



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

In the Matter of
SP

Docket No. 92-113-

CHAUFFEUR'S TRAINING SCHOOL,

Student Financial

Assistance Proceeding

Respondent.

Appearances: Keith J. Roland, Esq., of Roland, Fogel, Koblenz & Petroccione, Albany, NY, for Chauffeur's Training School, Inc.

Sarah L. Wanner, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs

Before: Judge Ernest C. Canellos

DECISION ON REMAND

On July 11, 1997, the Secretary remanded this case for further proceedings consistent with the district court's decision in *Chauffeur's Training School v. Riley*, 967 F. Supp. 719 (N.D.N.Y. 1997). Consequently, the issues before me are limited to the narrowly drawn questions presented by the district court concerning the appropriate calculation of liability.¹ Chauffeur's Training School (CTS) had filed suit against the U.S. Department of Education (Department) challenging the Department's administrative assessment of liabilities with respect to its participation in the Guaranteed Student Loan

¹ As part of the law of this case, the district court determined that "(i) the Final Program Review Determination was properly authorized and issued; (ii) CTS violated Title IV program regulations by engaging in incomplete file verification practices, incorrect file review procedures, lacking financial aid transcripts, and violating ability-to-benefit requirements; [and] (iii) CTS failed to provide the 300 minimum hours of instruction in the Tractor Trailer Driver II Program at the Albany campus." Dist. Ct. Mem. Dec. & Order. Although the institution presents the same arguments to this tribunal, on remand, that it presented to the district court, the court's decision has foreclosed my review of those issues.

(GSL) program, and sought a declaratory judgment setting aside my administrative decision.

The district court noted that my decision had upheld \$2,056,600 in liabilities owed by CTS for errors in the student files which were actually reviewed but that SFAP had recalculated its losses before the court and sought to collect "contingent liabilities" in the amount of \$1,850,542. As the court noted, SFAP's new calculation of liability "was never before Judge Canellos or the Secretary." In light of this observation, the court concluded that CTS was denied the ability to challenge the Department's sampling and extrapolation methodology--a methodology upon which CTS' liabilities were significantly predicated. In this regard, the court noted that "where, as here, the record is inadequate to allow meaningful judicial review, the Court should remand to the agency for further findings."

Accordingly, on July 31, 1997, January 30, 1998, and January 5, 1999, I issued orders directing the parties to respond to the issues set out in the district court's decision.² The parties were directed to respond precisely to the following questions:

1. In light of the institution's obligation to conduct a sufficient accounting for its determinations regarding Guaranteed Student Loans (GSL), that it caused to be disbursed to students, can the errors caused by Respondent in the 187 GSL program loans actually examined by Student Financial Assistance Program reviewers be projected to determine the amount of errors for loans to other Respondent borrowers? What specific evidence, or inferences from evidence, supports such a projection? If those errors can be projected, what is the liability amount derived from that projection?
2. Does the Department's Estimated Actual Loss Formula provide a reasonable method of computing actual losses to the Department for the cost of: (a) default payments; (b) loans discharged because of false certification, pursuant to 20 U.S.C. § 1087; and (c) interest and special allowance payments on repaid loans?

In response to these questions, CTS argues that SFAP's projections of liability are unsupported by the evidence in the record. In opposition to CTS, SFAP argues that my findings in the Initial Decision would support the use of either formula, but notes that the decisions of the Secretary have specifically authorized the use of the estimated actual loss formula under circumstances similar to this case. In light of the rulings upheld by the Secretary subsequent to the issuance of my Initial Decision, I find that the estimated actual loss formula should be used to calculate CTS' liability.³

² Although the filings in response to my orders on July 31, 1997, and January 30, 1998, thoughtfully presented arguments supporting the respective positions of the parties, additional briefing on the pertinent issues was necessary to ensure that the parties responded precisely to the questions presented.

