

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

On November 17, 1993, the Director of the Institutional Monitoring Division issued a Final Audit Determination (FAD) against Respondent. Respondent filed a Request for Review of the FAD on January 5, 1994. On March 4, 1994, Respondent filed a Motion to Dismiss, with one attachment, alleging that the FAD was issued by someone other than a "designated ED official." On March 14, 1994, the Office of Student Financial Assistance Programs ("SFAP"), U.S. Department of Education ("ED" or "Department") filed a memorandum in opposition (SFAP Response), which also included several attachments. On March 18, 1994, Respondent filed a reply. For the reasons given below, Respondent's motion to dismiss is denied.

34 C.F.R. §668.112 [See footnote 1 /](#) defines a "final audit determination" as "the written notice of a determination issued by a designated ED official based on an audit of an institution's participation in any or all of the Title IV, HEA programs covered under this subpart." § 668.112 defines a "designated ED official" as "an official of the Education Department to whom the Secretary has delegated the responsibilities referred to in this subpart." Despite the fact that under § 668.116(d), the institution in a subpart H proceeding bears the ultimate burden of persuasion, previous decisions have held that the Department bears the burden of production to establish a prima facie case. This includes the burden of presenting evidence sufficient to establish to a reasonable person that the FAD was issued by the person to whom the Secretary delegated the responsibilities under § 668.112 to issue final audit determinations. *In the Matter of Stautzenberger College*, Dkt. No. 90-102-SA, U.S. Dep't of Educ. (Final Decision April 2, 1991); *see also In the Matter of Berk Trade and Business School*, Dkt. No. 91-5-SP, U.S. Dep't of Educ., (Initial Decision Dec. 10, 1992), *aff'd* by the Secretary (Decision of the Secretary March 19, 1993). The Secretary has held that when SFAP fails to establish that the FAD was issued by a designated ED official, the FAD is void *ab initio*. *In the Matter of Atlanta College of Medical and Dental Careers*, Dkt. No. 91-93-SA, U.S. Dep't of Educ. (Decision of the Secretary February 16, 1994). [See footnote 2 2](#)

Initially, the tribunal will address Respondent's claim that the documents submitted with SFAP's Response were untimely submitted and thus are inadmissible. § 668.116(e)(1) prescribes the types of evidence that may be submitted in a Subpart H proceeding. The documents submitted with SFAP's Response are labelled as Attachments A (with corresponding Exhibits A through E) and B. They include a declaration by a Department official, several delegation memoranda, a delegation log, and excerpts from the Department of Education's Mission and Organization Manual. The only category under § 668.116(e)(1) in which these materials conceivably could fit is that of "[o]ther ED records and materials," which are admissible only "if the records and materials were provided to the hearing official no later than 30 days after the institution's filing of its request for review." § 668.116(e)(1)(v). Respondent filed its request for

review on January 6, 1994. Therefore, if these documents were "other ED records and materials," they could be submitted no later than February 5, 1994. These materials were not submitted until March 14, 1994, concurrently with the filing of SFAP's Response. Therefore, if these documents were "other ED records and materials," they would be inadmissible under § 668.116(f) because they were not timely submitted under § 668.116(e)(1)(v).

However, § 668.118(c) authorizes the tribunal to base findings of fact on matters given official notice. "[O]fficial notice may be regarded as two kinds--(1) official notice in a limited sense which is the same as judicial notice and (2) official notice in an enlarged sense which permits an administrative agency to adduce matters personally known to it or acquired outside the hearing but which requires all matters thus officially noticed be made known to the parties." 2 Am. Jur. 2d Administrative Law § 385; *see also id.* at §§ 386-388. Thus, the agency is not required to pretend ignorance of facts known to it. Therefore, to the extent that the documents submitted with SFAP's Response are internal Department documents prepared in the usual course of business and thus represent matters personally known to the Department, and were not prepared specifically for the purposes of this proceeding, the tribunal will take official notice of these documents. [See footnote 3 3](#)

The tribunal notes Respondent's objection to the use of official notice based on the refusal of the tribunal in *Stautzenberger* to take official notice of various documents, including, *inter alia*, U.S. Education Department Departmental Directive A:GEN:1-104, Delegations of Authority, dated August 15, 1989, [See footnote 4 4](#) and the Audit Resolution System Handbook with appendices. [See footnote 5 5](#) The tribunal in *Stautzenberger* noted §668.118(c), which authorized the tribunal to take official notice, but declined on the basis that "this provision does not apply to adjudicative facts that are crucial to the central factual controversy which must, of course, be proven through traditional evidentiary methods." *Stautzenberger* at 4 n.2 (citation omitted). [See footnote 6 6](#)

However, more recent decisions of both the Secretary and other tribunals effectively have taken official notice of internal Department documents, including delegations of authority and Departmental Directive A:GEN:1-104. *See, e.g., In the Matter of Long Beach College of Business*, Dkt. No. 92-132-SP, U.S. Dep't of Educ. (Initial Decision Nov. 30, 1993), *rev'd* on other grounds (Decision of the Secretary Feb. 16, 1994); *see also Berk* at 11 n.4. [See footnote 7 7](#) The tribunal in *Long Beach* considered both A:GEN:1-104 and delegation documents despite the fact that they had not been introduced within the time periods specified in § 668.116(e)(1)(v). Although the Secretary reversed the decision because he found that the FAD had been issued by the designated ED official, the Secretary did consider these documents.

