



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of

SOUTHEASTERN UNIVERSITY,
Washington, D.C.

Docket No. 92-102-SA
Student Financial Assistance
Proceeding

Respondent

DECISION OF THE SECRETARY

This matter comes before the Secretary on appeal by the United States Department of Education (Department), Office of Student Financial Assistance Programs (SFAP), and on cross appeal by Southeastern University (Southeastern) of the initial decision issued by the administrative law judge (ALJ) on October 12, 1993. Based upon a July 21, 1992, final audit determination (FAD), the ALJ ordered Southeastern to remit \$159,862 in disallowed loans and grants to the Department.¹ The ALJ found that the school had committed various program violations of Title IV of the Higher Education Act of 1965, as amended, (Title IV), including the failure to maintain proper Title IV documentation. The ALJ Decision (ALJ Dec.) at 29-35. Moreover, the ALJ ordered certain Southeastern students to remit a total of \$13,514 in disallowed Title IV loans to the Department, finding that they violated departmental regulations.² *Id.* at 29-35.

Both SFAP and Southeastern timely filed appeals on November 19 and 24, 1993, respectively, while each timely filed an opposition to appeal on December 22, 1993. Although SFAP agrees with various portions of the decision below, it seeks to have certain portions clarified and others reversed. *See* Appeal of SFAP (SFAP Appeal) at 1-2. Southeastern asks, among other things, that the Secretary vacate the initial decision, arguing improprieties in the Department's July 21, 1992, FAD. *See* Appeal to the Secretary by Respondent Southeastern (Southeastern Appeal) at 1. For reasons outlined below, I affirm the ALJ's decision, in part, and remand in part.

¹These loans and grants include Guaranteed Student Loans, Pell Grants, Supplemental Education Opportunity Grants, and College Work Study.

²This portion of the ALJ's order shall be discussed in greater detail below.

I. BACKGROUND AND PROCEDURAL HISTORY

Southeastern is a proprietary institution of higher education located in Washington, D.C. See ALJ Dec. at 1. On October 31, 1991, pursuant to 34 C.F.R. Part 668, Subpart H, the Department issued the first of two FADs to Southeastern in which the Department's Title IV loan disallowances and the school's corresponding monetary liabilities were set forth. See SFAP Appeal at 1. The FAD was based on an audit report submitted by Southeastern's independent certified public accountant for award years 1987-88 and 1988-89. See id. at 1. Southeastern submitted another audit for the above award years to reduce its monetary liabilities. See id. Based upon the re-audit, the Department issued a second FAD, which was not signed by the designated signatory,³ on July 21, 1992. See id.; see also Southeastern Appeal at 2.

On September 4, 1992, Southeastern filed a timely request for review of the July 21 FAD. See Southeastern Appeal at 3. Among the various reasons for this request, Southeastern asserted that the July 21 FAD was not signed by the designated Department official, and thus, the FAD was invalid. See id. at 3, 5. On May 25, 1993, along with filing its Initial Brief before the ALJ, Southeastern also submitted a motion asking him to vacate the FAD's findings based on the omission of a signature. SFAP timely responded to that motion. See ALJ Dec. at 2. Upon learning of the omission, SFAP contends a signed FAD, which was identical to the unsigned FAD, was reissued to Southeastern on June 9, 1993. See Reply Brief of SFAP (SFAP Reply Br.) at 2; see also Southeastern Appeal at 4.

On June 16, 1993, the ALJ denied Southeastern's motion, finding that the school's interests were not unduly prejudiced despite the issuance of the unsigned FAD. See Order of the ALJ (Order), dated June 16, 1993, at 2. After the issuance of the Order, the parties litigated the following issues:

- (i) whether the "actual loss" formula used by SFAP to assess Southeastern's liability was appropriate; and
- (ii) whether all or parts of the various findings of the July 21 FAD were proper.

