UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

CHRIS LOGAN CAREER COLLEGE.

Respondent.

Docket No. 95-126-ST

Student Financial
Assistance Proceeding

Appearances:

Rodney F. Page, Esq., and Marilyn T. Dare, Esq., Arent Fox Kintner Plotkin & Kahn, Washington, D.C., for Respondent.

Russell B. Wolff, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before: Frank K. Krueger, Jr., Administrative Judge.

DECISION

Introduction and Background

The Respondent, Chris Logan Career College, is a sole proprietorship owned and operated by its president Chris T. Logan. Respondent owned and operated schools in the following locations throughout South Carolina: Florence, Columbia, Sumter, Myrtle Beach, Rock Hill, Bennettsville, Greenville, North Augusta, and Anderson. All of the schools are accredited by the Southern Association of Colleges and Schools.

All of the Chris Logan schools operate a 1500-hour cosmetology program. The Sumter school also operates a 600-hour nursing assistant program. Each school operates a student-run cosmetology clinic which is open to the public where the students get practice and earn extra revenue for the school. Respondent employs from 140 to 160 employees at any given time, and enrolls from 1,500 to 2.000 students. The schools have about an 85 percent placement rate, and approximately 75 percent of the student bodies receive Federal student financial assistance. Respondent has been participating in the Federal student assistance program since about 1983- 84. Ms. Logan started out in 1972 with a school in Florence. Within several years additional schools were established in other cities throughout the state until in 1987 the last school was established in North Augusta. In 1994, the school was closed in Anderson.

By letter dated August 2, 1995, the Student Financial Assistance Program (SPAP), U.S. Department of Education (ED), notified Respondent of its intent to terminate Respondent's eligibility to participate in programs authorized under Title IV of the Higher Education Act of 1965, as amended. SFAP also notified Respondent of its intention to fine Respondent $933,000 for the violations cited. The termination action was based primarily on an OIG inspection conducted in March 1994, which

included on-site visits to the Myrtle Beach, Greenville, Anderson, Bennettsville, Columbia, and Florence campuses. OIG issued a report of its findings in December 1994. The termination action is based on the following findings: that Respondent failed to make refunds, and made refunds late, of Federal Family Education Loans (FFELs) and Pell Grants on behalf of students who withdrew from or otherwise terminated their participation in Respondent's programs; that Respondent failed to calculate refunds properly in accordance with the pro rata formula called for by the Title IV regulations; that Respondent misrepresented its cosmetology program as a "Pivot Point' program; that Respondent made payments on behalf of students who were near or in default of their FFELs in an effort to reduce its default rate in order to avoid automatic termination of its Title IV eligibility; that Respondent failed to comply with the requirements specified by the publisher of its ability-to-benefit test; that Respondent improperly administered its leave-of-absence program; and that the Respondent failed to demonstrate its capability to administer its participation in the Title IV programs.

An evidentiary hearing in this matter was held in Columbia, South Carolina, on December 11 through December 14, 1995.

Summary

As discussed in detail below, I find validity to SFAP's allegations concerning Respondent's failure to make refunds and its failure to make timely refunds. The evidence demonstrates that the Respondent virtually ignored its fiduciary duty to the Department during the period covered by the OIG inspection. Concerning the remainder of the SFAP allegations, the evidence demonstrated only a limited violation in Respondent's pro-rata calculations and its administration of leaves of absences, although much of the evidence does indicate some serious management problems in the past by Respondent. Unfortunately, the violations concerning the failure to pay refunds in accordance with the regulations are so overwhelming and pervasive that Respondent's participation in the program must be terminated. The evidence indicates that the Respondent has substantially made a full restitution of the refunds due. Given that fact, and my findings concerning the other violations alleged by SFAP, I find no rational purpose served by imposing a fine. Respondent's termination from the Title IV program is punishment enough.

DISCUSSION

I. Refunds.

When a student who receives Federal financial assistance under the Title IV program withdraws, or otherwise terminates, his or her enrollment from a participating institution, the institution must refund to the lender or the Federal government that portion of the tuition and fees covering the part of the education program not completed. 34 C.F.R. §§ 668.22, 682.606, 690.78(c) (1991, 1992, 1993). Under the FFEL program. a school must pay the refund to the student's lender within 60 days after the student's withdrawal or drop date. 34 C.F.R. § 682.607(c)(1) (1991, 1992, 1993). Under the Pell Grant and the Supplemental Educational Opportunity Grant (SEOG) program, the refund must be given to the Pell Grant or SEOG program within 30 days of a student's withdrawal or drop date. 34 C.F.R. §668.22(e)(5) (1991, 1992, 1993).

ED Exhibit 11 is the OIG tabulation of all refund candidates for the 1991, 1992, and 1993 (through March 1994) award years, based on information provided by the Respondent. Respondent accepts Exhibit 11 as accurate. Exhibit 11 demonstrates that Respondent was required to pay 826 Pell Grant refunds, 467 of which were paid late and, as of October 1, 1995, 291 were not paid at all. During this same period, Respondent was required to pay ninety-six Supplemental Educational Opportunity

Grants (SEOG) refunds, but only paid one on time. As of October 1, 1995, sixty-seven of the refunds were paid late and twenty-eight remained unpaid. And, during this period, Respondent was required to pay 177 FFEL refunds, and paid 152 late and, as of October 1, 1995, one remained unpaid. All totaled, of 1,099 refunds due during the years in question, only ninety-three were paid on time. Approximately one-half of the refunds paid late were outstanding for more than six months. The total refund liability for Respondent during this period was $636,399. The ninety-three refunds paid on time equaled $65,879; the refunds not paid on time equaled $570,520. As of October 1, 1995, Respondent owed $146,050 in unpaid refunds. Unpaid and late refunds involved students at all nine campuses. Thus, the problem of late and unpaid refunds was pervasive and institution-wide over a three-year period.

