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

In the Matter of **Docket No. 93-106-SP**

CLARK ATLANTA UNIVERSITY, Student Financial Assistance Proceeding

PRCN:90104028

Respondent.

Appearances:

William A. Blakey, Esq., Dean, Blakey & Moskowitz, Washington, D.C., for Clark Atlanta University.

Steven Z. Finley, 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 II

This decision is the result of a remand issued by the Secretary on August 1, 1997 (Remand II).See footnote 1[1] In the current remand, the Secretary confirmed that he "agree[d] with the Administrative Judge's finding that the CPA attestation submitted by Clark Atlanta University (CAU) does not provide a basis for reducing CAU's liability." The Secretary, however, also concluded that this matter should be remanded to me once again for review of the documentation submitted by CAU "for each of the remaining 19 students" at issue.See footnote 2[2] In that regard, the Secretary expressed some degree of uncertainty as to whether in my last decision I had considered the evidence concerning 19 student files that CAU now claims vindicates its position that its liability should be reduced.

In my last decision, after careful scrutiny of all of the evidence in the record, I determined that "neither the CPA's attestation, nor the accompanying reconstructed student files" support CAU's contention that the liability upheld by my Initial Decision should be reduced.See footnote 3[3] Indeed, I was persuaded, as I am now, that the evidence lacked any probative value on the issue of liability.

Since CAU persists in its position that the evidence in the record sufficiently supports a reduction in the liability it owes to the U.S. Department of Education (Department) and to ensure that these proceedings give complete effect to the Secretary's remand order, on August 5, 1997, I issued an order requiring CAU to submit a brief specifying the following:See footnote 4[4]

> *CAU is ordered to file within 30 days of the date of this order a short brief, not to exceed 10 pages in length, setting forth the specific basis as to why the institution owes no liability for improperly disbursed funds for each of the 19 individual students. In this regard, CAU shall specify in its brief, the exhibit and its page number, which supports the institution's position.*

In response to my order, CAU filed a brief that contained *one* reference, in footnote 8 of its brief, to a single page of the evidentiary record, which contains several hundred pages of student files.See footnote 5[5] Instead of complying with my order, CAU contends in its brief that I must conduct a "*de novo* examination of the nineteen (19) files at issue since they have never been before" me.See footnote 6[6] Notwithstanding CAU's recognized assurance that I will conduct the thorough scrutiny of the record that I am charged with doing, the burden of proof never lies with the fact-finder; that is a burden CAU must carry forward in order to prevail. Notably, to sustain its burden of proof, CAU must establish, by a preponderance of the evidence, that Title IV funds were lawfully disbursed. *See In re National Training, Inc.,* Dkt. No. 93-98-SA, U.S. Dep't of Educ. (October 18, 1995). Under this burden, it is axiomatic that an institution that fails to show how its exhibits establish its burden of proof acts at its own peril. In this respect, I find CAU's presentation of proof in this proceeding to be uncommonly deficient. Nonetheless, to ensure that this administrative proceeding reaches finality, I will specifically address below why the evidence in the record does not warrant a reduction in the liability CAU owes the Department.

At the outset, it is appropriate to review how SFAP determined CAU's liability in the final program review determination (FPRD). On December 11-15, 1989, SFAP's program reviewers from the Department's Regional Institution Review Branch located in Atlanta, Georgia conducted a program review of the institution's Federally funded student financial aid programs. The program review included a review of a sample of 31 student files for which Title IV financial assistance was awarded to students during the 1987-88 and 1988-89 award years. On June 25, 1990, SFAP issued a program review report that contained 20 findings concluding that CAU was in noncompliance with Title IV regulations. Six of the findings from the program review were not resolved by SFAP and CAU and, as a result, became the basis of the FPRD requiring the institution to repay the Department Title IV program liabilities totaling $759,216.55.

