



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

---

In the Matter of **Docket No. 92-102-SA**

**SOUTHEASTERN UNIVERSITY,** Student Financial Assistance Proceeding

Respondent.

---

Appearances: Stanley A. Freeman, Esq., Powers, Pyles, Sutter, & Verville, of Washington, D.C., for Southeastern University.

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

Before: Judge Ernest C. Canellos.

### **DECISION**

This decision is the result of a second remand order (Remand II) by the Secretary issued September 14, 1995, in the above-captioned proceeding. [See footnote 1 /](#) In Remand II, the Secretary recognized that my decision, issued in response to his order in Remand I, concluded that Judge Clerman's decision did not base its monetary liability upon application of the actual loss formula and, in that regard, addressed the issues raised by the Secretary in Remand I.

Subsequent to the issuance of my decision, the parties requested that I determine

whether the actual loss formula *should* have been applied by Judge Clerman in his calculation of Respondent's liability. Jurisdiction over this matter, however, had passed to the Secretary and, as a result, I could not rule on the parties requests. In light of that fact, the Secretary agreed with the parties that I address this new issue arising from Judge Clerman's Initial Decision. Accordingly, the questions before me are: whether the actual loss formula should have been applied and, if so, what would be Respondent's liability under the formula. For the reasons stated below, I find that the application of the actual loss formula to determine Southeastern University's (Southeastern) liability for improperly disbursed Title IV loan funds is warranted.

As I noted in my decision in response to Remand I, it is well understood that the actual loss formula measures the estimated loss to the Department that has or will result from ineligible loans certified by an institution. Under the formula, an institution's cohort default rate is multiplied by the total amount of ineligible loans disbursed during a given award year to yield an

estimated expenditure of defaulted loans. This estimate is added to estimated loan subsidies and special allowance payments [See footnote 2 2](#) made by the Department to yield the actual loss formula liability. Prior decisions of this tribunal have indicated that application of the actual loss formula is not appropriate in cases where its use would ultimately deprive the student borrower of the benefit of a reduction in the amount of his or her debt. In that respect, use of the actual loss formula has been rejected in cases where an institution has a clear legal obligation to make a refund to a student or lender, and SFAP has obtained the relevant data to precisely determine the amount of the ineligible Title IV loan disbursement. *See, e.g., In re Jett College of Cosmetology and Barbering*, Dkt. No. 95-21-SP In such cases, institutions have been required to repurchase the face value of an improperly disbursed loan by repaying the current holder of the Title IV loan note and, thereby, relieve the student of his or her student loan debt.[See footnote 3 3](#)

In other cases, however, use of the actual loss formula has been upheld as an alternative assessment of liability against an institution found to have improperly disbursed Title IV loans. Those decisions have consistently approved SFAP's use of the actual loss formula as an accurate assessment of liability when use of the formula supports principles of fairness and equity. In this respect, the decisions of this tribunal have recognized that it would frustrate principles of fairness and equity to preclude SFAP's use of the actual loss formula in cases where the Department could otherwise require an institution to repurchase the face value of ineligible loans and repay the Department interest and special allowances, despite the fact that the student debtors may either have repaid their Title IV loan debt or have commenced repayment of that obligation.[See footnote 4 4](#) *See, e.g., In the Matter of Selan's System of Beauty Culture*, Dkt. No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994); *In the Matter of Berk Trade & Business School*, Dkt. No. 93-170-SP, U.S. Dep't of Educ. (June 27, 1994). In this regard, the law is clear and straightforward in permitting the Secretary to either demand the repayment of *all* improperly disbursed Title IV loans when appropriate or impose a liability based upon the use of the actual loss formula when such use is clearly supportable. *See In re Southeastern University*, Dkt. No. 93-61-SA, U.S. Dep't of Educ. (October 22, 1993).

In the case at bar, the parties do not dispute that the circumstances of this case fall squarely within the line of the Department's cases finding that the facts of the case warrant the application of the actual loss formula. Indeed, the parties agree that the actual loss formula should be applied in this case since it is quite likely that at least some of the improperly disbursed Title IV loans have been repaid by the student debtors who successfully completed their academic programs at Southeastern.[See footnote 5 5](#) In this regard, I give considerable weight to SFAP's decision to use the actual loss formula, instead of seeking full recovery of all ineligible Title IV loans. SFAP has the duty to act in a manner that would ensure protection of the Federal government's interest and, in doing so, SFAP's decision to adopt an assessment of liability that may result in the Department's recovery of a reduced amount of funds is presumed to reflect SFAP's tacit acknowledgment that Southeastern's student debtors may have or are likely to have repaid their Title IV loan debts.