During the hearing, Chris Logan admitted that Respondent has never, since 1967, paid its tuition refunds on time for any given award year. Tr. at 722-723. An independent audit performed for Respondent under the Title IV program for the 1987 and 1988 award years, indicated that there were thirteen refunds due. with eleven refunds not paid. ED Exhibit 13-12. Another independent audit for the 1989 and 1990 award years reveals that, out of fifty-four refunds due, twenty-eight were not paid on time. ED Exhibit 12-12. In each instance, Respondent concurred with the audit finding and promised to do better in the future. Respondent blamed its failure to make timely refunds for the 1987 award year on an out-of-state processor of its refund requests. ED Exhibit 13-18. During her testimony, Ms. Logan attributed the problem in 1988 to the fact that she had to "carry" the nursing program at Sumter for one year before it became eligible for Title IV funds. Tr. at 722. For the late refunds in award years 1989 and 1990, Respondent never provided an excuse, but simply stated that its staff had now been trained and it would do better in the future. ED Exhibit 12-21.

Respondent's defense for its horrendous compliance with the refund regulations is that its lender, Anchor Bank of New Jersey, went bankrupt in May 1991. At the time Anchor Bank was Respondent's only lender. Testimony of Chris Logan, tr. at 697. At the time of the bankruptcy, Respondent had students who had commitments from the bank for loans, who were already enrolled. and then were told that the bank could not honor those commitments. Anchor Bank had a total commitment of all of the Chris Logan students of approximately $1.2 million. Testimony of Chris Logan, tr. at 696; testimony of Sue Bratten, tr. at 368. This placed a severe hardship on the school. During this period, according to Ms. Logan, Respondent decided to graduate students who had tuition due which could not be paid because of the Anchor bankruptcy. Testimony of Chris Logan, tr. at 695-698.

[W]e had to make choices, we had to make decisions, do we lay off staff and we chose not to lay off the staff. It is a requirement of the state board that you have one instructor per 20 and a maximum of 25 students. And we had to have staff in order to teach the number of students that we had enrolled. So we chose to not pay some of the loans back.

Id. at 698-699. According to Sue Bratten, Respondent's Financial Aid Director, difficult choices were made between paying utility bills and meeting the payroll, and paying refunds. Tr. at 369,473.

Respondent points to the fact that most, if not all, of the $146,050 which remained due in refunds as of October 1, 1995, has now been paid and cites to this as mitigation in favor of not terminating Respondent's participation in the Title IV program, or imposing a fine. Ms Bratten testified that payments would have been made earlier, but Respondent was advised by Keith Saucier, an ED official who was part of the OIG inspection team, in a March 1994 meeting to wait for the OIG inspection report. which was issued in December 1994. Tr. at 398. On October 1, 1995, Respondent paid $109,911 to ED to reduce its outstanding liability to $36,149. In addition, Respondent claims that, after being put on reimbursement in March 1994, it sought adjustments of reimbursement

amounts due from the Department of $23,398 for the 1991 award year, and that this was accepted by the Department. Respondent Exhibits 8 - 10; Joint Stipulations of Fact, ? 2; testimony of Sue Bratten, tr. at 370-374. Subsequently, Respondent attempted to make similar adjustments for the 1992 and 1993 award years, and was never given a definitive answer or directions on why the adjustments were not accepted. Respondent's Exhibits 11, 15, and 16; testimony of Sue Bratten, tr. at 375-380. Notwithstanding the apparent acceptance of this adjustment for the 1991 award year at least, SFAP contends that this was never acceptable as Respondent never produced necessary documentation showing that it had eligible Pell Grant students against whom to offset the refunds. Testimony of Sue Bratten, tr. at 477-488; testimony of Craig Cavallis, tr. at 116,118-119.

Respondent disputes an additional $4,142 in Pell refunds and $4,938 in FFEL refunds alleged due by SFAP. According to the somewhat maladroit testimony of Sue Bratten, her review of Respondent's files revealed a number of deposit slips and checks which show that these refunds were made. Tr. at 380-397; Respondent Exhibits 5, 51, 63, and 64. SFAP contests the validity of this documentation since it does not reveal whether the deposits were actually made. SFAP Post-trial Brief at 10. n. 12; see cross examination of Sue Bratten, tr. at 478-499.

I agree that Respondent appears to have satisfied the Department when the Department agreed to the $23,398 adjustment in its reimbursement payments (see Respondent Exhibit 10), and that Respondent received no guidance from ED when it sought direction on how to handle refunds under reimbursement for the subsequent years. The evidence may even support Respondent's contention that it may have paid off its outstanding liability earlier, but for the direction in March of 1994 from SFAP to wait until the OIG report was issued (ultimately in December 1994). However, all of Respondent's remaining arguments and defenses must be rejected as not being supported by law or evidence.

I agree with SFAP that Respondent's documentary evidence concerning the $4,142 in Pell refunds and $4,938 in FFEL refunds is inadequate for the purpose of proving what it is submitted to prove, since it does not demonstrate that the deposits in question were actually made as claimed by the Respondent. However, even assuming that the deposits were made, and that there is no remaining liability, the evidence overwhelmingly demonstrates, at best, a cavalier attitude toward the regulatory requirements of Title IV and, at worse, the use of funds held as a fiduciary for personal gain. Chris Logan, Respondent's sole owner and proprietor, appears to view Federal loan money as a source of liquid operating capital from which she can draw to support her business ventures. This is borne out by her testimony concerning the late refunds for the 1989 award year, when she stated that the late refunds discovered by her auditor were late because Respondent had to "carry" the Sumter nursing program for one year until it became eligible for Title IV aid. This attitude again revealed itself when the Anchor Bank went bankrupt in May of 1991, when both Ms. Logan and Ms. Bratten testified that bills were paid and payrolls met, at the expense of the refunds. Although one can sympathize with Respondent's position that students were kept in school who could have been released for failure to make tuition payments as a result of the Anchor bankruptcy, it is for Congress, not Ms. Logan, to decide on how Federal funds should be spent, and the Title IV funds in question were not authorized for use in keeping Respondent's students in school pending a bankruptcy by a lending institution.

