c) does not foreclose ED from going behind the 1992 Bliss financial statements, ED is foreclosed by virtue of the Higher Education Amendments of 1992, Pub. L. 102-325, which amended section 498 of the Higher Education Act of 1965, as amended ("HEA"), to provide in relevant part:

(c) Financial Responsibility Standards. -

* * *

(4) The determination as to whether an institution has met the standards of financial responsibility provided for in paragraphs (2) 9 and (3) (C) shall be based on an audited and certified financial statement of the institution. Such audit shall be conducted by a qualified independent organization or person in accordance with standards established by the American Institute of Certified Public Accountants.

(Emphasis added).

Thus, Bliss argues that absent fraud or misrepresentations in R-2, neither of which is even alleged here, ED may not second- guess the 1992 Bliss financial statements because the HEA restricts the manner in which the ED ascertains whether an institution has met the required minimum asset-to-liabilities ratio of 34 C.F.R. § 668.13(c) (1). Section 498(c) (4) of the HEA, according to Bliss, requires that ED base its assessment of an institution's conformity with the asset-to-liabilities ratio on the audited and certified financial statement of the institution. Congress' use of the mandatory "shall" is dispositive, says Bliss. Finally, Bliss differs with ED about the proposed reorganization plan. Bliss says that the plan will provide for full repayment of all overdue funds.

Discussion and Conclusions

Issues

Respondent discusses a number of issues where there is disagreement between its interpretation of law and ED's interpretation of law. However, before discussing those issues, attention is given to those matters where there is no dispute.

This action seeks to terminate the eligibility of Bliss to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (SFA Programs). This action also seeks to fine Bliss.

There are two basis for the termination action. One seeks to terminate Bliss because of a failure to make refunds which remain unpaid. Bliss admits that it has not made refunds which now are more than one year overdue. In its defense Bliss argues that presently there is a direct statutory prohibition against payment, but that it will pay them eventually under a plan of reorganization.

The second basis for termination is that Bliss fails to meet the regulatory condition of financial responsibility. ED's position is that Bliss does not meet the numeric tests required under 34 C.F.R. 668.13(c) and that Bliss also fails to meet all of its financial obligations, including refunds, as required by 34 C.F.R. 668.13(b). Bliss claims that because it produced a financial statement that on its face purports to meet the numeric tests, ED must settle for that demonstration. Further, Bliss seeks to exclude ED evidence which relates to the history of Bliss' categorization of assets as current or not current and which provides information that is material to Bliss' demonstration of financial responsibility. Bliss further argues that paying these refunds is "explicitly prohibited" (Bliss Brief at 27).

On the issue of the numeric tests, Bliss claims that review herein must be limited to an audited financial statement. Notwithstanding this argument, Bliss offers an exhibit (R-3) to support its view that a questioned intercompany receivable is properly classified as a current asset on its balance sheet. Bliss does not dispute ED's claim that the intercompany receivable will not be paid or otherwise converted to cash in the current operating cycle. 10 Bliss also does not dispute ED's claim that the intercompany receivable is dependent on the ability of the parent, Fischer

Educational Systems, Inc. (FES), to satisfy its total intercompany payable of $5.8 million 11 (which depends on it being repaid the $5.3 million debt from its sole stockholder).

Payment of Refunds

Among the disputed contentions, Bliss' argues that the automatic stay set forth in 11 U.S.C. 362 prevents Bliss from honoring its refund obligation. This is wrong, of course, the approval of the bankruptcy judge is required for major actions by the estate of the bankrupt. As well, the law stays the enforcement of any action by a creditor to force Bliss to make payment. The bankruptcy code, 11 U.S.C. 362(a), provides that the filing of a petition or application operates as a stay of (1) actions against the debtor; (2) enforcement against the debtor; (3) acts to obtain property of the estate; (4) (5) liens against the estate; (6) claims against the debtor; (7) setoff against the debtor, and (8) pre-petition tax proceedings concerning the debtor. Another section, 11 U.S.C. 362(b), provides the list of what actions are not stayed. However, there is nothing in Section 362 which prohibits a debtor from honoring its obligations after the debtor files its petition. Bliss need not wait until reorganization to pay its tardy refunds. Termination For Failure To Pay Refunds

Bliss' claim that paying refunds "are explicitly prohibited by the automatic stay provisions of the Bankruptcy Code," thus, is incorrect. Bliss cites to no provision of 11 U.S.C. 362 which prohibits Bliss from paying its refunds. None exists. Further, I have considered pages 26-35 of Bliss' Posthearing Brief which speaks to this issue. I understand that some bankruptcy courts assert total jurisdiction in matters also involving Federal agencies. Nonetheless, such absolute power does not exist. Bankruptcy courts are required to consider the entire context of a bankrupt's estate.