In any event, the Secretary's recent decision in *In the Matter of Baytown Technical School, Inc.*, Dkt. No. 91-40-SP, U.S. Dep't of Educ. (Decision of the Secretary April 12, 1994) is dispositive. In that decision, the Secretary upheld the judge's decision to admit exhibits despite the fact that they were untimely under § 668.116(e)(2). In doing so, the Secretary cited the hearing officer's responsibility to oversee the course of the administrative process and ensure a fair and impartial proceeding.

Therefore, based on these precedents, the tribunal will take official notice of certain of the documents submitted by SFAP with its Response. Nonetheless, the doctrine of official notice lies within the discretion of the tribunal, [See footnote 8 8](#) which will use official notice only to the extent that doing so is consistent with this tribunal's responsibility to oversee the course of the administrative process and ensure a fair and impartial hearing.

Specifically, the tribunal takes official notice of the Department of Education documents found at Exhibits A, B, C, D, and E of Attachment A to SFAP's Response. The tribunal also takes official notice of the excerpts from the Department's Mission and Organization Manual found at Attachment B to SFAP's Response. However, the tribunal does not take official notice of the Declaration of Wilma J. Hodo found at Attachment A, which is not a Department document prepared in the usual course of business, but instead is simply a document that was prepared specifically for the purpose of this proceeding and thus qualifies as an "other ED record or material" under § 668.116(e)(1)(v). Therefore, because this document was not timely

submitted, it is inadmissible and will be excluded from consideration in this proceeding.

Turning to the issue of whether or not the FAD was issued by a designated ED official, The FAD in the instant case was signed by the Director, Institutional Monitoring Division. Ex. R-1-7. Departmental Directive A:GEN:1-104, attached to Respondent's motion, states at page 1 that approved functional statements are one of the sources of authority within the Department for taking actions and making decisions that have legal significance. The Department of Education's Mission and Organization Manual, contained in SFAP Attachment B, states on page 1 that it "includes all approved functional statements in the Department . . ." That Manual further states that "The [Institutional Monitoring] Division is the action office for resolving external audits of institutions participating in SFAP programs and monitors compliance with the audit requirement." Therefore, this constitutes a valid source of authority for the Institutional Monitoring Division to issue the FAD in question.

For these reasons, the tribunal finds that the FAD at issue in this proceeding was issued by a "designated ED official" as required by § 668.112. [See footnote 9 9](#) Accordingly, Respondent's Motion to

Dismiss is hereby DENIED. The suspension of briefing schedule issued on March 7, 1994, is hereby rescinded. Respondent shall file its brief on or before **July 6, 1994**. SFAP shall file its reply brief on or before **July 20, 1994**.

Judge Richard F. O'Hair

Issued: June 9, 1994
Washington, D.C.

S E R V I C E

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[Footnote: 1](#) 1 Unless otherwise noted, all citations are to 34 C.F.R.

[Footnote: 2](#) 2 As Respondent notes in its Motion to Dismiss, the Secretary issued a number of other decisions on that same day in which he reversed the hearing official's determination that the FAD or other document had not been issued by the designated ED official because it had not been signed by that person, but rather by a subordinate on behalf of the designated ED official. See, e.g., *In the Matter of International Career Institute*, Dkt. No. 92-144-SP, U.S. Dep't of Educ. (Decision of the Secretary Feb. 16, 1994). In these decisions, the Secretary held that § 668.112 did not require that the FAD be signed by the designated ED official, but only that the FAD be issued by the designated ED official (regardless of who actually signs the FAD, the decision to issue the FAD must have been made by the designated ED official). Therefore, these decisions were consistent with the Secretary's holding in *Atlanta College of Medical and Dental Careers* that § 668.112 requires the Department to establish that the FAD was issued by the designated ED official.

[Footnote: 3](#) 3 The tribunal notes that in other student financial assistance proceedings, the Secretary has taken official notice of internal Department documents. In *The Matter of Bnai Arugath Habosem*, Dkt. No. 92-131-ST, U.S. Dep't of Educ. (Decision of the Secretary Aug. 24, 1993).

[Footnote: 4](#) 4 Departmental Directive A:GEN:1-105 was renumbered A:GEN:1-104 on May 22, 1991 by Department of Education Transmittal Sheet 91-20, Pen and Ink Changes.