In addition, Anchor declared bankruptcy in May of 1991. Respondent introduced no evidence as to how many students were involved, how long it took to acquire another lender, or whether it pursued such efforts diligently. The only evidence is that approximately $1.2 million was involved. Although Respondent appears to argue that the $1.2 million represents the total promised loan commitment made by Anchor Bank at the time of the bankruptcy (Respondent's Reply to SFAP's Post-Trial Supporting Brief at 7), the evidence itself is ambiguous. One cannot determine whether $1.2 million was promised to Respondent's students at the time of the bankruptcy for which the bank was unable to

deliver, or that the $1.2 million represented the total outstanding loan commitments and loans already made. The bankruptcy took place in May of 1991. and yet the systemic failure to pay refunds continued into March 1994, long after the time by which Respondent could have reasonably secured a new lender.

In addition, an examination of Respondent's financial statements for the years in question undermine Respondent's claim that it could not afford to make the refunds in question. The financial statements show that Respondent enjoyed significant profits for every year in question. In 1990, Respondent had a net book income of $715,213; in 1991, $841,911; in 1992, $258,342; in 1993, $40,63 1; and in 1994, $95,264. ED Exhibits 65 at 5; 68 at 5; 67 at 5; and 69 at 5. In addition to these profits, Respondent held certificates of deposits (CDs) at the end of each year in the following amounts: $379,134; $733,098; $631,411; $649,961 and $250,000. ED Exhibits 65 at 4; 68 at 4; 67 at 4; and 69 at 4. Thus, I must agree with SFAP and conclude that Respondent had the capacity to satisfy its refund obligations and simply chose not to do so.

Respondent takes the position that it could not use the CDs to reduce its refund obligations because to do so would reduce its assets to the point where its asset-to-liability ratio would be less than the 1:1 required by ED. Testimony of Chris Logan, tr. at 704; Respondent's Proposed Findings of Fact and Conclusions of Law and Supporting Brief at 47. However, on cross examination Ms. Logan recognized that refund obligations are a liability which, if paid out of her CDs, which are assets, would reduce the liabilities -- thus, the assets would be reduced in direct proportion to the liabilities, and the favorable asset-to-liability ratio would be preserved. 1/ Respondent points out that Ms. Logan is not an accountant and that her opinion on this matter cannot be relied on, and that SFAP failed to ask Martin Niforth during his expert testimony whether CDs can be considered assets. Since it is Respondent's position that the CDs were unavailable for use in reducing its outstanding refund liability. it was the responsibility oft he Respondent. not SFAP, to raise the issue with Mr. Niforth. In addition. Mr. Niforth was qualified as an expert in Title IV programs, not in accounting. Thus, his opinion on this matter would be of limited value. However, one need not be an accountant to conclude the indubitable, that Respondent's CDs are current assets since they are listed as such on the financial statements.

Under the regulations, when an institution participates in the Title IV programs, in which it is entrusted to disburse Federal money to eligible students on behalf of the Federal government, it acts as a fiduciary for the Federal government. 34 C.F.R. § 668.82 (1991, 1992, 1993). When it breaches this relationship of trust, it is grounds for termination of the institution's participation in the Title IV program. Id. at (c). "Fiduciary" is defined as "[a] person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." Black 's Law Dictionary 563 (5th ed. 1979). Respondent clearly violated its fiduciary duty to ED and the U.S. taxpayers by using Federal money for its own immediate purposes rather than for the purpose for which the funds were appropriated by Congress. Thus, Respondent's participation in the program must be terminated. SFAP requests that a substantial fine be levied against the Respondent for this violation of trust. Since Respondent made restitution for most, if not all, of the outstanding refunds owed, I find no purpose other than a punitive one for the fine; termination from the program is punishment enough.

II. Pro-Rata Calculation of Refunds.

Schools with default rates above 30 percent for any fiscal year after 1986 must conform to the pro rata refund calculation requirements described in 34 C.F.R. § 682.606(b)(1) (1991, 1992, 1993)2/ or 34 C.F.R. § 682.606(c) (1991, 1992, 1993), 3/ whichever results in a larger refund amount, no later than

60 days after the school received notification of its cohort default rate. 34 C.F.R. § 683.606(b)(2) (1991, 1992, 1993).

Respondent has been required to calculate and pay pro-rata refunds since November 1' 1989. SFAP originally alleged that Respondent either failed to make or incorrectly calculated pro-rata refunds for twenty-six students. SFAP stipulated that there was no violation with respect to twelve of the twenty-six students. Of the fourteen remaining calculations. the parties stipulated that Respondent incorrectly calculated the refunds, twice based on the application of the drop fee and once because of a rounding error. In eleven instances, the financial aid officer at Bennettsville incorrectly applied a rule requiring the school to apply either a pro rata refund calculation or the institutional refund calculation. The financial consequences of these incorrect calculations were $4,480.

I find that the evidence of failure to properly calculate pro rata refunds in fourteen cases over the course of three years does not support a termination of Respondent's Title IV eligibility. Most of the problems were caused by one individual at the Bennettsville campus who was subsequently dismissed. Testimony of Sue Bratten, tr. at 400. In addition, the pro rata refund regulations are extremely complex and difficult to understand. Martin Niforth, an expert on the Title IV program, testified as to the difficult nature of the regulations, and to the fact that most of the pro-rata problems occurred around 1992 when the statute and regulations in this area changed, and that this was a very confusing period. Mr. Niforth's experience is that hardly any schools have totally implemented the regulations without a flaw. Tr. at 562-568. As he testified, "you almost expect people to not understand...." Id. at 568.

III. Pivot Point Misrepresentation.

The Secretary may terminate a school's participation in the Title IV programs for any substantial misrepresentation regarding the nature of the school's educational program, its financial charges, or the employability of its graduates. 34 C.F.R. § 668.71(a) (1994). Substantial misrepresentations are defined as false, erroneous, or misleading statements on which prospective or enrolled students reasonably relied, or reasonably could be expected to rely, to their detriment. 34 C.F.R. § 668.71(b) (1994). SFAP alleged that, during the Carolina Women's Show held in Myrtle Beach on March 10-12, 1995, the Respondent falsely advertised itself as a Pivot Point school, and that students desiring the specialized education offered by Pivit Point could reasonably rely on this representation to their detriment.