³ See, e.g., *In Re Christian Brothers University*, Docket No. 96-4-SP, U.S. Dep't of Educ. (January 8, 1997); *In Re Southeastern University*, Docket No. 92-102-SA, U.S. Dep't of

It is well established that the nature of the enforcement of Title IV programs through the use of program review determinations creates the need for institutions to cooperate with SFAP by providing the agency with complete file reviews when that information is needed to determine whether any, if not all, Title IV funds disbursed to the institution were spent contrary to the statutory and regulatory requirements.⁴ More fundamentally, an institution's cooperation in providing SFAP with documentation of its expenditure of Title IV funds is consistent with its fiduciary duty to account for the disbursement of Title IV program funds. An institution is the only one that has at its disposal the files and records to justify the expenditure of Title IV funds. *See In re Belzer Yeshiva*, Docket No. 95-55-SP, U.S. Dep't of Educ. (June 19, 1996); *In re National Broadcasting School*, Docket No. 94-98-SP, U.S. Dep't of Educ. (December 12, 1994). SFAP does not bear the burden of specifically identifying the exact liabilities for the findings of non-compliance, nor does it have the information needed to assess these exact liabilities since they are determined by the extent of the institution's non-compliance. *In re Belzer Yeshiva* at 4. Consequently, CTS' refusal to provide SFAP with the data requested undercuts its position that the extrapolation methodology should be rejected because it is not a precise measure of SFAP's liability.⁵

Subsequent to the issuance of the tribunal's Initial Decision in this case, this tribunal has recognized that in cases, like this one, where the procedures set forth under Subpart H -- audit and program review regulations -- govern the proceeding, SFAP is entitled to recover losses directly attributed to the institution's improper expenditure of Title IV funds. In that respect, the reliability and appropriateness of using the estimated actual loss formula is firmly established in our administrative case law and, therefore, its application is clearly warranted in this case. More specifically, the decisions of the tribunal have consistently held that use of the estimated actual loss formula constitutes a fair calculation of the extent of the Department's losses where it is determined that an institution has improperly disbursed Title IV loans.⁶

Educ. (November 13, 1995). By its very definition, the estimated loss formula cannot be exact, but it is tailored to compensate the Department for its specific losses in default costs and interest and special allowances.

⁴ *See, e.g., In re Pan American School*, Docket No. 92-118-SP, U.S. Dep't of Educ. (October 18, 1994).

⁵ In this proceeding, the institution has the burden of proving that the questioned expenditures were proper. 34 C.F.R. § 668.116(d); *see also In re Sinclair Community College*, Docket. No. 89-21-S, U.S. Dep't of Educ. (Decision of the Secretary) (September 26, 1991).

⁶ *See, e.g., In re Selan's System of Beauty Culture*, Docket. No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994); *In re Berk Trade & Business School*, Docket No. 93-170-SP, U.S. Dep't of Educ. (June 27, 1994).

It cannot be overemphasized that throughout this appeal, CTS's position that it should be relieved of liability as SFAP has failed to establish any damages with specificity, run counter to its obligations to demonstrate the propriety of its Title IV expenditures. This is CTS' argument despite the fact that it has the burden of proving that its expenditures are correct and, most important, that it possesses the information with which to quantify these damages. Presented with this situation, SFAP could do nothing more than it has done. First, based on the degree of errors in the sample, SFAP gave CTS the option of doing a full file review. CTS chose not to do so. As the only other reasonable alternative, CTS' damages were determined by applying the error rate of the sample to the universe of students to calculate the Title IV loans which were erroneously certified. From that amount, SFAP applied its estimated actual loss formula to reach its final assessment of loss. Given the fact that CTS failed to provide any information which was probative, I find the sampling technique utilized in conjunction with the estimated loss formula is appropriate. It goes without saying that CTS could, if it wished, have reviewed "its" records and determined if the assessment of liability was less favorable than that which actually existed. Again, they apparently chose not to avail themselves of that opportunity.

The estimated loss formula measures the estimated loss to the Department that has or will result from the ineligible loans certified by the institution. Under this formula, an institution's cohort default rate⁷ is multiplied by the total amount of ineligible loans disbursed during a given award year to yield an estimated expenditure of defaulted loans. *In Re Selan's System of Beauty Culture*, Docket No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994) at 3. This estimate is added to estimated loan subsidies and interest payments made by the Department to yield the estimated loss formula liability.⁸ The

⁷ The cohort default rate is a creature of statute -- Congress has determined it to be a significant, meaningful measurement of the risk of loss in Title IV programs. 20 U.S.C. §§ 1085(a)(2) and (m); *In Re Bryant & Stratton Business Institute*, Docket No. 94-190-SA, U.S. Dep't of Educ. (Sept. 16, 1996). The cohort default rate represents the percentage of student borrowers who attended a particular institution, first enter repayment on their Stafford or SLS loans during a given fiscal year, and subsequently default on one or more of those loans during that year, or the following year. 20 U.S.C. § 1085(m)(1). CTS' cohort default rate for the period at issue is 54.4 percent.

