she undertook modified secondary studies. Since her enrolment there, she received pensioner education supplement. All the students at that school who qualify for AUSTUDY under the means test, receive it as the school recommends them on the basis that they are undertaking a secondary course; that is, they are studying academically although their study is modified because of their disabilities. The philosophy of the school is that social and academic skills cannot be separated and the independence and dignity of each student is encouraged, albeit slowly, in a very positive environment. Waite had made significant progress at the school, for example, assisted by her communication board, she ordered her own lunch and indicated when she needed to go to the toilet.

It was noted that apparent inconsistencies as to what was considered to constitute a 'secondary course of study' resulted in some students being eligible and others not because special developmental schools had contrasting policies about what constitutes such a course of study.

The DEETYA's position

The critical issue to be determined in assessing Waite's eligibility for pensioner education supplement was whether she was undertaking an approved secondary course. An accredited secondary course is one which offers an accredited secondary qualification to its students. The current procedure for assessing eligibility is based on advice from the principal of the school in question as the DEETYA takes the view that each individual school is in the best position to determine the nature of the care or schooling which it provides tailored to the capacities of its student. The Department was unable to say how familiar a school, in making such recommendations, was with the actual wording of the Regulations. It is probable that schools, such as the Goulbourn Special Developmental School, by not making any recommendations for the pensioner education supplement, had not tested the eligibility of its students.

The AAT's approach

It was noted that the programs of the Goulbourn Special Developmental School and the Echuca Special Developmental School reflected differing philosophies as to the activating of the potential of intellectually disabled persons. The AAT stated that the appeal raised a fundamental question as to the correct interpretation of the Regulations, and whether or not the pensioner education supplement was designed to deal with 'financially disadvantaged students' who have the level of intellectual and physical disability of Waite. This was a matter of policy to be addressed through the appropriate processes. Administrative issues were also raised by the appeal, and the DEETYA indicated that the procedure of relying on the principals' recommendations would be reviewed. Apart from these issues, the Tribunal found that Waite had neither the physical nor intellectual capacity to undertake a secondary course of study as required under the Regulations. The Tribunal came to this conclusion with some concern given that, at the date of the appeal, she was attending Echuca Special Developmental School and was in receipt of the pensioner education supplement.

Formal decision

The AAT affirmed the decision under review.

[S.L.]

AUSTUDY: meaning of 'extreme family breakdown'

SECRETARY TO THE DEETYA and PHILLIPS (No. 12179)

Decided: 3 September 1997 by T.E. Barnett and J.G. Billings.

The DEETYA sought review of a decision of the SSAT which had found that Phillips qualified for AUSTUDY at the independent rate, as it was unreasonable that he live at the home of his parents because of extreme family breakdown or other similar exceptional circumstances.

The legislation

Regulation 74 of the AUSTUDY Regulations provides that a student may qualify as:

> 'independent through it being unreasonable that he or she live at home, if:
>
> (a) he or she cannot live at the home of either or both of his or her natural or adoptive parents:
>
> (i) because of extreme family breakdown or other similar exceptional circumstances; or
>
> (ii) because to do so would be a serious risk to his or her physical or mental well being due to violence, sexual abuse or other similar unreasonable circumstances; and . . .'

The facts

Phillips had been ordered by his parents to leave the family home due to constant arguments and confrontations, mainly caused by his failure to comply with the rules of the house which required him to keep his room tidy, cook meals, do the laundry and keep his car tidy in return for free board and lodging while he pursued full-time studies in law at Murdoch University. Phillips said that he had never refused to do the chores and his failure to do so was not intentional but due rather to his lack of organisation and the rigid way in which the rules were applied. There had been trouble between Phillips and his parents over a long period. Matters came to a head when his father, in the course of cleaning Phillips' car following his failure to do so himself, found a bong (an instrument used for smoking marijuana). Phillips was told to leave and find somewhere else to live. It was an anxious time for the family as an elder son was very ill with leukemia. Phillips had not been invited back since leaving the house, and his requests to return had been refused. In cross-examination he agreed that, some years before, he had wanted to leave home because of the difficulty of living in a tense and hostile atmosphere but had stayed due to his lack of resources.

The issue

Phillips and the DEETYA agreed that the only issue was whether there was extreme family breakdown as set out in regulation 74(a)(i).

The DEETYA'S argument

On behalf of the Department it was argued that, at most, the facts indicated a family breakdown and not an *extreme* family breakdown which was only applicable in cases where there was violence, damage to health, extreme confrontations or, at the very least, an indication that the parties had done their best to resolve the matter, through counselling for example, and that separation was a last resort. To make a finding of extreme family breakdown in Phillips' circumstances would open the floodgates to many potential applicants who would just prefer to live away from home if possible.