The Pivot Point Corp. leases an educational curriculum for teaching cosmetology. As part of the Pivot Point program. a school leases two or three videos. Pivot Point also sells materials, such as combs and brushes. to the public, and many of the Pivot Point items are on sale in beauty salons which have no official affiliation with Pivot Point. Respondent was a Pivot Point school from 1972 to March 22, 1994. According to Ms. Logan, Pivot Point is a good program, but, after the IG inspection, and the school was put on reimbursement, Respondent had to downsize; so, participation in the Pivot Point program was eliminated. Tr. at 688. The program for all of Respondent's campuses cost about $5,000 per month. Testimony of Sue Bratten, tr. at 403.

SFAP's allegations concerning the alleged misrepresentation are based on the testimony of Michael McQuaig, and several pictures he took of Respondent's exhibit at the Carolina Women's Show at Myrtle Beach from March 10-12.1995. Mr. McQuaig is a one- half owner of the Strands College of Hair Design in Myrtle Beach, a Pivot Point school. Mr. McQuaig , who worked for Respondent as an instructor and training supervisor from September 1987 to February 1993, knew from his experience with Respondent that it had discontinued its affiliation with Pivot Point. Mr. McQuaig attended and

also had a booth at the South Carolina Women's Show in Myrtle Beach. Mr. McQuaig became aware of the Chris Logan booth on set-up day, Thursday, March 9, 1995. After the Chris Logan booth was set up, Mr. McQuaid observed that it contained a banner that said "Chris Logan Career College," and in the bottom right-hand corner there was the Pivot Point logo. When Mr. McQuaig observed the Pivot Point logo on the Chris Logan banner, he became upset, returned on Saturday morning before the show opened to the general public, and took several photographs of the Chris Logan booth with the Pivot Point logo displayed on the banner. The logo itself is simply the words "Pivot Point" contained in an outline of a box. See ED Exhibits 21-1; see also Respondent's Exhibit 73. Mr. McQuaig testified that, although he took the pictures before the show was open to the general public, he also observed the Chris Logan exhibit while the show was open to the public, and the Pivot Point logo was exposed. Tr. at 289,301.

Virginia Bryant, the director of Respondent's school at Myrtle Beach, was in charge of the Chris Logan booth at the Carolina Women's Show in Myrtle Beach in March 1995. The witness identified Mr. McQuaig's photos as being of her booth, but testified that the Pivot Point logo was covered up by a sign advertising the day and night hours of the student clinic program. In the photos taken by Mr. McQuaig, the witness noted that the sign in question was just below the Pivot Point logo on the floor, apparently having fallen down. Although the witness testified that they had constant problems with parts of the display falling down, when the public was present the sign was up and covered the Pivot Point logo. Tr. at 529-539.

Another witness appearing on behalf of the Respondent, Daniel Smith, is the admission officer at the Florence campus. Mr. Smith was in charge of Respondent's booth at the Carolina Women's show in Florence in December 1994. Since Mr. Smith was in charge of the Florence booth, and was working on a mural to place in the school clinic concerning school activities, Mr. Smith took pictures of the Florence display. Those pictures clearly show the same Chris Logan banner, but with the Pivot Point logo covered up with an academic cap. Respondent Exhibit 61; testimony of Daniel Smith, tr. at 515-517. Ms. Bryant testified that she did not use the academic cap to cover up the Pivot Point logo at her show in Myrtle Beach because she was trying to emphasize the fact that the clinic had day and night hours and used the sign advertising the clinic's hours instead, which did not stay up as well as the academic cap did at the Florence show. Tr. at 534-536. Daniel Smith, who was also helping out at the Myrtle Beach show. corroborated Ms. Bryant's testimony. Mr. Smith testified that, as the day warmed up, the sign kept falling down. Because of this problem, a new banner was made without the Pivot Point logo for future use. Tr. at 519-520.

During the hearing additional evidence was introduced which SFAP contends represents additional circumstances where Respondent misrepresented itself as a "Pivot Point" school. One piece of additional evidence is a declaration signed by Pamela Sue Smith, dated December 12, 1995, in which the declarant states that she was told by an unspecified person (Dan," last name unknown) at an unspecified Chris Logan School (perhaps the school in Greenville, since the declarant is presently a student at another cosmetology school in Greenville) in June of 1995 that the school provided "Pivot Point training." ED Exhibit 64. The declarant, however, was not made available for cross-examination. Given the vagueness of the declaration, and the unavailability of the declarant for cross-examination, the declaration is of little or no evidentiary value. The live testimony presented at the hearing indicated that, although Chris Logan Career College was no longer a "Pivot Point" school in that it no longer rented the Pivot Point videos and other instructional materials, most of the Chris Logan Career College faculty was trained in the Pivot Point method. Testimony of Chris Logan, tr. at 689. Since Chris Logan Career College was a Pivot Point school for ten years, it makes sense that

most of its instructors were trained in the Pivot Point method. Perhaps the declarant was confused as to what was told to her. This could have been brought out on cross-examination.

On cross-examination of Sue Bratten, it was brought out that Chris Logan Career College continued to use flip charts when making presentations to prospective students that continued to reference "Pivot Point" on two separate pages. Those making the presentations were instructed to pass over these references. Tr. at 482-483. But Daniel Smith, a Chris Logan Career College admission's officer, testified that these references were covered up and the pages recopied. Tr. 521. Both Mr. Smith and Ms. Bryant testified that, over the years, very few potential students ever inquired about Pivot Point. Tr. at 521-522; 539.

Based on this testimony and evidence, I find no basis to support SFAP's allegation that Respondent misrepresented itself as a "Pivot Point" institution at the Carolina Women's Show in Myrtle Beach in March of 1995. The prevailing weight of the evidence does not demonstrate an intent on the part of the Respondent to mislead potential students into thinking it was a "Pivot Point" school. The evidence shows that few, if any, potential students knew about "Pivot Point" schools or its program of instruction. And finally, the fact that the Chris Logan Career College banner contained the Pivot Point logo is, be itself, of little meaning since the logo does not state or necessarily indicate that the College is affiliated with Pivot Point -- it could simply be interpreted as an advertisement for Pivot Point products which are sold at cosmetology salons.

