

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

In the Matter of **SOUTHEASTERN UNIVERSITY**
Respondent.

Docket Nos. 92-142-SP, 93-40-ST
Student Financial Assistance Proceeding

Appearances: Stanley A. Freeman, Esq., White, Verville, Fulton & Saner, Washington D.C., for
Southeastern University

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

Before: Chief Administrative Law Judge Allan C. Lewis

INITIAL DECISION

This is a combined proceeding in which the United States Department of Education (ED) seeks to (1) terminate the eligibility of Southeastern University (Southeastern) to participate in the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended; (2) levy fines in the amount of \$206,500 under 20 U.S.C. § 1094(c)(2)(B) (1991) and 34 C.F.R. § 668.84 (1991); and (3) recover \$3,674,480 in student financial assistance funds. These actions are based upon a program review determination issued on October 23, 1992, and a notice of termination and fine issued on March 23, 1993.

Based upon the findings of fact and conclusions of law, infra, Southeastern's eligibility to participate in Title IV, HEA programs is terminated; however, no civil fines are imposed. In addition, ED may recover \$3,674,480.

I. FINDINGS OF FACT

The pertinent facts are set forth in the opinion. The detailed findings of fact are set forth in the Appendix, infra. To the extent that proposed findings of fact or conclusions of law by a party have not been adopted in this decision, they are rejected as being inaccurate or unnecessary to the disposition of this case.

II. OPINION

A. Termination Issues

The Secretary is authorized under Section 487(c)(1)(D) of the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, as amended by Section 451(a) of the Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1367 (to be codified as amended at 20 U.S.C. § 1094(c)(1)(D)), to prescribe regulations for --

(D) the . . . termination of the eligibility for any program under this subchapter . . . of any otherwise eligible institution, or the imposition of a civil penalty under paragraph (2)(B) whenever the Secretary has determined, after reasonable notice and opportunity for hearing on the record, that such institution has violated or failed to carry out any provision of this subchapter, . . . any regulation prescribed under this subchapter . . . or any applicable . . . agreement[See footnote 1 1/](#)

Pursuant to this authority, the Secretary promulgated 34 C.F.R. § 668.86(a) which provides that-- [t]he Secretary may terminate or limit the eligibility of an institution to participate in any or all Title IV, HEA programs if the institution violates any provision of Title IV of the HEA or any regulation or agreement implementing that Title.

In the termination action, ED maintains that Southeastern lacks the capability to administer the student financial assistance programs, lacks financial responsibility due to the negative unrestricted fund balances for the fiscal years ending August 31, 1989, 1990, and 1991, made improper disbursements to students, and failed to administer the student financial assistance programs in the capacity of a fiduciary by virtue of the above actions.

1. Lack of Administrative Capability

In general, ED maintains that Southeastern lacks administrative capability due to poor student records, inadequate accounting and fiscal records, improper cash management, and inadequate administration of the Perkins Loan Fund.

a. Failure to maintain proper student records.

Under 34 C.F.R. § 668.14, an institution must demonstrate that it is capable of adequately administering the Title IV program. Administrative capability is attained if an institution establishes and maintains student and financial records required under 34 C.F.R. § 668.23 and the individual program regulations.[See footnote 2 2/](#)

An institution shall establish and maintain on a current basis, records regarding--

- (i) [t]he student's admission to, and enrollment status at, the institution;
- (ii) [t]he program and courses in which the student is enrolled;
- (iii) [w]hether the student is maintaining satisfactory academic progress in his or her course of study;
- (iv) [a]ny refunds due or paid to the student, the Title IV, HEA program account(s) and the student's lender under the GSL, PLUS, and SLS programs;
- (v) [t]he student's placement by the institution in a job if the institution provides a placement service and the student uses that service;
- (vi) [t]he student's prior receipt of financial aid (see § 668.19);
- (vii) [t]he verification of student aid application data;
- (viii) [i]nformation substantiating all disclosures made to a prospective student under § 668.44(c) through (f) of this part.