In this proceeding, CAU's request for review of the FPRD is limited to Finding #5.See footnote 7[7] Under Finding #5, SFAP argues that CAU, in violation of 34 C.F.R. § 668.7(a)(7), improperly disbursed Title IV funds to students who had already defaulted on repayment of a Title IV loan, yet had not presented documentation to the institution that the defaulted loans had been repaid or were in satisfactory repayment.See footnote 8[8] CAU conceded, early in these proceedings, that it was liable for some improper disbursements, but disputed the number of students for which the improper disbursements had been made. At this juncture, the number is 19.

The Department's program reviewers discovered that of the 31 student files examined CAU had made Title IV funds available to 2 students who were in default on Title IV loans received from other institutions.See footnote 9[9] On this basis, SFAP instructed CAU to review the files of *all* students enrolled during the 1987-88 and 1988-89 award years to identify whether other students, who were in default, had been improperly awarded Title IV funds. CAU examined its *own records* and identified students who had received Title IV funds, but were in default on a previously obtained Title IV loan.See footnote 10[10] SFAP's review of this information resulted in its conclusion, under Finding #5 of the FPRD, that CAU improperly disbursed Title IV funds to 40 of its students during the 1987-88 and 1988-89 award years and, as a result, owes liabilities of $91,395.55 in Federal work-study funds, $81,848.00 in Federal Perkins loan funds, and $411,183.00 in estimated losses for improper disbursements of Federal guaranteed student loan funds (GSL).See footnote 11[11] When added to the liabilities which CAU does not dispute, the total amount sought by SFAP in this proceeding is $759,216.55.See footnote 12[12]

As an initial matter, CAU argues that it owes no liability with respect to student LAR because the reconstructed files for this student shows that this student never entered default status on a Title IV loan. CAU's current position, however, still misses the mark. As I noted in my Initial Decision, CAU's evidentiary burden in these proceedings requires it to make an affirmative showing that the institution disbursed Title IV funds lawfully. With regard to student LAR, CAU's evidence does not meet this burden because it does not affirmatively show that this student was not in default status when CAU disbursed Title IV funds to the student.

The reconstructed files contain FATs from each of the two institutions, Clark College and the University of Hawaii, that student LAR attended prior to enrolling in CAU during the period at issue.See footnote 13[13] At the University of Hawaii, the student received no Title IV student financial assistance and at Clark College the student received significant amounts of Title IV funding, including student loans from 1988 through 1990, but there is no indication whether the student entered default status during the period at issue on the basis of the Title IV loans awarded to the student while attending Clark College.See footnote 14[14]

In addition, the reconstructed files for student LAR contained an incomplete FAT from Westark Community College (Westark), indicating that Westark had no record of the student's attendance. Although it is conceivable that CAU mistakenly sent an FAT request to Westark, I find no basis in the record to support that conclusion. Moreover, it would be anomalous to conclude, on the basis of a lack of evidence, that CAU erroneously indicated to SFAP that this student had entered default status, when she had not, and also erroneously sent an FAT to a school that the student had not ever attended. One could speculate that this sequence of errors occurred, but I find this conclusion unwarranted by the facts. Accordingly, CAU failed to carry its burden of proof showing that the institution lawfully disbursed Title IV funds to this student.

In its brief, SFAP argues that CAU has presented contradictory reconstructed files for 6 of the 19 students now at issue.See footnote 15[15] In SFAP's view, CAU's initial documentation, at the time of the program review, revealed that each of the 6 students had defaulted on Title IV loans prior to CAU's disbursement of funds. Yet, when CAU reconstructed its files, after losing its initial documents,See footnote 16[16] the reconstructed files indicated that the 6 students had defaulted on their Title IV loans *after* CAU disbursed its Title IV assistance to the students. As

such, SFAP contends that this discrepancy should be construed against the institution because the reconstructed files, without additional confirming documents, lack credibility.