IV. Improper Manipulation of Cohort Default Rate.

The notice of termination notes that ED may terminate a school's participation in the Title IV program if a school's cohort default rate exceeds 40 percent for any fiscal year after 1989 where the default rate has not been reduced by at least 5 percent from its rate the previous fiscal year. SFAP notified the Respondent that its default rate was 34 percent for fiscal 1991, and 31.8 percent for 1992. 4 SFAP contends that these are not accurate rates since the school paid off a number of student loans in an effort to reduce its cohort default rate, and covered up those payments by making them with money orders which did not disclose the fact that the school was making the payments.

Notwithstanding SFAP's allegations, there is nothing illegal about paying off loans for students by a participating school. The regulations provide, however, that where a loan is paid by a school on behalf of a student, the loan is considered in default for purposes of establishing a school's cohort default rate. See 34 C.F.R. §§ 668.l5(f)(1) (1991); 668.1 5(h)(1)(i) (1992, 1993); see also 1993 Official Default Rate Guide, ED Exhibit 70 at 9.

Ms. Logan admitted that in 1992-93, Respondent made a number of Federal loan payments on behalf of students as part of the school's overall effort to control loan defaults, and that many of the payments were made by money order. However, she denied any effort to cover this up, and stated that once the school realized that the practice was questionable, it stopped. Furthermore, Ms. Logan explained that only two persons, Reba Gainey, Respondent's business manager, and herself, had check writing authority. Bills were paid by either money orders or they were sent into the central office in Florence and would be paid by check written by Ms. Gainey. A lot of bills were paid for at the local campuses out of money earned by the clinics. Advertising, water, and trash pickup were paid for using this method. Thus, in the summer/fall of 1992, when a decision was made to pay off some students loans, the mechanism of using money orders was in place and used for this purpose. Testimony of Chris Logan, tr. at 705-713.

Ms. Logan testified that in 1992-93 the default issue was a big issue with ED' and among Title IV institutions, and that she was advised by one of her financial aid consultants that it was a good strategy to pay off small amounts of student loans. Id. at 706. Thus, in the summer/fall of 1992, Respondent secured a copy of the pre-claims report from her lender. Respondent's central office staff then divided the names of students listed on the report as about to go into default, or already in default, according to the school attended, and sent the names out to the individual schools. The schools were to call the students and advise them on the importance of their obligations to pay off the loans, and counsel them concerning their entitlement to loan deferments and possible forbearance. Respondent chose to pay some of the money back for the students. Respondent paid amounts of up to $500 or $600 on unpaid loans. Respondent used revenues collected in the clinics to do this, and money orders were used since this system was already in place. Ms. Logan testified that there was no intent to cover this practice up since each student was notified when a loan payment was made on their behalf by a letter sent from the school. File copies of these letters, along with copies of the money orders, were readily made available to OIG when that office requested documentation concerning loan payments. Id. at 711-713; see also testimony of Craig Cavallis tr. at 110, and ED Exhibit 25.

Nancy Poole, one-half owner of Strand College of Hair design in Myrtle Beach, and a competitor with the Chris Logan Career College School in Myrtle Beach, testified that while employed as a financial aid officer for the Respondent she was told by Ms. Logan to sign the names of students to requests for deferments and forbearance during the time period when Respondent was attempting to lower its default rates. Tr. at 325.

Ms. Logan denied any attempt to manipulate the default rate, and claimed that it was too complicated to do so. Tr. at 713. Ms. Logan position on this issue mirrored that of Respondent's expert on the Federal student financial assistance program, Mr. Martin Niforth. It was Mr. Niforth's opinion that it would be very difficult to manipulate the cohort default rate because of the fact that one has to know precisely when particular students are going into default, and the name of the lending institutions and the guarantee agencies. On the latter point, Mr. Niforth noted that student loans are often sold many different times. Tr. at 589- 591.

Based on the evidence, it is clear that the Respondent paid off student loans in an effort to keep those loans from going into default. However, it does not appear that Ms. Logan and her business associates realized that this was contrary to SFAP policy. Once this was realized, the practice stopped. I find that the evidence does not support the SFAP claim that Respondent attempted to cover up this practice by using money orders to make loan payments. The use of money orders was a longstanding practice by the Respondent schools to make certain types of payments, and was simply continued to be used to make the student loan payments. In addition, Respondent was quite open about this practice, as evidenced by the fact that letters were issued to a student whenever Respondent made payment on a student loan. These letters were readily produced for the OIG inspectors when they requested all tiles concerning the repayment of loans by the Respondent. I do not find Ms. Poole's testimony on the direction she was allegedly given from Ms. Logan to sign requests for loan deferments and forbearance entirely convincing. Ms. Logan denied doing this, and Ms. Poole, as an employee who was abruptly fired by Ms. Logan and a competitor with her in the Myrtle Beach area, has a motivation to make the Respondent look bad. Ms. Logan's management style, as evidenced at the hearing, is curt and her interpersonal skills are not the best. Ms. Poole may have misinterpreted what she was being told.

V. Ability-to-Benefit Tests.

A participating school admitting students without high school diplomas or the equivalent is required to make a determination that the students are able to benefit from the training program offered at the school. Students enrolled after July 1, 1991, are required to pass an independently administered ability-to-benefit test approved by the Secretary of Education. 20 U.S.C. § 1091(d) (1995). 5/ SFAP alleged a number of improprieties in the Respondent's administration of its ability-to-benefit tests.

