IN THE MATTER OF Docket No. 93-171-ST
Bais Fruma,
Student Financial
Respondent. Assistance Proceeding

Appearances: Arthur Friedman, Esq., New York, New York, for Bais Fruma.

Russell B. Wolff, Esq., and Carol Bengle, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before: Judge Ernest C. Canellos.

DECISION

On December 14, 1993, the United States Department of Education (ED) Office of Student Financial Assistance Programs (SFAP) issued a Notice of Intent to Terminate the eligibility of Bais Fruma from participation in programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV).See footnote 1 *1* The Notice also imposed fines against Bais Fruma totaling $727,500.See footnote 2 *2* By letter dated December 23, 1993, Bais Fruma filed a timely appeal of the Notice. The Administrative Law Judge (ALJ) initially assigned to this case set the course of this proceeding to include the presentation of arguments and evidence by written submissions. Due to the illness of the ALJ, this case was reassigned to me on July 22, 1994.

This case involves significant allegations of fraud by Bais Fruma. Generally, SFAP alleges that the school's fraudulent conduct included the enrollment of numerous residents of Brooklyn, New York, as purported students in the school's academic programs for which the school collected several million dollars from the Federal government in Pell Grant funds.

I

As an initial matter, Bais Fruma argues that the Notice issued by SFAP does not adequately state the government's position. Recognizing that the sufficiency of a Notice is a threshold procedural question, I will consider that issue first.

According to Bais Fruma, SFAP's Notice denies the institution a full opportunity to justify or explain its conduct because the Notice lacks specificity. For example, although the first allegation alleges that the institution established and maintained false or inaccurate documents in student files, the allegation is impermissibly vague because the institution is not able to determine which document or what information contained within a given document is allegedly false or inaccurate.

It is well settled that the right to an administrative hearing carries with it the right to a notice of what the government intends to do. Generally, a notice is legally sufficient if it enables the affected party to prepare an informed response. See Administrative Procedure Act (APA), 5 U.S.C. § 554(b); NLRB v. Smith Industries, Inc., 403 F.2d 889 (5th Cir. 1968). Although this proceeding is not bound by the Federal Rules of Civil Procedure or the APA, the Secretary requires SFAP to issue notices that contain sufficient specificity of matters of fact and law to enable institutions the full opportunity to defend or justify their conduct. See, e.g., In the Matter of Romar Beauty Schools, Dkt. No. 90-90-ST, U.S. Dep't of Educ. (Decision of the Secretary) (September 7, 1994).

In that regard, I find that SFAP's Notice complies with the requisite administrative notice requirements. The Notice sets forth SFAP's allegations in a manner that notifies Bais Fruma of the activities that violate the regulatory requirements governing participation in Title IV programs. Although the Notice does not state which *documents* SFAP believes to be inaccurate or falsified, the Notice explicitly identifies the student *files* involved. On the basis of this identification, Bais Fruma could, as it apparently did, check the documents contained within the appropriate files for accuracy or evidence of falsification. Consequently, the Notice sufficiently stated SFAP's position and adequately informed Bais Fruma of the allegations.

II

(a)

Under 34 C.F.R. § 668.23(f)(2)(I), institutions receiving Title IV funds must establish and maintain records regarding the educational qualifications of each student the school admits regardless of whether the student receives Title IV financial assistance. According to SFAP, Bais Fruma maintained records that contained false or inaccurate information in violation of the school's recordkeeping obligations. Under this finding, SFAP cites 43 violations for which it seeks a fine of $5,000 for each violation.See footnote 3 *3*

SFAP alleges that in the files of student #1,See footnote 4 *4* program reviewers discovered a signed and completed admission application to Bais Fruma dated August 8, 1988. On the application, "NONE" was entered as the response to a question requesting the applicant to list all postsecondary institutions previously attended. According to SFAP, its Pell Grant program recordsSee footnote 5 *5* showed that student #1 attended at least three postsecondary institutions during the three years prior to the student's enrollment in Bais Fruma. In that regard, SFAP argues that this evidence shows that Bais Fruma created or maintained a false or inaccurate admission application on student #1. For its part, Bais Fruma maintains that the application properly reflects the information given to the school by the student, and asserts that SFAP's proof of falsification conspicuously omits evidence showing that an authorized representative or employee of Bais Fruma advised or persuaded student #1 to provide false or inaccurate information on the student's admission application. In rebuttal, SFAP contends that it relies upon circumstantial evidence to support its conclusion that, in fact, Bais Fruma was not an innocent bystander being led astray by its crooked student body. Nonetheless, I am persuaded that SFAP's evidence falls far short of what is required to meet its burden of proof.See footnote 6 *6*

As the Secretary held in In the Matter of Romar Beauty Schools, Dkt. No. 90-90-ST, U.S. Dep't of Educ. (September 7, 1994), while the presence of falsified documents in an institution's student files may give rise to a presumption that the documents were falsified by the institution, that evidence, standing alone, is insufficient to carry SFAP's burden of proof in a Subpart G proceeding.See footnote 7 *7* To meet its burden, SFAP must present probative corroborating evidence supporting its allegation; to hold otherwise would be tantamount to improperly shifting SFAP's regulatory imposed burden of proof upon the institution. Id. Although SFAP's evidence, undoubtedly, raises an inference that the admission application contains inaccurate information, the force of the inference is lost entirely by Bais Fruma's showing that SFAP's evidence is of dubious reliability.