CAU offers no explanation for why its reconstructed files contradict the evidence given to SFAP, upon its request, after the program review. Undoubtedly, the reconstructed files could be self-serving if, in all respects, they tend to vindicate the institution's position when the evidence appeared to be otherwise during the program review period. This is particularly true, here, where there is no explanation for why CAU's initial review of its original files indicated that these students had been in default prior to the institution disbursing Title IV funds to the student, yet, the reconstructed files indicate that these same students entered default status *after*See footnote 17[17] the institution had disbursed Title IV funds to them, which, of course, renders the disbursement proper. Although I recognize that SFAP and CAU exchanged information over the course of three years after the program review, but before the issuance of the initial FPRD, the evidence CAU offers is unpersuasive. The relevant evidence is based on form letters, presumably signed by an official at the students' undergraduate institution, who indicates by check mark and date when each of the six students entered default status, and is also based on copies of incomplete Financial Aid Transcripts.See footnote 18[18] These documents rather than clarifying or supporting CAU's position raise additional questions about these students. For example, student SLL was recorded in CAU's original files as a student in default status while attending CAU during the 1988-89 and 1989-90 award years.See footnote 19[19] Yet, CAU now proffers a letter from Voorhese College, signed by Ivan Griffin, which states that the student paid off her defaulted Title IV loan as of July 1988, prior to the student's attendance at CAU. The letter is dated April 25, 1994, but does not identify Griffin's relationship to Voorhese College. Nor does the letter explain why the Financial Aid Director, Lavenia W. Freeman, indicated on the student's FAT, which was signed by Freeman on January 20, 1994, that the student was currently in default status on a Title IV loan. Accordingly, I find CAU's evidence unpersuasive in refuting SFAP's position that these students were ineligible for Title IV financial assistance. The institution has not met its burden of proof with regard to these six students.

I find CAU's evidence equally unpersuasive regarding the remaining 13 students. After completing the file review requested by SFAP, CAU indicated that it had disbursed Title IV funds to student CA while the student was in default status. Now CAU contends that it owes no liability as to this student because its reconstructed file shows that the institution's initial file review was incorrect. In CAU's view, the fact that the institutions that this student attended prior to enrolling at CAU each reported that on the basis of their records the student had not defaulted on any Title IV loan vindicates CAU's position that the student was eligible for Title IV assistance. In support of its position, CAU submitted a letter, dated March 25, 1994, from the Vice Chancellor for Student Affairs at Southern Arkansas University Tech (SAU), Dr. Reginald Cooper, that states that the student never attended that institution and, therefore, he could not attest to the Title IV default status of the student. Apparently, CAU sent a copy of its form letter inquiring about default status to the wrong institution since the student's admissions application indicates that the student attended Southern Technical College, not SAU. Undoubtedly, this evidence falls far short off the mark. There is nothing in the record that is probative regarding this student's default status other than the initial results of CAU's file review indicating that this student was in default status when CAU disbursed Title IV funds to the student. Accordingly,

CAU's evidence is conflicting and unpersuasive in refuting SFAP's position that this student was ineligible for Title IV financial assistance while attending CAU.