International Career Institute at 1 n.1. Hereinafter, for purposes of this decision, this Departmental Directive will be referred to as A:GEN:1-104.

[Footnote: 5](#) 5 It is interesting to note that despite relying on Stautzenberger for its position that the attachments to SFAP's Response should not be considered, Respondent attached a copy of A:GEN:1-104 to its Motion to Dismiss and asked this tribunal to take official notice of A:GEN:1-104, even though the tribunal in Stautzenberger excluded this very same document. Respondent requests this tribunal to take official notice of that Departmental Directive "because it constitutes an ED regulatory directive which comprises part of the regulatory guidance governing this case." Motion to Dismiss at 9. The tribunal considers the distinction between A:GEN:1-104 and some of the documents submitted by SFAP to be tenuous at best. A:GEN:1-104 is not a regulation, and moreover, the Department's Mission and Organization Manual included with SFAP's Response could also be described as comprising part of the regulatory guidance governing this case. Additionally, as discussed *infra*, other tribunals have treated A:GEN:1-104 and the delegations alike, effectively taking notice of both.

[Footnote: 6](#) 6 Koch discusses the distinction between legislative facts, which can be given official notice, and adjudicative facts, which must be proven. However, the distinction is not always apparent, and there are conflicting court holdings as to whether an administrative agency can take judicial notice of its own records. See 2 Am.Jur.2d Administrative Law § 387. Therefore, for purposes of the Department of Education, a more appropriate distinction can be made between internal Department documents prepared in the usual course of business and documents prepared or introduced specifically for the purposes of this proceeding. This approach is similar to the distinction between "litigation" and "nonlitigation" facts made by the original Attorney General APA Committee, as quoted by Koch:

If information has come to an agency's attention in the course of investigation of the pending case, it should be adduced only by the ordinary process . . . But if the information has been developed in the usual course of business of the agency, if it has emerged from numerous cases, if it has become part of the factual equipment of the administrators, it seems undesirable for the agencies to remain oblivious of their own experience [and, they should take notice of such facts.]"

1 KOCH, ADMINISTRATIVE LAW AND PRACTICE § 6.37 (1985) (quoting A.G. Final Rep.

at 72). While Koch notes that this approach has been criticized and has been supplanted by the distinction between legislative and adjudicative facts, the tribunal considers the Attorney General Committee's approach to be useful in understanding the distinction between legislative and adjudicative facts, as well as in determining which facts can be noticed and which facts must be proven.

[Footnote: 7](#) 7 The Berk tribunal discussed Appendix 6 to the Department's Audit Resolution System Departmental Directive and Handbook even though it had not been introduced into evidence or cited by either party. Appendix 6 was one of the documents for which the Stautzenberger tribunal declined to take official notice. Stautzenberger at 2, 3 n.2.

[Footnote: 8](#) 8 *Castillo-Villagra v. INS*, 972 F.2d 1017, 1028 (9th Cir. 1992).

[Footnote: 9](#) 9 *The parties argue extensively over the meaning of the word "through" as used in the delegation of authority contained at SFAP Ex. A and Ex. R-20-1. Respondent contends that this did not imbue the Director, Division of Audit and Program Review (DAPR) with the authority to issue final audit determinations. SFAP claims that it did. Resort to Black's Law Dictionary and other dictionaries is inconclusive, indicating that the word "through" can have either of the meanings advocated by the parties. As Black's notes: "'Through' is [a] function word capable of several meanings depending on its use . . ."* BLACK'S LAW DICTIONARY 1328 (5th ed. 1979). Moreover, despite their separate control numbers and the log contained at SFAP Ex. D, it is unclear whether the documents contained at SFAP Ex. B and C constituted separate delegations or were simply distributional copies of the original memorandum. The fact that the memorandum specifically mentions the Directors of DAPR and SFAP, who also signed it, might indicate that authority was delegated to (and "through") them as well, but it also might simply indicate that they were informed of the delegation to one of their subordinates.

Other evidence is similarly inconclusive. The document at SFAP Ex. E entitled "Amendment to Delegations of Authority" [emphasis added] uses three separate control numbers to describe the April 22, 1991 delegation. This suggests that the Directors of DAPR and SFAP were delegated the authority to issue FADs. However, the April 22, 1991 delegation also stated that the authority to issue FADs was reserved to the Director, DAPR if the Chief, Audit Review Branch was recused from involvement because of a conflict of interest. Such a statement would be superfluous if the Director, DAPR already had this authority.

In conclusion, because the tribunal finds that the Director, Institutional Monitoring Division had the authority to issue the FAD in question, the tribunal declines to resolve the issue of whether the authority to make and issue final audit determinations was delegated solely to the Chief, Audit Review Branch, DAPR, or was also delegated to the Directors of SFAP and DAPR.

Consequently, it is also unnecessary at this time to resolve the issue of whether or not the Institutional Monitoring Division is the same office as the former Division of Audit and Program Review.