⁸ Interest and special allowances (ISA) are recoverable from an institution even though ISA payments are made to a third-party Title IV program participant. 34 C.F.R. § 682.609. Under the ISA benefit, ED pays lenders a portion of the interest that accrues on a Stafford or GSL 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 ISA benefits. *See* 34 C.F.R. Part 682, Subpart C.

estimated loss formula has been relied upon by SFAP as an alternative assessment of liability against an institution found to have improperly disbursed Federal Family Education Loan (FFEL) loans and this tribunal has consistently held that this formula constitutes a fair calculation of the extent of the Department's losses where it has determined that an institution has improperly disbursed Title IV loans.⁹

Before the estimated loss formula can be applied, an institution's total loan volume must be identified. In the instant case, the institution failed to provide the total loan volume for each of its campuses at issue. Consequently, SFAP's calculation of the total loan volume for each of CTS' three campuses at issue, Albany, Chicago, and Houston, represented the most accurate assessment of loan volume for both subsidized Stafford loans and unsubsidized Supplemental Loans for Students (SLS).

The chart below illustrates the computation of loan volume.¹⁰

Campus	Percentage of CTS borrowers by Campus	Total Stafford Loan Volume	Stafford Loan Volume by Campus	Total SLS Loan Volume	SLS Loan Volume by Campus	TOTAL Loan Volume by Campus
Albany	9% (161/1400)	\$31,525,311	\$3,625,410	\$11,039,279	\$1,269,517	\$4,894,927
Chicago	20.5% (288/1400)	\$31,525,311	\$6,462,688	\$11,039,279	\$2,263,052	\$8,725,740
Houston	16% (225/1400)	\$31,525,311	\$5,044,049	\$11,039,279	\$1,766,284	\$6,810,333
Stafford and SLS TOTALS:			\$15,132,147		\$5,298,853	

Once the appropriate loan volume is determined, the first step of the actual loss formula requires the tribunal to establish the appropriate error rate to use in extrapolating the loss from the sample of loans to the universe of the three campus' loan volume. In its March 2, 1998, brief, SFAP referred to an error rate for each of the three campuses based on the number of files sampled by SFAP in the FPRD and the alleged number of errors. To that end, SFAP found error rates of 21% for Albany, 50% for Chicago, and 56% of Houston. Then, SFAP multiplied the error rate by the total loan volume (both Stafford

⁹ See e.g., *In re Muscular Therapy Institute*, Docket No. 94-79-SP, U.S. Dep't of Educ. (July 14, 1995) at 6.

¹⁰ SFAP separately computed the loan volumes for each of the three campuses at issue by multiplying the percentage of the 1400 borrowers CTS' own auditors used to conduct its own audit for the period at issue, by the total loan volume for all of CTS' seven campuses. This amounted to \$31,525,311 in Stafford loans and \$11,039,279 in SLS loans.

and SLS) listed above to reach a total for all three campuses of \$9,204,588. This sum is repeatedly listed in SFAP's brief as the total amount of FFEL loan funds misspent, although, inexplicably, it is not employed anywhere in its estimated loss calculation¹¹.

Instead, SFAP used six different error rates to extrapolate the amount of the ineligible Stafford and SLS loans. SFAP may have generated these rates from using information from the original program review report, although I can do little more than speculate as to why these error rates were proposed.¹² In this respect, I find SFAP's use of these six different error rates improper. There is some indication in SFAP's submissions that it may have determined that a distinction between the error rates for ability-to-benefit (ATB) violations and other violations was appropriate, but such a distinction is clearly without basis. It is patently inappropriate for SFAP to bootstrap its arguments on the merits by calculating its proposed liability to reach issues that have been foreclosed by my Initial Decision. My determinations on the scope of CTS' regulatory violations have been upheld by the district court, and are not open to relitigation at the administrative agency level.