Respondent used the Wonderlic Test as its ability-to-benefit test from January 1991 to August 1993. The OIG inspectors alleged that Respondent did not administer the test in accordance with the standards specified by the test publisher. Gerda Klyer, a Special Agent with OIG in Dallas assigned to the inspection team for Chris Logan Career College, testified that in February 1992, Wonderlic sent out a notice that all testers for Wonderlic had to be certified by Wonderlic. See ED Exhibit 37. Under new Wonderlic procedures, when an independent tester was certified by Wonderlic he or she had to complete a testing log, which was a sheet of paper that provided the name, address, and social security number of the student taking the test, the date of the test, and the test score, along with a copy of the test. This information is submitted to Wonderlic, which then issues a quarterly report listing all of the students taking the test and indicating whether they passed. Testimony of Gerda Klyer, tr. at 151 - 152. However, on cross examination, Ms. Klyer stated that she had never determined whether the Wonderlic notice concerning this new policy had in fact ever been sent to Respondent. Id. at 190. Mr. Niforth, Respondent's financial aid expert witness, testified that Wonderlic never communicated directly with the schools, but with the testers. Tr. at 602-603, 633. At first it was not clear exactly what the new Wonderlic requirements were. Eventually, these were figured out, and testers began to register and send the required information into Wonderlic. During the interim period, Mr. Niforth stated that he was personally familiar with cases in which Wonderlic allowed the use of unregistered testers. Id. at 603-606.

Based on this evidence I find that there was no proof that the Wonderlic requirements were communicated to the Respondent. When Respondent became aware of these requirements, it made reasonable efforts to ensure that all of its testers were registered.

SFAP also charges that Respondent forged signatures of test administrators. SFAP claims that there were twenty-six invalid ability-to-benefit tests purportedly administered by Vicki Waddell, which Ms. Waddell never administered, and that there were five additional tests purportedly administered by Jim Tucker, which Mr. Tucker never administered. SFAP relies on two declarations to support its positions. However, since neither declarant would appear at the hearing nor otherwise make themselves available for cross-examination, the declarations are of limited evidentiary value.

In Ms. Waddell's declaration, ED Exhibit 57, she states that a number of cover letters, or test certifications, to ability-to-benefit tests appearing in the record which are purportedly signed by her (ED Exhibits 35-1 to 35-48) are not signed by her since she spells her first name as "Vicki" not "Vicky. There are fourteen such documents. ED Exhibits 35-1, 35-4 to 35-12, 35-29, 35-30, 35-33, and 35-34. Ms. Waddell then goes on to state that on the other letters her name is spelled correctly, but that these are Xeroxed copies of her signature, that someone reproduced her name. Although the fourteen documents in fact misspelled "Vicki" as "Vicky," there is no effort by the declarant or SFAP to identify who did this. The signatures on all of the documents appear to be in the same handwriting. Concerning the other signatures, the declarant makes no effort to state how she concluded that the signatures were Xeroxed reproductions; it is impossible to tell from the exhibits in the record. The declarant makes no effort to state whom she believes is the "someone" referred to as reproducing her signature. Nevertheless, Ms. Waddell was not available for cross- examination.

Mr. Tucker's declaration states that there were four students who were represented as being administered the Wonderlic Test by him who were not. Ed Exhibit 36. He states as reason for this conclusion that he always uses "check marks" and not slashes through the answers to grade exams. But, if one looks at the marks made on the exams in question, they could be considered "check marks." A potential area for cross-examination would be to have the witness demonstrate the difference. The declarant also states that the "cover letters" on the tests are false, because information concerning the name, age, sex, date of birth, and date of evaluation were typed, rather than handwritten. Mr. Tucker's declaration does not state how many exams he administered over the years in question, and perhaps some were typed and he simply forgot. In paragraph two of his declaration, Mr. Tucker states that he was asked by Pat Walters, the administrative officer at the Chris Logan Career College school in Bennettsville, to sign his name certifying tests which he had not administered and graded. He states that he refused to do so and sent a notarized statement to the South Carolina Cosmetology Board explaining that this had happened. A potential area of cross-examination would be the circumstances of the request allegedly made by Pat Walters. Perhaps Ms. Walters did not know that Mr. Tucker had not given the tests. Another question would be whether Mr. Tucker retained a copy of the "notarized statement" or whether he attempted to secure a copy from the state board.

Given the serious nature of the charges alleged by Ms. Waddell and Mr. Tucker, forgery and fraud, these charges must be subjected to the test of cross-examination before they are given credibility. It should also be noted that the declarations were not submitted in accordance with the pre-trial order establishing the schedule for the submission of exhibits prior to the start of the hearing, but were submitted at the hearing with little chance for prior review by the Respondent. Had there been an opportunity to review the declarations in accordance with the pre-trial schedule, Respondent may have been able to rebut these allegations.

VI. Leaves of Absences.

Under the regulations governing the Title IV programs, a student may receive one leave of absence within a twelve- month period. The student must make a written request and receive permission before taking a leave of absence. A school may grant a leave of absence of up to sixty days, unless the leave is for documented medical reasons, in which case it may be up to six months. 34 C.F.R. § 682.605(c) (1991, 1992, 1993).

Originally, OIG alleged twenty-nine instances of leave of absence violations. This was reduced to nineteen at the hearing as outlined below. Since November 1994, Respondent no longer permits leaves of absence. Testimony of Vicky Jordan, tr. at 672; testimony of Sue Bratten, tr. at 452.

Leave of Absence Request Not Signed -- one student.

There is no actual requirement that such requests be signed by the student seeking the leave of absence. The only regulatory requirement is that the request be made by the student in writing. Even if there were such a regulatory requirement, the evidence is inconclusive as to whether the student signed her request. The OIG concluded, comparing the signatures appearing on three leave of absence requests for this student in Respondent's file, that the signatures were not the same, and one was not the signature of the student. Testimony of Louise Hunter, tr. at 18-20; compare Exhibits ED 42-195, ED 42-196, and ED 42-197. However, the signatures appear to be the same to me, and I so find.

Leave of Absence Request With Questionable Signature -- one student.

Louise Hunter testified that the signature for this student was questionable because the leave of absence request (Exhibit ED 42-132) was signed with the last name before the first name, and on another form (Exhibit ED 42-133) it appears in the opposite order. Tr. at 20-21. This conclusion is not supportable. The fact that the student signed her name with her last name first, just as she wrote her name in the space at the beginning of the form, is inconclusive. Many people, when writing their names, will list their last name first.

Leaves of Absence Forms Missing from Files -- eight students.