Recapping, the facts establish that Bliss fails to make Guaranteed Student Loan refunds to its former students. E-l-2 and Enclosure l. Indeed, a hundred, more or less, of the refunds were due before 1992 (over seven months prior to Bliss' bankruptcy filing). Id. Further, five of the refunds were due before 1991 (one year and seven months prior to Bliss' bankruptcy filing). E-1-12 (Beck); -29 (Getridge); -32 (Harris); -42 (McCabe), and, -48 (Pauly). While filing for bankruptcy initially estops court actions against a debtor (11 U.S.C. 525), the code cannot be used to place a debtor totally beyond the requirements of ED. 12

As noted, prior to the bankruptcy petition, Bliss knew of refunds that it owed. E-l-8-88. R-2 identifies these unpaid refunds in an amount close to $200,000, although the exact amount is disputed. R-2-9. Both parties agree that Bliss owes a large amount of refunds. Nonetheless, in support of its position, Bliss cites case law which holds that a governmental entity may not force payment of debts while the debtor is in bankruptcy.

In making this argument, Bliss distorts the relief ED seeks in this proceeding. This is not strictly a proceeding to force Bliss to pay pre-petition refunds. Additionally, though not precluded under the bankruptcy laws, this is not a matter to determine the exact amount of those debts. That issue would be settled in an administrative hearing brought under 20 U.S.C. 1094(b) and 34 C.F.R. Part 668, Subpart H.

This proceeding concerns Bliss's obligation to honor its regulatory obligations to ED to pay its refunds of institutional charges. Bliss is a fiduciary. ED is entitled to cut its losses resulting from a breach of Bliss' fiduciary duty to make timely refunds. 34 C.F.R. 668.82 (a). Also see Bowling Green Jr. College v. U.S. Dept. of Education, 687 F. Supp. 293, 297 (W.D. Ky. 1988). Bliss has not put forward a Plan of Reorganization that gives ED full assurance that these refunds ever will be paid. 13

As stated herein, Bliss' regulatory obligations cannot be totally obviated by the bankruptcy court. If Bliss wishes to continue receiving funds from the Federal Treasury, Bliss must meet its obligations as a program participation (E-3) in order for ED to continue funding Bliss.

The Proposal To Fine Bliss For Failure To Pay Refunds

ED is not a private party against whom Bliss is involved in private litigation. ED is a governmental entity, with its own Federal statutory provisions, that is charged with the enforcement of the HEA. Bliss must follow these laws, and these laws require Bliss to pay refunds. At the same time, Bliss would not be before a bankruptcy court if it held sufficient funds to pay all creditors. Although Mr. Fischer receives an attractive annual salary which approximately equals the amount of the overdue refunds, I cannot second guess the bankruptcy judge in enabling FES to pay Mr. Fischer. As well, I cannot readily punish Bliss for conduct (nonpayment of refunds) which initially, plainly was inhibited by financial inability on the part of Bliss and presently by the bankruptcy filing and the bankruptcy court.

Thus, although remedial action (termination for lack of financial responsibility or eligibility) is required, I am inclined to the view that punishment (a fine) is not sustainable. Termination Of Bliss For Failure To Be Financial Responsible

In the section of its brief concerning the numeric tests, Bliss states, "the issue of financial responsibility in this case begins -- and ends -- with R-2 and 34 C.F.R. 668.13(c) (1)-(2)" and that ED "cannot, as a matter of law, go behind the 1992 Bliss financial statements." Bliss Brief at 14. As justification for this position, Bliss places weight on the fact that the auditor's opinion letter is neither adverse nor qualified. Presumably, Bliss would concede that further probing of the financial statement would be warranted in a circumstance where some qualification of the financial statement is made. Bliss Brief at 14-17.

Bliss errs in its argument. Under the facts of this proceeding, ED is not restrained from making an in-depth inquiry into the financial condition of Bliss. 34 C.F.R. 68.13(e) states, in pertinent part,

(e) The Secretary determines whether an institution is financially responsible in accordance with paragraphs (b), (c), and (d) of this section by evaluating documents submitted by the institution and information obtained from other sources, including outside sources of credit information.

(Emphasis added). As will be recalled, Bliss submits financial statements which contain no opinion by the auditor. This is an invitation to additional scrutiny. At the hearing, ED set forth its position concerning the depth of its ability to look beyond the face of Bliss's most recent financial statement as follows:

[T]aking this financial statement, beginning with the auditor's opinion and working through the balance sheet and through the history of the institution and its parent, that there is still a problem with the financial resources of Bliss College and its parent, [FES], such that this financial statement does not, as required by the reg[ulation], demonstrate to the Secretary that Bliss is financially responsible. . . .