The reconstructed files for students QC, CCSSee footnote 20[20], WD, CESee footnote 21[21], CMFSee footnote 22[22], GPF, MPG, BDM, GOO, CP, NR, DLS, JRS, Jacqueline RS, OS, and AS consist of: [1] copies of form letters, presumably signed by an official at the students' undergraduate institution, who indicates by check mark that the students did not enter default status; [2] copies of incomplete Financial Aid Transcripts, signed in 1994,See footnote 23[23] which indicate either that the student is not in default on a Title IV loan from that institution or that the undergraduate institution has no record that the student ever attended the school; [3] copies of the students' admission application to CAU which lists the undergraduate institutions attended by the student prior to applying for admission to CAU; and [4] copies of a computer print-out of one semesterSee footnote 24[24] of financial assistance awarded to each CAU student at issue. This evidence is not probative of whether CAU, despite the institution's initial evidence to the contrary, disbursed Title IV funds to students who had not defaulted on a prior Title IV student loan. The FATs are not credible because they are incomplete, the computer print-outs while relevant are not exculpatory of SFAP's finding since they only show the amount of Title IV assistance awarded by CAU, and the admission forms merely show the names of the institutions that each student attended prior to entering CAU (as a form of support, they fail to prove anything relevant). The remaining evidence that supports CAU's position are the form letters. As noted *supra,* many of these letters actually indicate that the student was in default status at the time CAU disbursed Title IV funds. The letters that indicate that the students were not in default status are not supported with any accompanying documentation.See footnote 25[25] In addition, although the letter is addressed to the "Financial Aid Director," it is not readily apparent that this is the person who signed the form letter. As noted *infra,* there is at least one instance in which the record is clear that someone *other* than the Financial Aid Director signed the form letter.See footnote 26[26] In this regard, I find the form letters unpersuasive on the matter for which they were submitted. Accordingly, CAU has not carried its burden of proof on the default status regarding these students during the period at issue. As I noted in my decision on Remand I, essentially, CAU's position is based on the fallacious argument that in cases where it can neither prove that it
disbursed funds lawfully, nor show which funds may have been disbursed unlawfully, I should balance the equities in its favor and determine that it has ostensibly carried its burden of proof. This, of course, would stand the burden of proof on its head. This form of burden shifting is neither warranted by the facts nor permitted under Subpart regulations. Accordingly, I find that the record, in its entirety, and the 19 reconstructed student files, in particular, do not support CAU's contention that the liability upheld by my Initial Decision should be reduced. As such, CAU has failed to carry its burden of proof showing that the institution disbursed Title IV funds consistent with the statutory and regulatory requirements under the HEA.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY

ORDERED that Clark Atlanta University pay to the United States Department of Education the sum of $759,216.55.

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Ernest C. Canellos
Chief Judge

Dated: December 22, 1997

SERVICE

A copy of the attached document was sent to the following:

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Footnote: 1 [1]*This remand is the second remand ordered by the Secretary in this case. The first remand was issued on March 15, 1996 (Remand I).*

Footnote: 2 [2]*In limiting the scope of this remand to a review of the reconstructed files for 19 students, the Secretary essentially appears to be giving some consideration to CAU's position that these 19 students properly remain at issue; the Secretary may have made this determination because CAU raised such claims before the Secretary in its appeal of my last decision. Nonetheless, it is worth noting that nothing in my prior decisions nor even in the arguments presented to me by the Office of Student Financial Assistance Programs (SFAP) focused upon or isolated any grouping of 19 students. In fact, the record shows that CAU has frequently altered its position, without explanation, as to the number of students for which it concedes liability. One glaring example is CAU's proffer to the Secretary, on appeal, that the tribunal has never had the opportunity to consider the evidence regarding student JRT [student initials are used as reference], one of the 19 students that is the subject of this remand. Yet, the record shows that this student was one of the two students originally identified by SFAP program reviewers when they were on site reviewing the institution's files before they were lost by CAU. The evidence regarding this student is not new evidence and has been in the record since the early stages of this case. In fact, the evidence on student JRT was not contested by CAU because the evidence*

came from CAU. Indeed, it would stretch logic and common sense beyond its usual limits for me to dislodge the weight of a program reviewer's on-site findings simply on the basis of CAU's post-hoc claim that its reconstructed files no longer support the data contained in the institution's original files.

More importantly, I am troubled by the number 19. Not only is there no basis for determining that these 19 student files should be sundered from the rest of the student files for further scrutiny, but CAU's selection of the 19 students is seemingly arbitrary; in fact, in one instance the selection of a student is patently incorrect. In its brief, CAU lists student RJ as one of the 19 students at issue. This is a mysterious occurrence since this student is not listed as one of the 40 students for which SFAP's finding is based. Nonetheless, CAU has submitted several reconstructed files on this student, none of which are relevant to the issues before me. Although I reviewed the contents of the reconstructed files in a manner consistent the Secretary's direction, I did so without any indication from the institution how these 19 reconstructed files were selected from the original 40 or how they require further scrutiny.