OIG originally contended that there were ten leave of absence forms missing from twelve of Respondent's files. ED Exhibit 41. Respondent admits that there were forms missing for two students, and SFAP agreed that forms were not required for two other students. Joint Stipulation of Facts, ¶ 11. The conclusion reached with respect to the six other students is based on an examination of the files by the OIG during its on-site visits. Testimony of Louise Hunter, tr. 23-29. Although Respondent contests this conclusion, it introduced no rebuttal evidence on this point. Thus, the OIG conclusions must be upheld.

Multiple Leaves of Absence in Twelve- Month Period -- six students.

Respondent concedes that this was done in one instance and SFAP proved this in the other instance with evidence which was never challenged by the Respondent. See Exhibit ED 42-195-197; tr. 18-20.

Backdated Leaves of Absence -- six students.

Originally, OIG contended that there were eight leaves of absence which were backdated. SFAP dropped this allegation with respect to two students, and Respondent conceded that it appears that the leaves of absence were backdated in two other instances. That leaves four contested cases of alleged backdating remaining. However, the evidence does not support SFAP's contention that backdating was actually done, and, even where it was, as in the instances conceded by Respondent, it in not necessarily illegal, as where a student is originally listed as absent and later requests a leave of absence when the student is able to communicate with the school, such as where the student is in an automobile accident.

In the case of T. B., ED Exhibit 42-134, her attendance card, indicates that on July 1 she was sent a "we miss you" card, but the record indicates that she was in class on the 29th and 30th just before the card was sent. From this the OIG concluded that the student did not herself request the leave of absence and that there was backdating on her attendance record. Tr. 21-22. The evidence does not support these conclusions.

ED Exhibit 42-115, the attendance card for G.C., demonstrates, according to the testimony of Louise Hunter, that absences are written on the third line, and the leave of absence is superimposed. Tr. 29-30. However. one cannot make out eraser marks on the copy introduced into evidence. and even if there were eraser marks it does not prove backdating. The witness herself admitted that there could be other explanations, given the procedure used to record student attendance. and that no effort was made by OIG to verify why apparent changes were made to records. Tr. 35-36.

In the case of the one remaining student, S.C., SFAP contends that her attendance card was altered, presumably by inserting "LOA" over eraser absence marks. See SFAP's Proposed Findings of Fact at 7, ? 79. However, the attendance card in question, ED Exhibit 42 at 32, does not show any eraser

marks. And, even if it did, as noted above, this is not evidence of backdating which, in itself, is not illegal.

Thus, for the leave of absence issue, the evidence proves a violation in twelve instances, ten missing requests for leaves of absences in the files, and two multiple leaves of absences within a twelve month period. When the leaves of absence resulted in a refund to the Department. Respondent correctly calculated the refunds and paid the Department, although the payments were late. Given the period covered by the inspection, three years, and the total student body of Respondent's campuses, 1,500 to 2,000, I do not find twelve violations unreasonable and do not believe it to be of such a magnitude as to warrant a fine.

During the hearing, SFAP introduced declarations from two former students at the Chris Logan Career College school in Myrtle Beach. ED Exhibits 58 and 59. Both students refused to testify at the hearing and thus were not subjected to cross-examination. Both students stated that they were not allowed to finish their course work and graduate because they had outstanding balances due on their tuition, and were put on leaves of absences with the expectation that they would receive student loans. One student never received a loan, but was allowed to work at the school and was eventually graduated. The other student was also allowed to work and, while working, received a loan, returned to class, and graduated. I fail to see the significance of these declarations, since the allegations, even if true, do not demonstrate any regulatory or statutory violation. As stated by SFAP's own witness,

[e]very school, public or private, has the right to suspend or cease the attendance of a student who fails to meet their financial obligation. I mean that in every school, whether it is Princeton, or Harvard, or Chris Logan Career College.

Testimony of Richard Whitten, tr. at 804.

VII. Administrative Capability.

The final reason alleged by SFAP to justify its termination notice is that Respondent has not, as required by the regulations, demonstrated that it is capable of adequately administering the Title IV programs. See 34 C.F.R. § 668.16 (1994).

SFAP alleges that Respondent is not administratively capable based on its view that Respondent had no idea, in March of 1994 when the OIG conducted its on-site inspection, exactly how many refunds were due. When the OIG conducted its review, it asked Ms. Logan for an estimate of the refunds due. In an affidavit dated March 18, 1994, Ms. Logan estimated the amount at $48,000. ED Exhibit 6. Several days later, on March 25, Ms. Bratten submitted another statement to the OIG and estimated the amount at $93,000. ED Exhibit 7. And on March 28, a detailed list of refunds due was submitted to the OIG indicating that the amount was $122,000. ED Exhibit 8. As noted earlier, the total amount ended up as $145,050. ED Exhibit 11.

I do not find that this evidence demonstrates a present lack of administrative capability. The testimony was that the OIG investigators met with Ms. Logan and Ms. Bratten while at the Greenville campus. The OIG investigators requested Ms. Logan to provide a "ballpark" estimate of the amount due. Additional subjects were discussed during the interview. The OIG investigators then requested that Ms. Logan put what she had told them during the interview into an affidavit. Ms. Bratten took notes of the interview, faxed them to the headquarters office in Florence where an affidavit was prepared, and faxed back to Greenville where it was signed by Ms. Logan. The affidavit states that it is an "estimate." See ED Exhibit 6; testimony of Chris Logan, tr. at 702, 728; testimony of Sue Bratten, tr.

at 494. Concerning the subsequent estimates, Ms. Bratten testified that the confusion was caused by the fact that she did her calculations at home where she did not have all of the records. Tr. 465467. I find this explanation plausible. The fact that the Respondent did not have the information requested immediately available upon request does not prove a lack of administrative capability.