34 C.F.R. § 668.23(f)(1).

Moreover, 34 C.F.R. § 668.23(f)(3) requires that the records specified above and the records required under the specific program regulations be systematically organized and readily available for review. As a fiduciary, an institution must maintain its records with the highest standard of diligence and care. 34 C.F.R. § 668.82.

ED asserts that Southeastern's files were in such a state of disarray that it could not ascertain whether the disbursements of Federal grants and loans were properly made in fiscal years 1987 through 1990. As a result, ED required Southeastern to reconstruct its files. Based on Southeastern's inadequate records and its subsequent inability to reconstruct these records, ED concludes that Southeastern lacked the administrative capability to oversee the student financial assistance programs. In ED's view, this systemic deficiency constitutes a ground to terminate Southeastern's eligibility to participate in the student financial assistance programs under Title IV.

Southeastern does not dispute that it did not complete the reconstruction demanded by ED. However, Southeastern disputes whether ED had the authority to order a total reconstruction of all of its records.

Initially, Southeastern concedes that ED has the authority to order a reconstruction in a specific, limited area of student files which has been identified as failing to satisfy the regulatory requirements. In Southeastern's view, however, ED is not permitted to order a complete file reconstruction unless it identifies, pursuant to IRB-S-89-11, specific instances in all areas in which Southeastern was required to maintain records.

According to Southeastern, there is insufficient evidence to warrant a total reconstruction of its records. ED identified only three specific areas of purported violations (verification, satisfactory academic progress, and enrollment status) rather than a multitude of areas in which violations purportedly occurred. As to those specified areas identified, Southeastern argues that the magnitude of the purported violations is insufficient to warrant a reconstruction. Thus,

Southeastern concludes that ED did not have sufficient evidence to order reconstruction for those three limited areas, much less, a complete reconstruction.

Under 34 C.F.R. § 668.14, an institution is required to maintain its student and financial records in accordance with 34 C.F.R. § 668.23 and the program regulations. This record requirement is designed to protect the public fisc from the unauthorized and unaccounted expenditure of Federal student financial assistance funds. These records provide the means to ascertain whether Federal funds are utilized for their appropriate purposes and the absence of such records renders such a determination impossible.

It is clear from the record herein that Southeastern's student and financial files were in complete disorder. During the on-site review, the program reviewer examined selected student financial assistance files including academic and payment records, the institution's fiscal and cash management records, and records concerning the institution's administration of the Perkins Loan program. Subsequently, the program reviewer testified that Southeastern's administration of the Title IV program was abysmal and the records maintained by Southeastern did not reflect that Federal funds were properly spent. Further, ED's program reviewer indicated that, due to the nature of the records, reconstruction was necessary to determine the eligibility of each student for student financial assistance funds.

The abysmal condition of the records is further confirmed by various consultants who were subsequently engaged by Southeastern to assist in the reconstruction of its records. Initially, Thompson & Associates was retained to assist Southeastern in the reconstruction of its student financial aid files. This relationship was terminated by Southeastern after four months. In its Final Report, Thompson & Associates noted that, during its attempt to reconstruct Southeastern's files, it discovered significant problems with Southeastern's record keeping and administration of the Title IV program. [See footnote 3 3/](#) Southeastern later hired the certified public accounting firm of Fred Jurash and Co. to assist in the reconstruction. Based on the efforts of these two firms, some files were reconstructed; their lack of progress, however, is additional evidence that the student records were inadequate and that a determination regarding whether Federal funds were appropriately expended could not be made. [See footnote 4 4/](#)

As noted above, Southeastern contends that ED can only order a reconstruction of records in accordance with IRB-S-89-11 and that, under the IRB, a full reconstruction of its records was not warranted. [See footnote 5 5/](#) ED argues that an IRB is not binding and is designed merely for guidance in conducting program reviews.