There is no evidence supporting SFAP's allegation that an individual acting on behalf of Bais Fruma falsified the application. SFAP introduces no evidence from student #1, in the form

of a signed affidavit or otherwise, that the signature on the admission application is not the student's or that the information on the form was not supplied to Bais Fruma by the student. Nor is the corroborating evidence, the records from three other institutions, probative of falsification by Bais Fruma. The evidence could just as plausibly support a finding that student #1 had not attended a postsecondary institution prior to enrollment in Bais Fruma. In this regard, SFAP offers no justification or rationale why I should find the records of another institution more reliable than the records of Bais Fruma. Consequently, this failure of proof must be held against SFAP since it is the party that carries the burden of proof.See footnote 8 *8* Accordingly, this allegation is unsupported by the record.

SFAP's allegation regarding student #2 suffers from the same evidentiary infirmity as the allegation above. Namely, although SFAP's evidence relating to student #2 raises an inference that the admission application for student #2 was falsified, there is no evidence supporting SFAP's allegation that the *school* falsified the application.See footnote 9 *9* SFAP's evidence includes copies of two admission applications from other institutions. The applications show that student #2 graduated from secondary school in 1988 instead of 1987, the date indicated on Bais Fruma's own admission application. Although SFAP argues that the records of the other two institutions are more reliable than Bais Fruma's records, SFAP does not introduce probative evidence in the form of a high school transcript or diploma, an affidavit from the student, or an otherwise corroborating document showing that student #2 completed secondary school in 1988. Consequently, from the record before me, I am unable to determine *which* year student #2 actually completed secondary school, a determination which is an obvious predicate to finding that the year noted in the Basis Fruma's records is falsified or inaccurate.

More fundamentally, SFAP's evidence is incomplete. It does not show that the information on the form was not supplied to the school by the student. Notwithstanding SFAP's persistence that there is no reason or incentive for students to misrepresent their biographical data on Bais Fruma's admission application, SFAP concedes that its evidence is not only circumstantial, but equivocal, regarding whether the alleged falsification was the result of an

error or an omission by the student or Bais Fruma. As such, it is unclear whether the document in Bais Fruma's student files, or those in the files of the other two institutions, is inaccurate. Consequently, this allegation is also unsupported by the record.

Similarly, SFAP's allegations relating to students #3 - #5, #7 - #10, #12 - #14, #16 - #23, #26 - #29, #32 - #38, and #42 each involve the same failure of proof.See footnote 10 *10* In each instance, SFAP alleges that an admission application found in Bais Fruma's files contained falsified or incorrect information.

I find it significant that SFAP failed to introduce evidence, in the form of an affidavit from the student or an otherwise probative corroborating document, showing that the selected student files were in fact falsified or inaccurate. In this regard, SFAP's failure of proof is fatal to its position. As noted supra, although the presence of falsified documents in an institution's student files may give rise to an inference that the school falsified the documents, that fact, without more, is simply insufficient to carry SFAP's burden of proof. Accordingly, the allegations relating to students #3 - #5, #7 - #10, #12, #13, #16 - #23, #26 - #29, #32 - #38, and #42 are unsupported by the record.

(b)

In the remaining allegations involving inaccurate or falsified documents, SFAP argues that with regard to student #6:

> an admissions application to Bais Fruma dated 7/10/87, indicates no secondary school graduation. The school's records shows that Bais Fruma had information indicating that this individual graduated from secondary school in 1966.

In this instance, SFAP's evidence demonstrates that the institution's own records concerning whether, and when, student #6 graduated from secondary school were inconsistent. Notably, SFAP does not argue that student #6 was ineligible to receive Title IV student financial assistance because the student was admitted to Bais Fruma without proof of secondary school graduation or the administration of an ability-to-benefit test. SFAP's position is simply that Bais Fruma violated Title IV because of the school's inaccurate recordkeeping. Since the evidence shows that the institution's own records conflict, I uphold the finding with regard to student #6.

(c)

Regarding student #11 SFAP argues that:

> an admissions application to Bais Fruma dated 5/5/88, indicates that this individual graduated from secondary school in 1970. A statement by the student, indicates that she is not a secondary school graduate.