Tr. 28, 29. Although it would appear to be an administrative nightmare to fully examine all parents of all schools, there may be some basis for ED to pick and choose which parents of schools to scrutinize. Here, the auditors' statement contains no opinion and ED would be derelict in not finding out the basis for the omission, especially when the intercompany receivable of Bliss is of such magnitude and leads directly to cash poor FES which may owe an unforgiving IRS as much as $5,000,000. I find that it is correct for ED, in this instance, to examine all the information available to it, not just the balance sheet of Bliss. In so doing, ED shows that Bliss is not financially responsible as required by 34 C.F.R. 668.13.

Once ED looks beyond the face of the financial statement, Bliss does not meet the regulatory requirements of financial responsibility. Based on the information obtained from the hearing, Bliss has not made its requisite demonstration of financial responsibility. The only reason that Bliss is able to present a putative numerically acceptable financial statement is because of its intercompany receivable. The intercompany receivable depends on the ability of the parent corporation, FES to pay. Most of this money may be owed to the IRS which offers no evidence herein. FES's ability to pay, thus, is tied to the bankruptcy, to the IRS and to a $5,000,000 note obligation of its sole stockholder, Mr. Fischer. Mr. Fischer's ability to pay is in serious doubt, but not merely because that note has not been repaid during the period covered by the past four years of FES balance sheets, E-4, -5, and -6 (covering the years 1988, 1989, 1990, and 1991).

Bliss makes an issue about the fact that Bliss' financial statement did not receive an adverse or qualified opinion from the auditors. As the only CPA-expert to testify at the hearing, Mr. Kistler identified three types of auditor's opinion letters: unqualified, qualified, or adverse. Tr. 154, 160. An unqualified letter is limited to three paragraphs. In Bliss' financial statements, the auditors did not issue an unqualified opinion nor did they issue an adverse opinion. The letter in this case is qualified by its refusal to issue an opinion. Tr. 160.

In expressing no opinion on the financial statement, Deloitte & Touche declined to provide the reader with assurances that the financial statements were entitled to unqualified support. There is no "determination" in sufficient accordance with amended section 498 of HEA.

The failure of the auditor to issue an opinion in this case indicates that the "reader would have to make his own opinion and derive his own comfort level upon reading these financial statements since the auditor was not able to and declined to issue an opinion." Tr. 161

ED asked Bliss to provide the Deloitte & Touche auditor who could explain his position and the information that he had or did not have when auditing the financial statements. Bliss concluded that providing the Deloitte & Touche auditor was not necessary to resolve the issues in this case. The only reliable evidence on this issue is ED's. Mr. Harb's self-serving hearsay about the audited financial statement is virtually worthless.

Bliss argues that ED's failure to produce a letter to Mr. Harb sent by Deloitte & Touche should be a basis to exclude financial statements (ED Exhibits 5 and 6) which demonstrate that, for at least the past four years, the financial condition of FES and Bliss has been weak. Bliss argues that in the absence of such a letter, a characterization of the intercompany receivable as "current" must be accepted. Such a letter exists and was produced. It was sent to FES's Chief Financial Officer and a copy of it is attached to the Reply Brief of ED dated August 6, 1993. The letter is received as a post-hearing exhibit and does not in any manner undercut the receipt in evidence of Ex. 5 and 6. Instead, the letter to Mr. Harb tends to confirm the existence of financial problems at FES and Bliss. My prior ruling to receive ED Exhibits 5 and 6 is affirmed.

Bliss argues that the testimony of Bliss students, Mr. Hamilton and Ms. Triggs, a senior citizen (TR 73), is indicative of the typical Bliss student. I accept that they are. Bliss is an institution of long standing in the Columbus area. Its passing would be regrettable. Mr. Hamilton and Ms. Triggs represent Bliss students who were able to improve their life through attendance at Bliss. Tr. 221.

However, ED is entitled to remedial action. Bliss makes the argument that it cannot be terminated because to do so would harm students and because Bliss would be forced to close. Bliss Posthearing Brief at 7. Nonetheless, ED's obligation is to safeguard Federal educational funds. Simply, Bliss is not an eligible institution and must be terminated, not as punishment but because it does not qualify for participation in Federal educational programs. This differs from a situation where an institution is terminated because of flagrant violations.