ED is correct. An IRB is an internal policy memorandum prepared by the Institutional Review Branch and provides direction to ED regional offices regarding the conduct of program reviews. It is a lower level of communication than a Dear Colleague Letter or the Preamble to regulations published in the Federal Register. In these latter instances, the Secretary held that interpretations and policy matters disseminated in these publications are not binding since these pronouncements have not been subject to the notice and comment procedures of the Administrative Procedure Act. In re MBTI Business Training Institute of Puerto Rico, Dkt. No. 93-147-SA, U.S. Dept. of Education at 5-6 (Apr. 15, 1994), certified by the Secretary (June 9, 1995); In re Denver Paralegal Institute, Dkt. Nos. 92-86-SP and 92-87-SA, U.S. Dept. of

Education at 4-5 (Mar. 14, 1994), certified by the Secretary (Feb. 24, 1995). Thus, ED's position is supported by precedent within the Department.

The courts have addressed the binding effect of internal guidelines and procedures involving other agencies. For example, the Internal Revenue Service employs an internal procedures manual in the audits of taxpayers. It is well-established that a failure by the Internal Revenue Service to follow its internal manual does not relieve the taxpayer of his liability. The provisions of the manual are “directory rather than mandatory . . . and clearly do not have the force and effect of law.” Gille v. United States, 33 F.3d 46, 48 (10th Cir. 1994). See Armstrong v. Commissioner, 15 F.3d 970, 975 (10th Cir. 1994); Marks v. Commissioner, 947 F.2d 983, 986 n.1 (D.C. Cir. 1991). Similarly, in Groder v. United States, 816 F.2d 139, 142 (1987), the Fourth Circuit held that internal rules of an agency “confer[] no substantive rights or privileges upon taxpayers.” See United States v. Kaatz, 705 F.2d 1237, 1243 (10th Cir. 1983) ; United States v. Mapp, 561 F.2d 685, 690 (7th Cir. 1977). See also United States v. Caceres, 440 U.S. 741 (1979). Hence, there is ample support for ED's position.

Southeastern also argues that ED disregarded its written and unwritten internal program review procedures. Specifically, Southeastern alleges that ED ignored Southeastern's correspondence and preliminary submissions, failed to notify Southeastern that it considered its preliminary submission to be inadequate, and issued the final program review determination without first providing advance notice to Southeastern of its forthcoming issuance. Inasmuch as ED did not follow its established program review process, Southeastern asserts that it need not comply with ED's request for reconstruction. [See footnote 6 6/](#)

ED asserts that, even assuming Southeastern's argument is related to the ability of ED to impose liabilities, it has no relevance in the termination proceeding regarding its eligibility to participate in the Title IV programs. ED contends that either Southeastern possesses the student files which contained the appropriate records or it does not.

Southeastern's argument is unpersuasive. Internal program review procedures are no different than internal guidelines regarding their binding authority on the Department. Accordingly, for the reasons set forth above, this argument is also rejected.

Alternatively, Southeastern argues that ED did not provide appropriate guidance regarding the manner in which the records were to be reconstructed and, therefore, it was excused from the reconstruction order. Southeastern contends that it is standard operating procedure for ED to provide a format detailing the form of a response, a list of the documents sought, the format for reporting the information, the dates on which interim reports are due, and the due date for the final response. ED responds, in effect, that the regulations provide the guidance regarding the necessary records. Moreover, ED notes that Southeastern never sought any additional guidance regarding reconstruction over the 2½ year period between the program review and the issuance of the final program review determination. [See footnote 7 7/](#)

Southeastern's argument lacks merit. The regulations require each participating institution to maintain student records. They also identify the type of documentation which must be included therein. [See footnote 8 8/](#) Thus, Southeastern was on notice regarding the nature and extent of the

bookkeeping requirements when it sought participation in the Federal student financial assistance programs. ED's request for the reconstruction of records does not, in any manner, excuse Southeastern from its duty to comply with the regulations.

Southeastern also maintains that the reconstruction task was impossible and cost prohibitive, and, therefore, it need not comply. In this regard, Southeastern argues that it is impossible to reconstruct records for a four year period after the students no longer attend the institution; that it was impossible to determine the student's eligibility or the proper amount of his or her financial assistance because different sets of regulations were in effect during this four year period; that it was impossible to determine how its financial aid office operated during this time period because some of its financial aid staff had since departed; and that it was an impossible burden on the current financial aid staff to ask them to account for current students and to retroactively reconstruct the files of former students. Finally, Southeastern argues that an estimated price tag of \$500,000 to \$750,000 to reconstruct the records is cost prohibitive.