SFAP submitted a copy of an unsworn statement signed by student #11 stating that the student did not graduate from high school to support its position that the admission application for the student is inaccurate or falsified because the application indicated that student #11 graduated from secondary school in 1970. The application is signed by the student.See footnote 11 *11* Bais Fruma fails to rebut SFAP's position. The institution simply argues that the student's statement

has little probative value. According to Bais Fruma, the student may have used the term "graduate" in an unusual manner because the student lacked English language proficiency. Although it is unclear whether the school *falsified* the document, I am persuaded by SFAP's evidence that student #11 did not graduate from secondary school and that Basis Fruma's admission application indicating the contrary is inaccurate. As such, I uphold the finding regarding student #11.

(d)

With regard to student #15, SFAP argues that:

> an admissions application to Bais Fruma dated 7/21/85, indicates that this individual enrolled in Bais Fruma. Other documents in her student file indicate that she attended Bais Fruma in the semesters fall 1985, spring 1986, fall 1988, spring 1989, fall 1989, spring 1990, fall 1990, and spring 1991. An affidavit from Institutional Review Specialist Yessyka Santana attests that Ms. Santana interviewed this individual on July 14, 1994 and that the individual said that she never heard of Bais Fruma and had not enrolled in any school or studied at home in the United States.

SFAP relies upon a signed declaration by a member of its staff, Yessyka Santana. Ms. Santana interviewed student #15 who, during the interview, said that she had not heard of Bais Fruma but would not make a written statement to that effect. Presumably, this proffer is made to show that student #15 never attended the school. Bais Fruma argues that its records are not falsified because the signature of student #15 on its admission application is identical to the student's signatures on other documents submitted by SFAP. I accept Bais Fruma's argument that to an eye untrained in signature authentication, the signatures on the documents appear to be authored by the same individual. However, SFAP's evidence is compelling. Consequently, I am persuaded that the student's admission application and academic transcript are of dubious authenticity.

The signed declaration submitted by one of SFAP's investigators is entitled to considerable weight, even in view of the fact that student #15 refused to submit her own signed

statement.See footnote 12 *12* According to Ms. Santana, student #15 told her she had never heard of Bais Fruma. In the record, there is a copy of what portends to be a transcript of student #15's grades over the course of eight semesters at Bais Fruma. It seems unlikely, to say the least, that a student could attend an institution for eight semesters and be unable to recall the name of that institution two years later. In addition, at least one other institution recorded on a school transcript the student's attendance at its institution during some of the same semesters recorded on Bais Fruma's transcript. Although SFAP does not provide any support for why one school's transcript is more reliable than another, the inconsistency of the two transcripts taken with Ms. Santana's declaration persuades me that Bais Fruma's admission application and transcript are, at best, inaccurate and, more likely, fabricated. As such, I uphold the finding regarding student #15.

Similarly, I find SFAP's evidence regarding the alleged falsification of documents in student #24's file persuasive. Bais Fruma's admission application on this student shows that the student was born in 1914, graduated from secondary school in 1932, and applied for admission to Bais Fruma on August 2, 1987. A transcript of the student's grades shows that the student attended Bais Fruma during the 1987-88 academic year. As such, the student was 73 years of age while

enrolled in Bais Fruma as a full-time student. The likelihood that a student attended Bais Fruma for the purpose of training for gainful employment in a recognized occupation at the age of 73 is significantly diminished by SFAP's evidence, which shows that the student was born in 1944 instead of 1914.

Although Bais Fruma concedes that the student was not born in 1914 (the 1914 date presumably was the result of a clerical error), the school has no explanation for why its files indicate that the student's dates of attendance and graduation from secondary school precede the student's birth. Clearly, these inaccuracies cannot be explained away as simple clerical errors. Student #24 could not have graduated from secondary school in 1932, if the student was born in 1944. Nor is it likely that student #24 signed an application containing such basic biographical inaccuracies -- yet, the application is signed with what appears to be the student's name. Indeed, the most plausible explanation of the gross inaccuracy on the signed admission application of student #24 is that the document was fabricated or falsified. Undoubtedly, if student #24 were born in 1914, it would not be unlikely that the student could have completed secondary school in 1932. However, the fact that the student was born in 1944 renders the date Bais Furma recorded for the student's secondary graduation inaccurate on its face. Although SFAP's evidence does not exclude entirely the possibility

that the student falsified the admission application, I am persuaded that the misrepresentations contained on the application result from the conduct of Bais Fruma. The document was contained within the files of the school. According to SFAP's records, the student was enrolled at another postsecondary institution at the time Bais Fruma's files indicate the student attended its school. The student's name is misspelled on the application. The inaccurate dates and the misspelled name were typewritten, not handwritten. The school defends itself by arguing that these significant inaccuracies simply were clerical errors. Yet, the school makes no effort to explain how the student actually could have *attended* Bais Fruma throughout the 1987-88 academic year without any school official or administrative employee recognizing that the student was thirty years younger than indicated on the school's records. Undoubtedly, the evidence is compelling that the admission application was falsified. Consequently, I uphold the finding concerning student #24.