As to the first issue, the ALJ did not actually articulate whether the implementation of the "actual loss" formula was appropriate under the circumstances presented. See ALJ Dec. at 2-9. He did, however, set forth the relevant arguments of the parties hereto, and accordingly imposed monetary liability. See id. at 2-9, 29-35.

³The designated signatory was the Chief of the Audit Review Branch Division of Audit and Program Review.

As to the second issue, the ALJ found certain aspects of the ten FAD findings contested by Southeastern to be valid and others invalid. See id. at 29-35. Consequently, he affirmed, rejected, and/or modified the monetary liability owed by Southeastern. See id. Furthermore, in those instances where the ALJ upheld various FAD findings, he imposed liability against certain Southeastern students identified in the FAD, as opposed to the school. See, e.g., ALJ Dec. at 30.

Now, both SFAP and Southeastern appeal, among other things, all or portions of the aforementioned rulings. See SFAP at passim; see also Southeastern Appeal at passim. Those issues raised, jointly and severely, by SFAP and Southeastern, are addressed below.

II. DISCUSSION

A. The ALJ Correctly Denied Southeastern's Motion to Vacate the July 21 FAD.

Southeastern asserts that the lack of a signature on the July 21 FAD negates the FAD's merit to the extent that its findings should be dismissed. See Southeastern Appeal at 5. Southeastern argues that, pursuant to departmental regulations, a FAD must be authorized by a designated Department official in order to be deemed valid. See id. at 5. According to Southeastern, the lack of a signature implies that not only was the July 21 FAD not authorized by a designated Department official, but that SFAP failed to meet its regulatory imposed burden of production because the FAD was not duly issued by said official. See id. at 5-6.

In support of its position, Southeastern cites Department precedent in which an FAD was ruled invalid by the tribunal where there was no evidence that the person executing the FAD was authorized to do so. See Southeastern at 7-10. Southeastern concludes that "'the Designated [Department] Official requirement' contemplates that any final determination of liability will be scrutinized, approved, and signed by the particular official to whom the Secretary has delegated the requisite authority." Southeastern Appeal at 6.

In response, SFAP asserts that the July 21 FAD was reissued to Southeastern in identical form on June 9, 1993, with the appropriate signature. SFAP argues that such action moots the school's preceding argument. See SFAP Reply Br. at 2. According to SFAP, the real issue is whether Southeastern was entitled to "yet another 45 days to submit new evidence after the FAD was signed. . . ." ⁴ See id. at 2. By adopting the reasons set forth in the ALJ's Order, SFAP argues that the school should not have been accorded another 45 days to respond to the reissued FAD. See id. SFAP adds that the signed FAD was identical to the unsigned one and that ". . . Southeastern received adequate notice . . . in the unsigned FAD, since each

⁴Pursuant to departmental regulations, a FAD recipient has 45 days from its receipt of the FAD to respond to the allegations therein and to request a review hearing.

finding. . . identifies with particularly the student file where deficiencies were found and the nature of the violation." See id. SFAP concludes that Southeastern was not prejudiced by the ALJ's actions. See id. at 4.

In the Order, the ALJ discussed, among other things, what constituted a valid FAD. Turning to 34 C.F.R. § 668.112, he found that a valid FAD is "the written notice of a determination issued by a designated [Department] official." See Order at 2. The ALJ ruled that Southeastern received exactly that, and consequently, he denied the school's motion. See id. I agree with the ALJ's decision.

Although I do not endorse the Department's issuance of FADs without the actual signatures of authorized officials, 34 C.F.R. § 668.112 does not identify the affixture of such signatures as a prerequisite to validating FADs. See In the Matter of International Career Institute, Dkt. No. 92-144-SP, U.S. Department of Education (Decision of the Secretary, February 16, 1994) at 3. As the ALJ correctly points out in his Order, a written notice by a designated Department official is the essential criterion of a FAD. See 34 C.F.R. § 668.112.