More important, it is not disputed that SFAP clearly sets forth the factors upon which the calculation of Southeastern's actual loss liability is based. In this respect, SFAP's actual loss worksheet shows that for purposes of the actual loss formula, the relevant cohort default rate was

Southeastern's 1989 21.5% cohort default rate. The final audit determination (FAD) issued by the Office of Student Financial Assistance Programs (SFAP) determined that Southeastern disbursed \$317,071 in ineligible Title IV loans during the period at issue. The findings of the Initial Decision reduced the amount of ineligible Title IV loans to \$136,584. On this basis, SFAP estimated Southeastern's Title IV student loan defaults to total \$29,366 for the period at issue. SFAP also estimated its recoverable loan subsidies and special allowance payments to total \$35,692. Therefore, under the formula, Southeastern's actual loss liability totals \$65,058. In this respect, I find SFAP's calculation of liability demonstrably supportable. Accordingly, the use of the actual loss formula is clearly appropriate in this case.

#### ORDER

On the basis of the foregoing findings, it is HEREBY ORDERED:

(1) That the monetary liability imposed against Southeastern University for \$13,514 by my March 23, 1995 Decision be modified in accordance with this decision, and

(2) That the monetary liability imposed against Southeastern University by the Initial Decision for ineligible Title IV loan disbursements be modified and calculated on the basis of the actual loss formula.

Accordingly, consistent with the liability established by the Secretary's initial Remand Order, Southeastern University should repay to the Department of Education \$65,058 for ineligible Title IV loan disbursements, \$11,139 for improper Title IV grant fund disbursements, and should repay \$12,139 to the appropriate Title IV PLUS loan lenders.

SO ORDERED:

Ernest C. Canellos  
Chief Judge

Dated: November 13, 1995

---

---

*[Footnote: 1](#) 1 An earlier remand order (Remand I) was issued by the Secretary on November 29, 1994, wherein in addition to ordering Southeastern University to remit \$159,862 to the Department, the Secretary requested the tribunal to determine whether the monetary liability imposed against Southeastern by the Initial Decision is based, in part, on the application of the actual loss formula. The Initial Decision in this case was issued by Administrative Law Judge, Paul J. Clerman. Due to the retirement of Judge Clerman, this case was assigned to me.*

---

*[Footnote: 2](#) 2 The Department pays lenders a portion of the interest that accrues on a Title IV on behalf of eligible student borrowers, and also pays a percentage of the average unpaid principal balance of the loan -- called a special allowance -- while the student remains eligible for the benefits. See 34 C.F.R. Part 682, Subpart C.*

---

*[Footnote: 3](#) 3 Significantly, many of these cases involve issues concerning the propriety of an institution's calculation of the amount of tuition or fee expenses it should refund a student who has withdrawn from an institution or otherwise failed to complete his or her academic program. In stark contrast, the case at bar raises issues concerning the appropriate calculation of liability an institution must pay for improperly disbursing Title IV loans, notwithstanding the unrebutted position of the institution that its students completed the academic programs for which Title IV funds were awarded.*

---

*[Footnote: 4](#) 4 Indeed, I find SFAP's use of the actual loss formula supportable because it also embraces a principle adopted by the doctrine of unjust enrichment; namely, that it is unjust for one party to retain money or benefits which in justice and equity belong to another or results in the enrichment of one at the expense of another. See, e.g., Black's Law Dictionary (5th ed. 1979) at 1377.*

---

*[Footnote: 5](#) 5 Although Southeastern "reserved" its right to raise the objections presented to Judge Clerman regarding its opposition to the liability imposed against the institution for judicial review, the school clearly stated in its April 26, 1995, submission to the tribunal that the institution "agrees with SFAP that this tribunal should apply the actual loss formula in this proceeding." More important, Southeastern's contention that under the actual loss formula its liability to the Department is \$76,197 makes it plainly evident that the institution concedes that the cohort default rate used by SFAP in its actual loss worksheet is the appropriate cohort default.*