(e)

According to SFAP:

> In the file of student #25: an admissions application to Bais Fruma dated on or about 7/3/90, indicates attendance at SINY secondary school in N.Y., N.Y. from 1969 and graduation in 1969, prior postsecondary education only at Touro in 1989-90, and U.S. citizenship. One document shows that this individual is a resident alien and was not admitted into the United States until 5/24/79. Two other documents also show that this individual was a noncitizen as of 1/90. One admission application shows prior postsecondary at Rockland Community College in the spring of 1989 while another shows prior postsecondary education at Touro College in 1988-89 and 1989-90.

SFAP argues that Bais Fruma's admission application for student #25 incorrectly indicated that the student was a U.S. citizen and that the student graduated from a New York State high school in 1969.See footnote 13 *13* SFAP's evidence includes copies of identification cards that classify student #25 and student #30 as resident aliens. The cards also indicate that student #25 entered

the United States in 1979 and student #30 entered in 1986. Moreover, the school points out that it had no reason to doubt the veracity of either student's answers to the questions on the admission application, and consequently, did not check the students' answers. Bais Fruma argues that the citizenship status of the students is irrelevant to the students' participation in Title IV programs, and that student #25's date of high school graduation was supplied by the student. Despite Bais Fruma's protestation to the contrary, citizenship status is not irrelevant to a student's participation in Title IV programs. Under 34 C.F.R. § 668.7(a)(4), Title IV regulations prescribe the citizenship and immigration status

that students must qualify for to be considered eligible to participate in any Title IV program. Institutions have a duty to ensure that Federal student financial assistance is awarded to students who are eligible to receive those funds as prescribed by Section 668.7(a). Accordingly, I am persuaded by SFAP's evidence and I uphold the finding concerning students #25 and #30.

(f)

With regard to student #31, SFAP argues that:

> an admissions application to Bais Fruma dated 6/23/89, indicates that this individual graduated from UTA secondary school in Monroe, New York in 1986. This information conflicts with information in another Bais Fruma document, which states that he graduated from secondary school in 1988. UTA records also show that this individual graduated from UTA secondary school in 1984. In addition, other documents show that this individual was enrolled in postsecondary education at UTA Brooklyn in 1984-85, 1985-86, 1986-87, and 1987-88.

SFAP presents evidence that Bais Fruma's own records on student #31 contains conflicting information. One document shows that student #31 graduated from postsecondary school in 1988, while the student's admission application indicates such graduation was in 1986. Although under this finding Bais Fruma concedes that its records are conflicting, the school argues that this deficiency is insignificant since the evidence shows that whatever the year the student graduated, it was before student #31 enrolled in Bais Fruma. This argument misses the point.

The gravamen of SFAP's allegation is its contention that the records are inaccurate. Clearly, at least one document in the school's files regarding this student *is* inaccurate since student #31 could not have graduated from postsecondary school in both 1986 and 1988. Accordingly, I uphold the finding regarding student #31.

(g)

According to SFAP:

> In the file of student #39: an admissions application to Bais Fruma dated 1988, indicates that this individual attended secondary school from 1984 to 1988 and graduated in 1988. The admissions application and student file also indicate that the individual enrolled in and attended Bais Fruma. The admissions application also indicates that this individual's social security is a signed statement from this individual which demonstrates that she attended secondary school only through the 10th grade and then attended a seminary in Manchester, England. The statement also indicates that this individual has not been in school since returning to the United States six years ago, 1988.

The evidence SFAP submits purports to show that a falsified admission application was contained in the file of student #39. However, SFAP, perhaps inadvertently, failed to submit a copy of the allegedly falsified admission application. Instead, SFAP submitted a copy of an admission application regarding a student who is not student #39. Consequently, without the

inclusion in the record of student #39's admission application, I am unable to evaluate SFAP's allegation that the document was falsified or inaccurate. Accordingly, SFAP's allegation with regard to student #39 is unsupported by the record.

(h)

Regarding student #40, SFAP argues that:

> an admissions application to Bais Fruma dated 7/7/87, indicates attendance at Satmar Bnai Brek and does not indicate graduation from secondary school. However, an internal tracking document, shows that Bais Fruma had information indicating that this individual graduated from secondary school in 1952, when he would have been less than three years old, assuming a June graduation date. Since Bais Fruma had information indicating that this individual did graduate from secondary school and the information was obviously incorrect as to date, Bais Fruma should have obtained correct secondary school attendance and graduation information and placed that information in its files.

In this instance, SFAP presents evidence that Bais Fruma's records contained conflicting dates of graduation for students #40, #41, and #43. As for these students, Bais Fruma renews its argument that the conflicting dates of postsecondary school graduation is essentially a *de minimis* matter since the students were admitted on the basis of an ability-to- benefit examination, and since there is no evidence in the record that the inconsistencies are the result of anything other than clerical errors.