Further, despite Southeastern's argument, the oversight by the Department in this instance is not tantamount to having the July 21 FAD issued by a person who, from the outset, had no authority to issue such a determination.⁵ Undisputedly, the person identified in the July 21 FAD as the designated signatory was authorized by the Department to issue that FAD. Therefore, the July 21 FAD is valid and the ALJ's Order is affirmed.⁶

-4-

⁵Nothing in the record indicates that the omitted signature in the July 21 FAD was anything more than an inadvertent oversight.

⁶With respect to this issue, Southeastern raised one particular argument, among others, worthy of mention. The school asserts that if just the type-written name of the designated official set forth on the FAD would satisfy departmental FAD criteria, the credibility of the FAD would be in doubt, because unauthorized Department staff could improperly send out FADs under the names of the individuals authorized to do so. See Southeastern Appeal at 14. However, assuming arguendo that departmental regulations mandate the affixture of signatures on FADs, these same unauthorized staff persons used in Southeastern's hypothetical could, if they were so inclined, also forge the signatures of the authorized officials whose names appear below the spaces provided for their signatures. Thus, under either scenario, departmental regulations could be circumvented through malfeasance. Therefore, primary focus should be placed on the authorization status of the designated signatory and not on the signature itself, since the signatory, in this case, will ultimately be held accountable for the FAD and the circumstances behind its issuance.

B. The ALJ Failed to State Clearly His Rulings on the Department's Use of the "Actual Loss" Formula and the Imposition of Student Liability.

Both Southeastern and SFAP assert that the ALJ did not plainly articulate his ruling relating to the implementation of the "actual loss" formula, and its ultimate affect upon the tribunal's imposition of liability owed by Southeastern. See Southeastern Appeal at 18-21; SFAP Appeal at 2-3. Southeastern acknowledges that the "actual loss" formula was used by SFAP to assess the school's monetary liabilities in the FAD. See Southeastern Appeal at 19. However, the school is uncertain as to how the ALJ calculated those monetary liabilities owed by it in the initial decision. See id. at 18. It is confident nonetheless that the ALJ did not use the "actual loss" formula to arrive at his monetary liability rulings. See id. at 21.

SFAP argues that the use of the "actual loss" formula to determine Southeastern's initial monetary liabilities is proper.⁷ See SFAP Appeal at 2. However, SFAP, like Southeastern, contends that the ALJ failed to render an opinion concerning that formula's use when arriving at his final liability calculations. See id. at 2-3. But, SFAP concludes, that the ALJ's silence on this issue indicates that Southeastern failed to persuade the tribunal that the formula was inappropriate and, thus, the ALJ's conclusion should be affirmed. See id. at 3.

In his decision, the ALJ cites both Southeastern's and SFAP's arguments relating to the "actual loss" formula. See ALJ Dec. at 6-11. When appropriate, the ALJ imposes monetary liability against Southeastern for proven departmental violations. See id. at 29-35. He does so, however, without explicitly stating whether such liability is premised upon the foregoing formula. See id.

Consequently, I cannot determine whether the ALJ accepted or rejected the merits of the "actual loss" formula. Thus, I shall remand this portion of the initial decision to the tribunal below for greater clarity as to whether the ALJ's monetary liability calculations are in fact contingent upon this formula. Furthermore, since Southeastern, and not its students, is the subject of the FAD, liability should accordingly fall upon the school for proven Title IV program violations. Therefore, I set aside the monetary liability imposed against individual Southeastern students in the initial decision, while remanding that portion of the decision to the tribunal below for greater clarity as well. See, e.g., ALJ Dec. at 30, 33.

⁷In its reply brief, Southeastern argues that SFAP's use of the "actual loss" formula was, among other things, arbitrary and invalid. See Brief of Southeastern in Opposition to SFAP's Appeal to the Secretary (Southeastern Reply Br.) at 11-17.