Footnote: 3 [3]*Notably, the evidence that CAU directed to the Secretary's attention was admitted into evidence, on remand, after I granted CAU the extraordinary opportunity to submit evidence for my consideration after the regulatory time period for filing such evidence had expired by several months.*

Footnote: 4 [4]*This, of course, is a proper task for CAU since it is the party contending that the evidence proves its liability should be reduced. More important, as noted in my Initial Decision, in subpart H proceedings, the institution always carries the burden of proof. See 34 C.F.R. § 668.116(d).*

Footnote: 5 [5]*CAU cited page 4 of the CPA's attestation for the proposition that the file reconstruction occurred over a ten month period.*

Footnote: 6 [6]*All of these files are, of course, copies of the reconstructed files for which I granted CAU leave to file for all 40 students before issuing my last decision.*

Footnote: 7 [7]*CAU does not dispute SFAP's determination that the institution owes a liability to the Department under Findings #1 -- $68,978 -- (undocumented adjustments to expected family contribution), #3 -- $38,776 -- (financial assistance provided in excess of need), #6 -- $41,117 -- (funds disbursed in absence of a need analysis), #7 -- liability amount already identified under Finding 3 -- (inappropriate use of need analysis), and #8 -- $25,919 -- (funds disbursed in absence of verification of financial aid application).*

Footnote: 8 [8]*Under Title IV program regulations, institutions eligible to receive Title IV funds may disburse those funds only to students who are eligible to receive student financial assistance under Title IV. In that regard, 34 C.F.R. § 668.7(a)(7) prescribes that a student is eligible for financial assistance under Title IV if, inter alia, the student is not in default, and certifies that he or she is not in default, on any loan made under Title IV. In addition, a student who is in default on a Title IV loan may still be considered eligible to participate in Title IV programs if the*

student presents the institution with documentation showing that the defaulted loan either has been paid in full or that the student has made satisfactory arrangements to repay the loan.

Footnote: 9 [9]*The HEA, under Section 484(a), prohibits students from receiving Title IV loans if they are in default on any Title IV loan disbursed by any postsecondary institution unless the defaulted loan was repaid or is in satisfactory repayment. See, Title IV of the Higher Education Act of 1965, as amended, (HEA), § 484(a), 20 U.S.C. § 1091(a). Similarly, Title IV regulations throughout the period at issue prohibit institutions from disbursing Title IV funds to students once it receive a financial aid transcript which indicates that the student is in default on any Title IV loan. See, e.g., 34 C.F.R. § 668.19 (1990). Section 668.19 is abundantly clear that an institution that certifies a Title IV loan application must return to the lender any funds it disburses to the student if the institution receives a financial aid transcript indicating that the student defaulted on a Title IV loan. In addition, the unambiguous language of Section 668.19 prohibits institutions from disbursing more than one Pell Grant payment to students if institutions do not obtain appropriate financial aid transcripts.*

Footnote: 10 [10]*This is a critical point because CAU's argument rests, in part, on the fallacious notion that it may escape liability by claiming that due to the lapse of time it cannot disprove SFAP's assertion that some of CAU's students were ineligible for Title IV funds. Yet, the basis of SFAP's calculation of liability is premised on the evidence submitted to it by CAU during the program review process. It was CAU who, after conducting the required file review, identified the students who had been in default of a Title IV loan at the time the institution disbursed Title IV funds to them. It is CAU who has a Title IV responsibility to obtain documentation that students who are in default status are otherwise eligible for Title IV funds.*

Footnote: 11 [11]*Notably, the liability is based on all Title IV funds disbursed to the students identified by CAU because under 34 C.F.R. § 668.7(a)(7) these students were ineligible to receive any Title IV funds while attending CAU.*