Although I am persuaded that Bais Fruma did not intentionally maintain inaccurate records with a design to defraud the Federal Government, at least one document in each students' file *is* inaccurate or incomplete in as much as the records of each student conflict about the status of the students' postsecondary school attendance. Undoubtedly, the evidence presented by SFAP clearly shows that the secondary school attendance data on the admission applications of these three students is inaccurate and incomplete. Accordingly, I uphold the finding with regard to students #40, #41, and #43.

III

As a prerequisite to lawful participation in the student financial assistance programs authorized under Title IV, an institution must satisfy either the definition of an "institution of higher education," as set forth at 20 U.S.C. § 1141(a) and 34 C.F.R. § 600.4(a), or the definition of a "postsecondary vocational institution," as set forth at 20 U.S.C. § 1088 and 34 C.F.R. § 600.6. See, e.g., In the Matter of Bnai Arugath Habosem, Dkt. No. 94- 73-EA, U.S. Dep't of Educ. (June 16, 1994). To satisfy either of these definitions, an institution must offer an eligible program under the applicable statutory provisions. The parties do not dispute that Bais Fruma is a postsecondary vocational institution. As such, an intended purpose or aim of at least one of its programs must be consistent with the statutory requirement that the focus of the program is the

preparation of students for gainful employment in a recognized occupation. It is not sufficient that gainful employment in a

recognized occupation is potentially *derived or incidentally available* at the completion of the school's program; instead, the program must have as its *purpose or aim*, the training of students to obtain employment in a recognized occupation. Students enrolled in programs at postsecondary vocational institutions not satisfying this definition are ineligible to receive Title IV funds. See 34 C.F.R. § 668.7(a).

According to SFAP, Bais Fruma disbursed Title IV Pell grant funds to students who were not enrolled in a program that prepared students for gainful employment in a recognized occupation.See footnote 14 *14* To support its position, SFAP relies upon academic transcripts that indicate that some of Bais Fruma's students enrolled in courses that were successfully completed at other institutions. In addition, SFAP argues that its evidence shows that some students enrolled in courses for as many as sixteen semesters without ever receiving a certificate or diploma certifying that the student completed one of the school's programs.

Bais Fruma argues that its programs clearly prepare students for employment and the fact that some students enrolled in courses completed at another institution is more indicative of the unique Judaic Studies programs offered by the school rather than an indication that the purpose or aim of the school's programs are not vocational. In addition, Bais Fruma argues that the failure of the school to grant students transfer credit for duplicative courses should not have a bearing on the issue of whether the institution disbursed Title IV funds to ineligible students. According to Bais Fruma, as long as a student is pursuing studies in preparation for employment, the student is eligible to receive Title IV funds regardless of whether the institution grants transfer credits for previously completed courses at another institution. Further, Bais Fruma argues that in most of the circumstances cited by SFAP, the school was unaware that those students previously attended a postsecondary institution based on the students' responses on their admission applications. Finally, Bais Fruma argues that SFAP has not satisfied its burden of proof. According to Bais Fruma, SFAP relies on the same unpersuasive evidence presented under the previous finding; namely, evidence from other institutions for which SFAP provides no basis to determine why the records from these other institutions should be considered more reliable than the records of Bais Fruma.

From the evidence presented, I am unpersuaded that Bais Fruma's students were not enrolled in a program that prepared students for gainful employment in a recognized occupation. SFAP failed to demonstrate that Bais Fruma does not offer eligible programs as a postsecondary vocational institution. Indeed, the evidence relied upon by SFAP is entirely unpersuasive on this issue. SFAP may have assumed that evidence that Bais Fruma's students enrolled in courses previously completed elsewhere is sufficient evidence, per se, that Bais Fruma's programs do not satisfy the definition of a postsecondary vocational institution. However, assuming, without deciding, that Bais Fruma's students declined to pursue advanced standing (or obtain transfer credits) for previously completed course work,

that fact alone is unpersuasive on whether the students were pursuing a program of study that prepares students for gainful employment in a recognized occupation. The trier-of-fact must

determine whether the pertinent *programs* prepare students for gainful employment in a recognized occupation. See, e.g., In the Matter of Sara Schenirer Teachers Seminary, Dkt. No. 94-8-EA, U.S. Dep't of Educ. (March 21, 1994). SFAP did not present any probative evidence on the scope of Basis Fruma's programs. As such, SFAP has not satisfied its burden of proof where, as here, it fails to present evidence about the nature of the applicable programs enrolled in by the 40 students cited under this finding.See footnote 15 *15*

IV

The Pell Grant program awards grants to help eligible students meet the cost of their postsecondary education. Under the program's regulations, a student is eligible to receive a Pell Grant for the period of time required to complete the recipient's first undergraduate baccalaureate course of study, but is not entitled to receive Pell Grant funds concurrently from more than one institution. See 34 C.F.R. §§ 690.6 and 690.11.

