IN THE MATTER OF BNOS JERUSALEM RABBINICAL SEMINARY,
Respondent.

Docket No. 93-99-SP
Student Financial Assistance Proceeding

ORDER RE ED'S MOTION TO AMEND THE
FINAL PROGRAM REVIEW DETERMINATION

On October 5, 1993, some two days before the due date of its brief and supporting evidence, the Office of Student Financial Assistance Programs (ED) filed a motion for an order requesting permission to amend the final program review determination issued in this case. Due to ED's approaching deadline, it was necessary for the tribunal to suspend the proceeding in order to obtain the views of Bnos Jerusalem Rabbinical Seminary (Bnos). Bnos responded on October 20, 1993, and agreed to the amendment concept providing the amended final program review determination was used solely to clarify the existing charge that Bnos had caused its students to utilize its address rather than the students' addresses for purposes of receiving the student aid reports. Bnos objected to the possible utilization of this approach as a means to create a new set of adverse findings or to establish a new set of deadlines for the admission of evidence.
ED filed a reply on November 1, 1993.

Upon review of the submissions, the tribunal requested ED to submit a draft of the revised final program review determination to Bnos to assist the parties in formulating a proposal agreeable to the parties. The draft was reviewed by Bnos and, thereafter, the parties failed to resolve this matter. Thus, the motion to amend is presently before the tribunal.

In In re Missouri Valley College, U.S. Dep't of Education, Dkt. No. 92-71-SP (Order of Nov. 13, 1992), the tribunal held that it had the discretion whether to grant a request by ED for a dismissal without prejudice where ED intended to reissue the final audit determination. The analysis in Missouri Valley is equally applicable in the instant case where ED's request is one to amend a final program review determination--

> The next matter for resolution is whether OSFA may obtain a dismissal without prejudice from the administrative law judge in order to reissue a final audit determination. This is a matter normally within the sound discretion of the
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> tribunal. United States v. Gunc, 435 F.2d 465, 467 (8th Cir. 1970); Millsap ex rel. Millsap v. Jane Lamb Memorial Hosp., 111 F.R.D. 481, 483 (S.D. Iowa 1986); 9 **Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure** § 2364, at 161 (1971).
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> There are, however, several overriding factors which distinguish these administrative proceedings from judicial proceedings. Under 20 U.S.C. § 1094(b)(2) (1990), Congress provided, in effect, that the hearing shall take place not later than 150 days after the Secretary receives the institution's request for review of the final audit determination. Thus, Congress

sought a quick resolution of these matters--an objective which would thwarted under OSFA's approach.

In addition, the regulations governing this proceeding also provide restrictive limitations regarding the submission of evidence. 34 C.F.R. §§ 668.116(e) and (f). The reissuance of the final audit determination would allow OSFA to circumvent the regulations by granting it another opportunity to submit evidence as well as to add other matters.[footnoted omitted] Thus, the nature of the statutory and regulatory schemes contemplates that initial audits are final and re-audits are discouraged.

This finality of the audit rationale has been adopted by Congress for other governmental agencies. For example, the Internal Revenue Code dictates that once a deficiency letter--which is akin to a final audit or program determination--is issued to a taxpayer, further deficiency letters are restricted. 26 U.S.C. § 6212(c)(1) (1989) provides--

> [i]f the Secretary has mailed to the taxpayer a notice of deficiency . . . and the taxpayer files a petition with the Tax Court within the time prescribed in Section 6213(a), the Secretary shall have no right to determine any additional deficiency . . . .

This provision was originally adopted in 1926 and is based on the principle that--

> [f]inality is the end sought to be attained by these provisions of the bill, and the committee is convinced that to allow the reopening of the question of the tax for the year involved either by the taxpayer or by the commissioner (save in the sole case of fraud) would be highly undesirable.

S. Rep. No. 52, 69th Cong., 1st Sess. 26 (1926).

In McCue v. Commissioner, 1 T.C. 986, 987 (1943), the Tax Court interpreted this Congressional directive and stated--

> [i]f later the Commissioner becomes convinced that the deficiency has been determined in too small or too large an amount or if he deems the grounds relied upon and set forth by him in his notice of deficiency erroneous or inadequate, his only remedy is to endeavor to straighten out those matters in the proceeding before this Court.

The Tax Court ultimately held that the Commissioner had no right to mail a second notice and was not entitled to the advantages which would accrue to him if his second letter had been a statutory notice. Id. at 988. See also Stamm Int'l Corp. v. Commissioner, 84 T.C. 248, 252 (1985) (the Commissioner had no right to send the taxpayer a second notice for the same taxable year and tax liability); Harvey Coal Corp. v. Commissioner, 12 T.C. 596, 603 (1949) (same). The rationale under the tax system applies with equal force to the Federal student financial assistance programs and supports the denial of OSFA's motion to dismiss.

Id. at 3-5.

Thus, amending the final program review determination appears contrary to the statutory and regulatory schemes and the doctrine of finality.

ED urges that, in the absence of the proposed revisions to the final program review determination, it would be impossible for the hearing official to consider all of the material facts necessary to render a just and proper decision. ED acknowledges that it had the materials in its possession prior to the issuance of the final program review determination. ED fails, however, to disclose any meaningful explanation as to why this material was not considered, included, or reflected in the final program review determination which would justify overriding the statutory and regulatory schemes and the doctrine of finality. Under the present circumstances, amending the final program review determination would encourage the production of deficient and substandard final program review determinations, a matter which the Department cannot condone.See footnote 1 1/

Accordingly, ED's motion to amend the final program review determination is denied. In addition, the parties shall file

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their briefs and supporting evidence in the manner prescribed within the Order of September 16, 1993 as follows:

1. ED's brief and supporting evidence is due on or before December 17, 1993.

2. Bnos's brief and supporting evidence is due on or before January 11, 1994.

3. ED's reply brief is due on or before January 25, 1994.

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Allan C. Lewis
Administrative Law Judge

Issued: December 1, 1993
Washington, D.C.

Footnote: 1 1/ Moreover, a cursory review of ED's revised draft final program review determination reveals that many of its proposed additions appear irrelevant to the issues in this case, namely whether Bnos's students improperly used the address of the institution in their applications for Pell grants and, if so, the proper amount of the recovery, if any, by the Department.