Footnote: 12 [12]*Notwithstanding CAU's renewed contention that the liability at issue is $193,949.00, the law of this case has already rejected the institution's attempt to narrow the scope of this case to award years 1987-88 and 1988-89 only. The Secretary's decision in Remand II reaffirmed my finding that once it is determined that a student is ineligible for Title IV assistance, all Title IV funds disbursed by CAU to the ineligible students must be returned to the Federal government. Consequently, it is of no apparent significance that SFAP's program review and the institution's auditors both reported on Title IV disbursements only for the 1987-88 and 1988-89 award years. The critical document in this case is the FPRD, which assesses a proposed liability for award years beginning in 1986-87 through 1990-91.*

Footnote: 13 [13]*The student apparently enrolled in CAU a second time, but that period of attendance is outside the scope of the FPRD.*

Footnote: 14 [14]*The student received $29, 010 in GSL funding and $7, 904 in Supplemental Loan for Students (SLS) funding.*

Footnote: 15 [15]*Those students include: LE, TLK, SLL, EGL, PO, and RRS.*

Footnote: 16 [16] *As noted in the Initial Decision, CAU lost or misplaced its original student files in 1989 in the midst of a merger between Clark College and Atlanta University.*

Footnote: 17 [17] *One student, RRS, entered default status while attending CAU. Nonetheless, as I noted in my Initial Decision, once a student enters default status that student becomes ineligible for Title IV financial assistance unless the institution can show that the student meets one of the exceptions under the statute, which CAU could not do. Further, SFAP has not required that CAU repay this student's $7,500 Title IV loan. Instead, SFAP relies on its actual loss formula to calculate the liability for this student. In this regard, I find no reason to reduce the liability for this improper disbursement.*

Footnote: 18 [18] *CAU offers no explanation for why in each case, except for student PO, the FATs it submitted are incomplete. This is a critical factor since, without, copies of complete FATs I cannot determine whether Title IV loans were disbursed by the students' prior institution. More important, these incomplete FATs would clearly be unacceptable to SFAP for the purpose for which they are required. Consequently, I see no reason to find incomplete FATs probative evidence of student eligibility in this proceeding.*

Footnote: 19 [19] *A copy of the student's academic transcript indicates that the student graduated from CAU on December 18, 1989.*

Footnote: 20 [20] *This student attended three institutions prior to enrolling in CAU, yet CAU's evidence consists of a form letter indicating that the student was not in default status in 1994 from only one of those institutions. Not only is this evidence of dubious probative worth on the matter for which it was submitted, but CAU offers no evidence regarding the student's default status at the other two institutions.*

Footnote: 21 [21] *The evidence CAU presents on this student shows that the student entered default status during his attendance at CAU in December 1986. CAU argues that this student would not have entered default status if he had obtained an in-school deferment for which he was in entitled. In my Initial Decision I rejected this argument as being incorrect as a matter of law. I see no reason to revisit this issue since my holding has been upheld by the Secretary's remand decision.*

Footnote: 22 [22] *This student entered default status during her attendance at CAU. See n.20, supra.*

Footnote: 23 [23] *As I stated supra, the probative weight of an incomplete FAT is minimal. More important, it is not readily apparent what relevance an FAT has attesting to the fact that a student is not in default status in 1994 when the time period at issue is the time up to and during the student's attendance at CAU. Clearly, CAU's evidentiary obligation in this proceeding requires the institution to come forward with evidence specifically addressing the time period at issue.*

Footnote: 24 [24] *It is not apparent why this document was submitted since it only contains data on one semester for each student.*

Footnote: 25 [25] *This is a significant failing because the form letter indicates the person signing it is determining whether the student was in default status when CAU disbursed Title IV aid to the student. The form letter, however, does not indicate when the student in question attended CAU. Consequently, it is unclear to me what the "Financial Aid Director" means when he or she places a check in the blank indicating that the student was not in default status. Indeed, many of these "Financial Aid Directors" were unclear as well since in a few instances the time period of default that they indicated was after the student had graduated from CAU.*

Footnote: 26 [26] *That person's title or authority remains unknown.*