According to SFAP, Bais Fruma concurrently awarded Pell Grant funds to three students who were also recipients of Pell Grant funds from other institutions. SFAP concedes that its evidence is circumstantial, but argues that given the other behavior engaged in by Bais Fruma, the lack of a motive for the students to lie, and the existence of a motive for the school to lie, the fact that this occurred on more than one occasion, and the absence of any affirmative evidence to the contrary, this tribunal should find that substantial evidence supports the conclusion that Bais Fruma acted knowingly to receive Pell Grants on behalf of ineligible students. Bais Fruma argues that in the absence of proof that it knew of such double payments, it would be unfair to fine Bais Fruma for relying on the representations of its students.

Based on the evidence, it is clear that each student attended more than one institution during the same award year.See footnote 16 *16* Although Title IV does not prohibit students from concurrently attending more than one institution, institutions are required to undertake their best efforts to ensure that Pell Grants are not disbursed to students who are recipients of Pell Grant funding from another institution during the same award year. In this regard, Bais Fruma may have undertaken insufficient precautions to ensure that the school did not improperly disburse Pell

Grant funds to some of its students. However, the allegation before me presumes, without any evidentiary showing, that Bais Fruma disbursed Pell Grant funds with the knowledge that another institution also had disbursed Pell Grant funds to the students. As noted supra, in adjudicating issues of fact, I cannot assume the existence of the very facts that the party who carries the burden proof has a duty to prove through the submission of reliable and probative evidence. Accordingly, SFAP's allegations concerning students #1, #2, and #3 are unsupported by the record.

V

Under Title IV regulations, except under circumstances not applicable here, an institution may disburse Pell Grant funds to an otherwise eligible student for only *one* payment period if a requested financial aid transcript (FAT) from each eligible institution the student previously

attended has not been received by the school. See 34 C.F.R. § 668.19. According to SFAP, Bais Fruma disbursed Pell Grant funds to 35 students covering more than one payment period despite the fact the school had neither requested nor received FATs from all eligible institutions previously attended by the student. Bais Fruma argues that although FATs were not included in the student files when SFAP reviewers checked the files, FATs were requested and received by the institution. Bais Fruma does not offer the FATs into evidence. Instead, the school contends that since the results of program and compliance audits of its Pell Grant program covering fiscal years 1989 and 1990 did not reveal that the school had not requested and received FATs, I should find the audits persuasive in supporting the school's position that FATs, although now unaccounted for, were requested and received by Bais Fruma during the appropriate award year. I cannot agree.

The results of the independent program and compliance audits are simply not probative of whether Bais Fruma requested and received FATs for 35 students specifically listed under this finding. More to the point, in 21 of the 35 instances noted, the admission application indicated that the student had not attended any postsecondary institution prior to enrolling in Bais Fruma.See footnote 17 *17* Under the falsification of documents allegation, Bais Fruma contended that it had not known that the students previously attended other postsecondary institutions. Now, Bais Fruma argues, ostensibly, that not only did it know that the students attended another institution prior to enrolling in the school, but that it requested and received FATs from these institutions. I am obviously incredulous of the school's contradictory position.

In addition, I am unpersuaded by the school's argument that since SFAP has the burden of proof, that burden should be construed to require SFAP to explicitly prove a negative; the nonexistence of FATs. To the contrary, once SFAP has provided substantial evidence, as it

has done here,See footnote 18 *18* that FATs were not in the student files of 35 students, to rebut the inference that this allegation is true, Bais Fruma must come forward to either produce FATs or produce evidence that FATs were duly requested and/or obtained. To find otherwise would permit institutions to successfully defend their position that FATs were requested and received by simply saying so, without any evidentiary showing supporting the school's position.See footnote 19 *19* Accordingly, I uphold SFAP's finding that Bais Fruma improperly disbursed Pell Grant funds to 35 students.See footnote 20 *20*

VI

Based on 121 instances of alleged regulatory violations, SFAP proposed fines against Bais Fruma totaling $717,000. Under 34 C.F.R. § 668.84, an institution may be fined up to $25,000 per violation of *any* provision of Title IV or any agreement or regulation implementing Title IV. See also 20 U.S.C. § 1094(c). In assessing whether the imposition of SFAP's proposed fine is warranted, 34 C.F.R. § 668.92 requires that I consider the gravity of the institution's violation and the institution's size. Although there is little regulatory guidance in assessing the size of an institution for purposes of determining an appropriate fine, the administrative law judge's decision in Hartford Modern School of Welding, Dkt. No. 90-42-ST, U.S. Dep't of Educ. (January 31, 1991) (Hartford) may be instructive. In Hartford, the administrative law judge concluded that an institution which disburses $1.2 million in Title IV program funds over the

course of two years should be deemed a medium sized institution based on the average amount of Title IV funds disbursed by institutions during the applicable award year. In that regard, for the most recent award year in which complete data is available, 1990-91, Bais Fruma disbursed $3,970,835 in Pell Grant funds -- an amount, SFAP contends, that is significantly greater than the median amount of Pell Grant funds administered by institutions participating in Title IV programs during the same period. Consequently, I find that given the significant amount of Pell Grant

funds disbursed by Basis Fruma, the school's size is not a mitigating factor warranting the imposition of an insubstantial fine.