There was also testimony from Nancy Wheeler, a financial aid officer for Respondent at the North Augusta campus for 3 ? years. Ms. Wheeler testified as to incomplete financial aid records at the campus. However, at the time in question, the North Augusta campus was not eligible for Federal student aid. Tr. at 223-225, 253, 255, 264-265. Later, Ms. Wheeler became the Corporate Compliance Officer with responsibility for oversight of the award of financial aid at all of the Chris Logan Career College campuses. She served in this position for fifteen to sixteen months. During this period she saw a lot of problems. Tr. 228-237. However, most of Ms. Wheeler's testimony is neutralized by that of other witnesses who testified that the problems observed by Ms. Wheeler are largely corrected. See testimony of Sandra Edward, tr. at 653-661; testimony of Vicky Jordan, tr. at 664-668; testimony of Martin Niforth, tr. at 614- 617. Richard Whitten, SFAP's rebuttal witness, testified that when he joined the central office staff of the Chris Logan Career College as the Director of Admissions and Marketing in 1991, there was a lot of confusion and inconsistent policies among the campuses, or no policies at all. However, when he left Respondent's employment in 1994, due largely to his own work, things were running much smoother. Tr. at 764-769, 801. Thus, on the basis of this testimony and evidence, I cannot conclude that Respondent is not administratively capable.

Findings and Conclusions

I. Refunds.

1. Since 1987, Respondent has never paid its tuition refunds on time.

2. Although Respondent agreed with the findings of independent compliance audits conducted for the 1987, 1988, 1989, and 1990 award years and promised to ensure that the problem of not paying refunds on time would be corrected, the problems continued and increased.

3. For the 1991 and 1992 award years, and the 1993 award year through March of 1994, Respondent was required to pay 1,099 refunds under the Title IV programs, but only paid 97 on time and. as of October 1. 1995.320 were not paid at all.

4. 4. As of October 1, 1995, Respondent owed approximately $146, 050 in unpaid refunds. Respondent has substantially paid off this obligation, and presently owes approximately $9,080 in refunds.

5. During the 1991, 1992, and 1993 award years, Respondent failure to pay refunds and the payment of refunds late was pervasive and institution-wide, involving all nine campuses.

6. Respondent had comfortable profits and savings during the 1991, 1992, and 1993 award years and could have made the refund payments notwithstanding the bankruptcy of its lending institution in May of 1991.

7. Chris Logan, Respondent's owner and sole proprietor, viewed refunds due in a cavalier manner and as a source of operating capital from which she could pay bills and other current obligations.

8. Respondent's failure to pay refunds on time or not at all, and to divert refund capital to other expenses was in clear violation of 34 C.F.R. §§ 668.22; 682.606; 682.607; 690.78(c) (1991, 1992, 1993), and a violation of its fiduciary duty contained in 34 C.F.R. 668.82 (1991, 1992, 1993).

II. Pro-Rata Refund Calculations.

9. Respondent was required to calculate and pay pro-rata refunds since November 1, 1989, in accordance with 34 C.F.R. §§ 682.606(c) (1991, 1992, 1993).

10. Respondent failed to correctly calculate refunds in accordance with the required pro- rata formula in fourteen instances over the 1991, 1992, and 1993 award years.

11. Given the complexity of the regulations and the size of the respondent -- nine schools and between 1,500 to 2,000 students -- the failure to correctly calculate the refunds for fourteen students is not unreasonable and does not support program termination or a fine.

III. Pivot Point Misrepresentation.

12. Respondent did not substantially misrepresent the nature of its educational program in violation of 34 C.F.R. §§ 668.71(a) (1994) by advertising itself as a "Pivot Point" school or as being otherwise affiliated with the Pivot Point Corp.

IV. Ability-to-Benefit Tests.

13. Respondent used the Wonderlic test as its ability-to-benefit test from January 1991 to August 1993.

14. In February 1992, Wonderlic sent out a notice that all of its testers had to be registered with Wonderlic. However, the notice, although it was sent to the testers, was not sent to the institutions, and was never sent to the Respondent. When Respondent became aware of the registration requirement, it made reasonable efforts to ensure that its independent testers complied.

V. Improper Manipulation of Cohort Default Rates.

15 . During the 1992-93 period, Respondent, as part of its overall effort to reduce the number of its students defaulting on their Federal student loans, made a number of loan payments on behalf of its students. Respondent did not realize that such payments were viewed by SFAP as a violation of SFAP policy. Once it became aware that such payments were a problem, it stopped.

16. Respondent made no effort to cover up the loan payments that it made on behalf of its students from ED. Respondent's use of money orders to make loan payments was in accordance with its longstanding practice of paying some of its expenses through funds generated out of its student-run cosmetology clinics and was not for the purpose of covering up such payments.

17. It is not a violation of the Title IV regulations or the Higher Education Act for a participating institution to make loan payments on behalf of their students, although the loans may be considered in default as a result of such payments. See 34 C.F.R. §§ 668.15 (f)(1) (1991); 668.15 (h)(1)(i) (1992, 1993).

VI. Administrative Capability.

18. Respondent does have the administrative capability of administering the Title IV programs.

Order

Respondent's eligibility to participate in the Federal student financial aid programs under Title IV of the Higher Education Act of 1965, as amended, is hereby terminated.

Frank K. Krueger, Jr.
Administrative Judge

March 28. 1996

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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1/ This of course. as noted by SFAP in its brief. assumes that the outstanding refund obligations are reported in the financial statements. If SFAP is correct in its contention that Respondent had no idea exactly what its refund obligations were in March of 1994, and perhaps had no intent of paying them. then the financial statement would not be correct. I prefer to give Respondent the benefit of the doubt and assume that its financial statements are accurate and that the refund obligations are reported under liabilities. although they are not specifically identified.

2/ The refund shall be the larger of the amount provided under the requirements of state law; the requirements established by the school's accrediting agency; or, if the accrediting agency has no standards, the standards specified in Appendix A of 34 C.F.R. Part 682 or any association of institutions of postsecondary education and approved by the Secretary of Education.

3/ A refund of not less than that portion of the tuition and fees assessed the student equal to the portion of the period of enrollment for which the student has been charged that remains on the last day of attendance, rounded downward to the nearest 10 percent of that period, less any unpaid charges owed by the student and reasonable administrative fees.

4/ Respondent is appealing these rates.

5/ Prior to 1991, the ability-to-benefit test did not have to be independently administered. The regulations have not been modified to reflect this 1991 statutory requirement. See 34 C.F.R. § 668.7 (b) (1995).