In its proposed calculation of CTS' error rate, SFAP ignored evidence presented by CTS and found probative by the tribunal regarding student work file records, ATB tests, financial aid worksheets, and other student records. My initial decision acknowledged that CTS was able to account for some of its expenditures, and that CTS had sufficiently rebutted some of SFAP's allegations. As such, I determined that the unrebutted allegations constituted a 10 percent error rate under customary sampling extrapolations. In other words, CTS had left unrebutted SFAP's remaining allegations that its sampling techniques had shown that 10 percent of the student files maintained by three institutions operated by CTS would contain errors sufficient to render those students ineligible for Title IV student financial assistance. Therefore, for the reasons enumerated above, I find that under the estimated actual loss formula a 10 percent error rate be used. The appendix sets out the actual loss formula applied in this decision.

¹¹ See ED Exhibit 12.

¹² See SFAP's March 2, 1998, Brief at p.11 and ED Exhibit 11.

ORDER

On the basis of the foregoing, it is hereby - -

ORDERED, that Chauffeur's Training School repay to the United States Department of Education the sum of \$1, 279,333.¹³

Ernest C. Canellos
Chief Judge

Dated: November 23, 1999

¹³ This sum includes \$28,408 upheld in the Initial Decision, and unrelated to the calculation of estimated loss liability.

Appendix

The following tables illustrate each step in the estimated loss calculation. I have recalculated the estimated loss liability listed in ED Exhibit 12 for two reasons: first, I have used a 10 percent error rate across the board to extrapolate the amount of the ineligible loans and second, SFAP erred by including SLS loans in its calculation of ISA. ISA payments are not applicable to SLS loans. Step 1 extrapolates the error rate to the total universe of loans. In Step 2, the institution's cohort default rate is multiplied against the total amount of ineligible Stafford and SLS loans disbursed during the period at issue. This calculation yields the estimated loss in Title IV disbursements resulting from students defaulting on repayment of ineligible loans. In Step 3, the amount of ineligible Stafford loans is multiplied against the daily Interest and Special Allowance (ISA) factor determined by SFAP. This number is then multiplied against the average number of days the Department paid loan subsidies to lenders (from disbursement to repayment for proprietary schools). The Department similarly uses this calculation under Steps 4a and 4b to determine the special allowance amounts paid to lenders. Under Step 5, the amounts indicated in the last column of each table are added together to yield the total estimated loss liability.

STEP 1: Calculate Ineligible Stafford/SLS loans

FFEL Loan Type	Total Loan Volume	Error Rate	Ineligible FFEL Loan Amounts
Stafford	\$15,132,147	10%	\$1,513,215
SLS	\$5,298,853	10%	\$529,885

STEP 2: Estimated Defaults

FFEL Loan Liabilities	Amount of Ineligible Loans	Cohort Default Rate	Estimated Loss from Defaults
Stafford	\$1,513,215	54.4%	\$823,189
SLS	\$529,885	54.4%	\$288,257

STEP 3: Estimated Subsidies paid to Lenders from Disbursement to Repayment

Ineligible Stafford Loans	Daily ISA Factor	Average Number of Days	Total Subsidy
\$823,189	.000247	584	\$118,743

STEP 4a: Estimated Special Allowance Paid to Lenders from Disbursement to Repayment

Ineligible Stafford Loans	Cohort Default Rate	Daily ISA Factor	Average Number of Days	Total Allowance
\$823,189	54.4%	.0000273	418	\$5,110

STEP 4b: Estimated Special Allowance from Repayment to Paid-In-Full Date

Ineligible Stafford Loans Minus Estimated Loss in Step 2	One-half the Result of the Previous Column	Daily Special Allowance Factor	Average Number of Days	Total Allowance
\$690,026	\$345,013	.0000273	1659	\$15,626

STEP 5: Total Estimated Loss Liability

Estimated Loss	Subsidies Paid	Special Allowance	PIF	Total Estimated Loss Liability
\$1,111,446	\$118,743	\$5,110	\$15,626	\$1,250,925