In assessing the gravity of the numerous allegations I have upheld, I am persuaded that a significant fine should be imposed. The findings I have upheld show that Bais Fruma acted contrary to the duty, trust, and confidence reposed in it by ED. Bais Fruma's numerous regulatory violations during the award years at issue violated public trust and injured significant Federal interests. The school's conduct, by its tendency to deceive and violate public confidence, in several instances must be deemed constructive fraudSee footnote 21 *21* and, in other instances, I am convinced that intentional fraudulent conduct occurred. As such, the imposition of a significant fine is warranted.See footnote 22 *22*

When assessing the appropriate penalty for the violation of program regulations, I must determine whether the total punishment is appropriate.See footnote 23 *23* In the Matter of Cosmetology Training Center, Dkt. No. 93-86-ST, U.S. Dep't of Educ. (April 14, 1994) (citing In re Beth Rochel Seminary, Dkt. No. 92-110-ST, U.S. Dep't of Educ. (1993)). In this regard, I recognize that the imposition of the statutory maximum $25,000 fine for each instance of inaccurate and falsified recordkeeping is warranted. Accordingly, Bais Fruma shall be fined: **$250,000** for ten instances of inaccurate and falsified recordkeeping.

With regard to the thirty-five instances of Bais Fruma's failure to request financial aid transcripts from all eligible institutions previously attended by the school's students, SFAP proposed to fine the institution $2,500 per instance. Clearly, while an institution's failure to request financial aid transcripts in a timely manner could result in overawards of Pell Grant

funds and is undoubtedly a serious violation of Title IV program regulations, a fine significantly less severe than the statutory maximum fine should be imposed. Accordingly, I uphold SFAP's fine of **$87,500** for thirty-five instances of failure to request or obtain financial aid transcripts in accordance with Title IV.

FINDINGS

I FIND the following:

(1) The Notice of Intent to Terminate and Fine issued by the Office of Student Financial Assistance Programs (SFAP) sufficiently stated SFAP's position and adequately informed Bais Fruma of the allegations against it.

(2) SFAP met its burden of proving that;

(a) Bais Fruma maintained records that contained false or inaccurate information in the files of students #6, #11, #15, #24, #25, #30, #31, #40, #41, and #43,

(b) Bais Fruma improperly disbursed to students Pell Grant funds covering more than one payment period despite the fact the school had neither requested nor received financial aid transcripts from all eligible institutions previously attended by the students.

(3) SFAP failed to meet its burden of proving that;

(a) Bais Fruma maintained records that contained false or inaccurate information in the files of students #1 - #5, #7 - #10, #12 - #14, #16 - #23, #26 - #29, #32 - #38, #39 and #42,

(b) Bais Fruma did not offer eligible programs that prepared students for gainful employment in a recognized occupation,

(c) Bais Fruma improperly disbursed Pell Grant funds to three students who were recipients of Pell Grant funding from another institution during the same award year.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED, that Bais Fruma, immediately and in the manner provided by law, pay a fine in the amount of $337,500 to the United States Department of Education.

SO ORDERED:

Ernest C. Canellos
Chief Judge

Issued: March 9, 1995
Washington, D.C.

Footnote: 1 1 The school's eligibility to participate in Title IV programs was terminated in a separate action involving an issue unrelated to this case.

Footnote: 2 2 Subsequent to its issuance of the Notice, SFAP reduced the proposed fine to $717,000.

Footnote: 3 3 Although the Notice cites 45 violations, SFAP has elected to pursue 43 violations, dropping two from its case-in-chief.

Footnote: 4 4 Student numbers indicate the number of the student referenced in the Notice under each applicable finding.