C. The Remainder of the ALJ's Decision is Affirmed in All Other Respects.

In their respective appeals, both Southeastern and SFAP contend that the ALJ erred by imposing, modifying, or rejecting the monetary liability set forth in the FAD's various findings.⁸ For example, the ALJ's decision to uphold portions of findings 10 and 23, which primarily alleged that student confirmation reports (SCRs)⁹ were not present in student files or completed timely by the school, is the subject of dispute. See Southeastern Appeal at 21-25. Collectively, the monetary liability imposed under these findings is \$94,106. See ALJ Dec. at 31, 34.

Principally, Southeastern asserts that SFAP failed to meet its regulatory imposed burden of production. See Southeastern Appeal at 21-22. Southeastern agrees that departmental regulations provide for the submission of status reports which apprise lenders of changes in student enrollment status. See id. at 22. However, the school argues that SFAP has not produced evidence to demonstrate that loans were improperly disbursed after a given student changed his or her enrollment status, or that the student was ineligible for such disbursements prior to a change in enrollment. See id.

SFAP contends that the imposed monetary liability clearly stems from Southeastern's "failure to accurately report the potential changed enrollment status of its students." SFAP Reply Br. at 7. SFAP notes that its burden of production was met upon discovering and then reporting that certain SCRs were neither present in Southeastern's files, nor timely completed. See SFAP Reply Br. at 8. SFAP points out that at the hearing below when the school established a student's enrollment status through independent data, as opposed to a SCR, the presumption of impropriety was rebutted and no liability was imposed by the ALJ. See id. at 7. SFAP concludes that, in those instances where liability was upheld, Southeastern failed to submit either a SCR or comparable independent data, and thus, it failed to meet its burden of persuasion. See id. at 8.

As described above, the ALJ only upheld those portions of findings 10 and 23 that were not rebutted through the submission of relevant evidence. See ALJ Dec. at 31, 34-35. I agree with this reasoning.

Contrary to Southeastern's belief, SFAP met its burden of production once it demonstrated that requisite SCRs were untimely completed or not within certain student files.

⁸Accordingly, in their respective replies to the other's appeal, both Southeastern and SFAP assert why the rulings in their favor should remain undisturbed.

⁹Generally, a SCR is used to confirm a Title IV student's enrollment status. See 34 C.F.R. § 682.610(c). An institution must complete and return the SCRs to either the Department or the guaranty agency within 30 days of its receipt of them. See id. § 682.610(c)(1).

Not only are the foregoing acts and/or omissions in and of themselves departmental violations,¹⁰ but they inherently raise the issue of student eligibility which is, among other things, a condition precedent to allowable loan disbursements.¹¹ Without valid enrollment documentation, the Department may reasonably infer that those Southeastern students receiving Title IV funds may not be eligible recipients. Given that 34 C.F.R. Part 668, Subpart H governs these proceedings, the burden of persuasion falls upon Southeastern to prove otherwise.

At the hearing below, the ALJ was persuaded by Southeastern's comparable independent data when SCRs were not readily available and, accordingly, excused the school from liability. When neither was available, he dutifully imposed liability, since Southeastern ultimately failed to prove that Title IV funds had been disbursed to eligible students. Therefore, the ALJ's decision regarding findings 10 and 23 is correct and affirmed.

The ALJ's rulings pertaining to findings 3, 17, and 24 were also questioned. Both findings 3 and 17 alleged that in violation of school policy, separate Statements of Educational Purpose (SEPs) were missing from certain Southeastern student files. Although the ALJ noted that "such a signed statement is a regulatory requirement," he ruled that promissory notes and Student Aid Reports (SARs), which were found in the files of these same students, served as acceptable substitutes for the aforementioned SEPs. ALJ Dec. at 11, 29-30, and 32-34.

SFAP asserts that although the foregoing is permissible under the regulations, Southeastern in effect ignored departmental regulations by failing to adhere to its own policy of securing individual SEPs from its students. See SFAP Appeal at 6-7. SFAP argues that Southeastern should not be excused from liability "because [it] fortuitously found alternative documentation" SFAP Appeal at 6.