Findings

The Tribunal found that although Phillips was difficult to live with because of his inability to organise himself, his need to express his independence from his parents, and the demands of his legal studies, his parents showed insufficient recognition of his needs as a university student. The tension between Phillips and his parents was caused by a failure on all sides to understand the other's needs, and an inability to discuss and work out their problems. The AAT ac-

cepted that Phillips was ordered to leave in the anger of the moment, but his parents then stuck to that position and refused his genuine requests to be allowed to return home.

Extreme family breakdown?

The AAT agreed with the SSAT's view that when a family member is denied access to the family home, there is extreme family breakdown in relation to that family member. The Tribunal agreed with the observations in *DEET and Sheiles* 44 ALD 401, that the Act and Regulations were beneficial legislation and any ambiguities should be decided in favour of the student. Although tension between parents and adolescent children is common, when it reaches the point that a child is ordered to leave the family home and that situation persists over a period of months, that is exceptional and as far as that child is concerned it amounts to extreme family breakdown.

Formal decision

The AAT affirmed the decision under review.

[S.L.]

AUSTUDY overpayment: income, eligible termination payment, child support

HORVATH and SECRETARY TO THE DEETYA (No. 12457)

Decided: 3 December 1997 by F. Smith.

The DEETYA sought to recover $6172.83 from Horvath. It maintained that he was overpaid AUSTUDY in 1993. The SSAT affirmed the decision and Horvath appealed to the AAT.

The facts

On 26 January 1993, Horvath ceased work with the State Electricity Commission of Victoria and received a voluntary redundancy package of $30,881. On 15 February 1993 he completed an AUSTUDY application form in which he estimated his 1993 income as 'nil'. On 30 August 1993 he lodged an AUSTUDY eligibility check form and again declared that his 1993 income was 'nil'.

In 1996 the Australian Taxation Office advised the DEETYA that Horvath's taxable income in the 1993-94 financial year was $37,292. When the DEETYA sought clarification, he provided details of his eligible termination payment and his child support obligations and payments. The DEETYA sought repayment of $6172.83. Horvath argued that it should not be repaid because his termination payment did not constitute income as he paid it to his wife and family. He paid out $13,947.26 on 26 July 1993 and $14,000 on 26 April 1994. These two payments were made pursuant to consent orders of the Family Court of Australia dated 18 February 1994. The consent orders were a property settlement with his former wife.

The legislation

The *Student and Youth Assistance Act 1973* and the regulations pursuant to this Act provide for the repayment of overpayments. Section 290C provides that in special circumstances the repayment of the debt may be waived. Regulation 83(1)(a) defines student income as 'taxable income within the meaning of s.6(1) of the *Income Tax Assessment Act 1936*'. According to regulation 83(3) maintenance payments are to be deducted from a 'student's income'.

The issues

Horvath argued that his AUSTUDY should not be repaid as the lump sum did not constitute income because he paid it to his former wife. The AAT had to determine whether the two lump sum payments were maintenance payments and therefore to be deducted from Horvath's income. In addition, Horvath argued that if his eligible termination payment was income, then the debt should be waived due to special circumstances. The DEETYA submitted that the money was income, was not part of any maintenance arrangement and that no special circumstances existed which warranted waiver.

Determinations

In considering whether the two lump sums were maintenance, the AAT referred to *Cameron and Secretary to the DSS* (1990) 54 *SSR* 772. In that case the AAT indicated that, regardless of the terms and definitions used in the *Family Law Act* and *Child Support (Assessment) Act*, the AAT must separately determine the meaning of terms such as 'maintenance' in the *Social Security Act*.

Neither the Act nor the Regulations defined 'maintenance' for the purposes of AUSTUDY. The AAT referred to the definitions in a number of dictionaries. It determined that maintenance consisted of *regular payments* for the purpose of maintaining the children and former spouse in 'good condition'. Because the definition implied regular payments, the context of regulation 83(3) does not imply inclusion of one-off lump sum payments made pursuant to consent orders for a property settlement.

The AAT found that the eligible termination payment was income even though it was used to pay a Family Court property settlement. In considering whether the debt should be waived, the AAT had to decide if there were special circumstances in this case. The Tribunal referred to *Beadle and Director General of the DSS* (1984) 26 *SSR* 321 and asked whether there were unusual, uncommon or exceptional circumstances such that it would be unjust, unreasonable or inappropriate to pursue the debt. The AAT found that there were no such special circumstances warranting a waiver.

Decision

The AAT affirmed the decision under review.

[H.B.]