Footnote: 5 *5 SFAP's Pell Grant records are based on information and documentation submitted to it by institutions participating in the Pell Grant program.*

Footnote: 6 *6 In Subpart G -- fine, limitation, suspension, and termination -- proceedings, SFAP has the burden of persuasion. 34 C.F.R. § 668.88(c)(2).*

Footnote: 7 *7 But cf. In the Matter of Maurice Charles Academy of Hair Styling, Dkt. No. 91-18-ST, U.S. Dep't of Educ. (May 17, 1993) (holding that despite the lack of direct evidence of falsification, proof that a falsified diploma was found in the files of an institution is sufficient to show that school officials or employees falsified the diploma).*

Footnote: 8 *8 Although SFAP opposed the institution's request for a full evidentiary hearing in this case, SFAP, itself, may have benefitted from the opportunity to enhance its ability to meet its burden of proof through the introduction of testimonial evidence.*

Footnote: 9 *9 While affirmative proof of wrong-doing is not essential for SFAP to meet its evidentiary burden of proof, the evidence must be more than equivocal. In other words, the weight of the evidence should support the conclusion that SFAP's view of the facts is more plausible (as opposed to being simply just as plausible) than the views offered by the school or arising from commonsense. See,e.g., In the Matter of Romar Beauty Schools, Dkt. No. 90-90-ST, U.S. Dep't of Educ. (Decision of the Secretary) (September 7, 1994) at 9 (upholding the administrative law judge's determination that equivocal evidence is insufficient to sustain a finding of falsification of documents).*

Footnote: 10 *10 SFAP acknowledges that the allegations involving students #44 and #45 were not pursued in its submissions. Consequently, the issues concerning those allegations are not before me.*

Footnote: 11 *11 The student admits to signing the application, but states that she did not complete the form.*

Footnote: 12 *12 I recognize that Ms. Santana's statement regarding student #15 is undeniably hearsay evidence. However, under 34 C.F.R. § 668.88(c)(1), the formal rules of evidence are not applicable to this proceeding. Generally, evidence is admissible in this proceeding if it is relevant, material, and not unduly repetitious. Clearly, Ms. Santana's statement comes within this standard and, as a Federal agency investigator, her statement warrants the presumption that the statement is offered in evidence by SFAP with sufficient guarantees of trustworthiness.*

Footnote: 13 *13 A similar allegation is made with regard to student #30. In that student's file, SFAP notes:*

> *an admissions application to Bais Fruma dated 8/15/88, indicates that this individual is a United States citizen. This individual's resident alien card, shows that he is a resident alien who entered the United States on 5/23/86.*

Footnote: 14 *14 According to SFAP, Bais Fruma disbursed Pell grant funds to 40 ineligible students. SFAP seeks to fine the institution $10,000 for each ineligible student.*

Footnote: 15 *15 To the extent that SFAP renews its arguments, under this finding, regarding the alleged falsification of records by Bais Fruma of the same student files evaluated supra, I consider those issues thoroughly exhausted by my earlier findings.*

Footnote: 16 *16 Although SFAP argues that the students were enrolled in multiple institutions only on paper, and in fact did not attend any of the institutions for which they received Pell Grant funding, that issue is not before me under this finding. Consequently, I have assumed that the students actually attended the institutions the evidence shows they were enrolled in.*

Footnote: 17 *17 21 of the 35 instances cited involve students named under the falsification of records finding above.*

Footnote: 18 *18 In each of the 35 instances, SFAP presents evidence, through the use of Pell Grant Program Payment Summary reports, that a student received Pell Grant funds covering at least an entire award year from Bais Fruma as well as having received Pell Grant funds from a previously attended institution.*

Footnote: 19 *19 Notably, requiring Bais Fruma to rebut or meet the presumption that SFAP's allegation is true does not impermissibly shift the burden of proof to the institution. The risk of nonpersuasion remains with SFAP. See, e.g., Black's Law Dictionary 1067 (5th ed. 1979) (a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof).*

Footnote: 20 *20 Although the Notice also alleges that Bais Fruma breached its fiduciary duty under Title IV, SFAP did not propose a fine against the school on the basis of the allegation. Consequently, the issue of whether Bais Fruma breached its fiduciary duty is not before me.*

Footnote: 21 *21 Constructive fraud consists of any breach of duty, which by its tendency to deceive, without actual fraudulent intent, gains an advantage to the person or entity at fault. See, e.g., Black's Law Dictionary 595 (5th ed. 1979).*

Footnote: 22 *22 While the recently promulgated 34 C.F.R. § 668.90(a)(3)(vii) is not binding on this proceeding, it is worth noting that this section provides that the Hearing Official should terminate an institution's eligibility designation on the basis of a finding of fraud, if the institution falsified any document received from a student or pertaining to a student's eligibility for assistance under Title IV. Consequently, it is clear that the Secretary has determined that the quantum of evidence showing fraud need not be abundant to warrant the imposition of a significant penalty on the basis of a finding of fraud.*

Footnote: 23 *23 It is well established that fines are imposed to punish the wrongdoer for past bad acts, discourage the wrongdoer from future offenses, and deter other potential wrongdoers. In this regard, fines should be significant enough to achieve the multiple purposes of punishment, but not so excessive that the fine is viewed arbitrary and capricious. In the Matter of United*

Talmudical Academy of Monsey (NY), Dkt. No. 93-11-ST, U.S. Dep't of Educ. (May 4, 1994). As such, I must recognize in determining an appropriate fine that Bais Fruma's eligibility to participate in Title IV programs already has been terminated.