Southeastern contends that despite the omission of separate SEPs in the files of certain students, the ALJ acknowledges that the school had submitted responsive evidence which contradicted portions of findings 3 and 17. See Southeastern Reply Br. at 3. Moreover, Southeastern argues that the Department has no authority to impose liabilities based upon noncompliance of its internal policies. See id. at 5.

In his decision, the ALJ accepted the promissory notes and SARs of the students in question because within the text of these documents were SEPs executed by the foregoing students. See, e.g., ALJ Dec. at 33. Implicitly, the ALJ was not prepared to hold Southeastern accountable for deviating from its policy when SEP regulations were properly satisfied. Given the foregoing reasoning, I agree with the ALJ and affirm his ruling.

¹⁰ See 34 C.F.R. § 682.610(c).

¹¹ See 34 C.F.R. § 668.7.

Finding 24 alleges that the cost of attendance for certain Southeastern students was not verified and, thus was inconsistent with the standard cost of attendance reported on the school's Institutional Payment Summary. See ALJ Dec. at 26. The finding imposed Pell Grant liability upon Southeastern in the amount of \$21,963. See id. at 25. The ALJ rejected this finding. See id. at 28.

In its appeal, SFAP asserts that student cost of attendance is essential to determining a student's right to Pell Grant funds. See id. at 26. Accordingly, SFAP argues that Southeastern did not submit evidence to establish individual budgets for those students identified in this finding thereby failing to ". . . show with particularity that the amounts used were accurate for any specific student." SFAP Appeal at 11. Conversely, Southeastern contends that SFAP's allegations of excessive Pell Grant disbursements were contradicted by its own evidence, which proved that the school properly disbursed the Pell Grant awards to the students in question. See id. at 9.

The ALJ rejected this finding because an independent third party,¹² hired by SFAP, confirmed that Southeastern could have used a higher cost of attendance for calculating Pell Grant awards, but chose not to do so. See ALJ. Dec. at 27. Apparently, the ALJ concluded that the Department suffered no harm since these awards were not excessive but, in fact, appropriate. See id. at 28. Based upon the foregoing factual findings of the ALJ, I affirm this ruling.

III. ORDER

Accordingly, I order as follows:

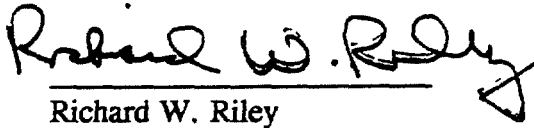
- 1) the ALJ's Order in which he denied Southeastern's Motion to Vacate the July 21, 1992, FAD shall be affirmed;
- 2) the ALJ shall clarify his opinion relative to the Department's implementation of the "actual loss" formula and thus, this portion of the initial decision shall be remanded to the tribunal below;
- 3) the ALJ shall clarify his opinion relative to the imposition of monetary liability against certain Southeastern students identified in the initial decision and thus, this portion of the decision shall be remanded to the tribunal below; and

¹²The third party is FAME, a student financial aid consulting firm.

- 4) the remainder of the ALJ's initial decision is affirmed in all other respects.

Notwithstanding order #3 above, Southeastern shall remit to the Department the total sum of \$165,264.¹³

So ordered this 29th day of November, 1994.


Richard W. Riley

Washington, D.C.

¹³The sum total has been adjusted accordingly to include the actual monetary liability of finding 23. SFAP inadvertently stated in its Initial Brief that the liability for this finding was \$52,916, when in fact it was \$58,318, as evidenced by the re-audit. See SFAP Appeal at 12, n15.

SERVICE LIST

Office of Hearing and Appeals
U.S. Department of Education
600 Independence Avenue, S.W.
Washington, DC 20202-4533

Mr. Stanley Freeman, Esq.
Pyles, Powers, Sutter & Verville
1275 Pennsylvania Avenue, N.W.
Third Floor
Washington, DC 20004-2404

Mr. Russell Wolff, Esq.
Office of the General Counsel
U.S. Department of Education
600 Independence Avenue, S.W.
Washington, DC 20202-2110