Findings and Order

I Find:

(1) that Bliss failed to make refunds as required;

(2) that Bliss is not financially responsible;

(3) that Bliss based on finding (2) must be terminated from further participation in SFAP programs because it is not an eligible institution, and

(4) that Bliss should not be fined $197,000 because in the absence of any misconduct, its pre-bankruptcy financial inability and its bankruptcy insulate it from punishment from what in this instance is not a grave offense of non-payment of refunds.

Bliss is terminated from further participation in SFA Programs. In the absence of a timely appeal or stay, this decision will become effective as the decision of ED.

Dated this 7th day of September, 1993.

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1 Hereafter referred to as R-#-#. ED Exhibits shall be similarly labelled E-#-#.

2 More specifically, ED seeks here to terminate Bliss' participation in the Federal Pell Grant, Federal Supplemental Educational Opportunity Grant, Federal Perkins Loan, and Federal Work Study Programs and the Federal Family Education Loan Programs which include the Federal Stafford Loan, FPLUS, and Federal SLS programs.

3 ED notes that one of Bliss' witnesses who testified at the hearing, Ms. Vena Triggs, was unaware of the fact that, according to Bliss' own information, she is owed a refund for her guaranteed loan. E-1-65; Tr. 80 - 81.

4 References to the Hearing Transcript for the hearing will be cited as TR _____.

5 The jurisdiction of ED and this administration law judge is not affected by the automatic stay provisions of the Bankruptcy Code because FES's and Bliss's bankruptcy filings do not operate as a stay of any action by the Secretary of Education regarding the eligibility of Bliss to participate in the SFA Programs. 11 U.S.C. 362(b) (16).

6 ED complains that one person who continues to receive funds is the sole stockholder of FES, Mr. Fischer, who receives a salary in Nashville, TN of $215,000 per annum. E-8-58. During the year since filing bankruptcy, Mr. Fischer's salary could pay virtually all of the student refunds that are not being paid to Bliss students and are listed at R-2-9 as refunds that Bliss considers subject to compromise. ED queries, does this indicate FES's desire to help its students and to satisfy all of its obligations?

7 ED invites official notice of two other financial statements prepared for FES subsidiaries in the Matter of Fischer Technical Institute, 92-141-ST (Exhibit R-2) and In the Matter of Draughon College, 93-04-ST (Exhibit R-9). Both these financial statements contain sizeable intercompany receivables that are necessary for the institutions to claim that they meet financial responsibility. No other FES or subsidiary financial statements have been prepared.

8 R-3 shows that Bliss has been paid a portion of the intercompany receivable. However, without net figures, ED notes that it is impossible to determine whether these payments to Bliss constitute anything more than a quid pro quo that Bliss would turn around and replenish FES's cash flow position. R-3 does not demonstrate to ED that Bliss is financially responsible. R-3 does demonstrate that Bliss recognizes that the information that appears on the face of its financial statement is insufficient.

9 The standards of financial responsibility provided for in paragraph (c) (2) include operating losses, net worth, and asset-to- liabilities ratios. See Section 498(c) (2) of the HEA.

10 Bliss does attempt to prove, using R-3, that the intercompany receivable is being paid. However, Bliss was forced to admit that R-3 did not represent a "net" lowering of the intercompany receivable. Tr. 247, 248. There is no information about the size of the intercompany receivable (what net effect the clearinghouse account had on Bliss' intercompany receivable) during this same period. Tr. 248, 250.

11 That figure is the combination of all the intercompany payables and all of the intercompany receivables listed on the latest financial statement of FES and subsidiaries, E-4-16-29. What is left is the FES intercompany payable. At the hearing, Mr. Kistler testified as follows:

I do not believe the company the parent has the wherewithal to honor those receivables; therefore, they could be considered to be non-current assets. And the financial information that I have seen, along with the statements issued by the auditors, and looking at the statement of cash flows which shows the reader the cash that is generated from an operation, I don't believe the company can honor that 1,631,000. . . . [W]hen you look at the total picture, the parent [FES], the subsidiaries and so forth, the intent is not there and the ability is not there to pay that number. And we believe in Education that it should not be considered a current asset, that it should be considered something other [than a current asset].

Tr. 212, 213.

12 ED does not agree that the bankruptcy code applies to its actions under the Higher Education Act of 1965, as amended, but plainly all jurisdiction of the bankruptcy court cannot be disclaimed by ED.

13 Bliss argues that the Plan of Reorganization can be relied upon for the proposition that Bliss and all the FES subsidiaries will repay $950,000 in pre-petition refunds but then argues that ED cannot rely upon the Plan of Reorganization to support the proposition that Bliss and all other FES subsidiaries can expect nothing from FES or Mr. Fischer as Class 17 Claimants. Bliss Posthearing Brief at 21-22 and 34-35.