ED counters that it did not require Southeastern to do any more than it was supposed to do before it disbursed any Federal funds.

The impossibilities of and the cost associated with reconstruction were caused by and were the product of Southeastern's own deficiencies. Acceptance of Southeastern's argument is tantamount to waiving compliance with the regulations based on Southeastern's misfeasance. Such a result would render the record requirements meaningless and sanction non-compliance with the Department's regulations. Thus, these arguments are rejected.

Finally, Southeastern alleges that the ED official with supervisory responsibility over its program review, Mr. Gargano, exhibited bias against Southeastern and its President, and that this bias tainted his impartiality regarding his review of Southeastern. In its view, this bias was a driving factor in ED's departure from the standard Departmental practices and procedures, and undermined ED's determination that Southeastern was unresponsive to the program review report.

ED counters that Mr. Gargano was neither responsible for conducting the program review nor was he the official responsible for issuing the final program review determination letter. In this regard, ED argues that the official responsible for the findings concerning Southeastern was the program reviewer, Mr. Kolotos, and the official who issued the final program review determination letter was Mr. Sweeney, the Chief of the Region. ED indicates that Mr. Gargano had no direct role in this program review and that his only connection was that he was Mr. Kolotos' supervisor. Moreover, ED argues that, to the extent that Mr. Gargano was involved in the program review, his demeanor was influenced by Southeastern's lack of commitment in the program review process and his attitude reflected a straightforward approach.

During the program review, Mr. Gargano participated in the entrance and exit conferences with Southeastern officials; however, he did not participate in the field audit work which was conducted by Mr. Kolotos. It also appears that, prior to the issuance of the final program review determination, Mr. Kolotos was transferred to another position within the Department and Mr. Gargano, as Mr. Kolotos' former supervisor, became responsible for the Southeastern audit.

While a program review consists of a number of intermediate steps, the two crucial aspects are the field audit upon which the findings in the final program review determination are based and the final program review determination which formally notifies the institution of purported deficiencies in administering its Title IV program. In this case, Mr. Gargano did not conduct the field audit and became responsible for the Southeastern audit only after Mr. Kolotos was transferred to another position. In addition, Mr. Gargano did not issue the final program review determination. As such, his role was minimal.

The record amply reflects, as noted above, that Southeastern failed to maintain appropriate student records which justified its Federal expenditures. This evidence stands firm with or without the contribution of Mr. Gargano. Accordingly, Southeastern's argument is rejected.

b. Failure to maintain adequate accounting and fiscal records.

ED alleges that Southeastern did not properly perform the required monthly reconciliations of its accounts regarding its Pell Grant and campus-based programs and the required reconciliations of its bank statements and Title IV general ledgers with the quarterly reports (272 reports) filed with the Department. [See footnote 9 9/](#)

With regard to the Pell program, 34 C.F.R. § 690.81(a)(2) provides that an “institution shall account for the receipt and expenditure of Pell Grant funds in accordance with generally accepted accounting principles.” Under the campus-based programs, an “institution shall . . . establish and maintain program and fiscal records that-- (i) [a]re reconciled at least monthly.” 34 C.F.R. §§ 674.19(d)(2)(i), 675.19(b)(iv), and 676.19(b)(2)(i).

Regarding the reconciliation of the Pell Grant and campus-based program accounts, ED argues that, according to the program reviewer, the records were in such disarray that he could not perform the requisite reconciliations and that Southeastern's business manager was also unable to reconcile the accounts. [See footnote 10 10/](#)

Southeastern maintains that it performed the account reconciliations contemporaneously with receipt of the monthly bank statements. At the hearing, Southeastern elicited testimony from its business manager that such reconciliations were prepared monthly. [See footnote 11 11/](#)

The above testimony is in conflict. Southeastern's testimony is, however, corroborated by Gelman, Rosenberg & Freedman, the certified public accountants engaged by Southeastern in response to ED's demand. It is evident from the documentation supplied by the certified public accountants that the monthly reconciliations were prepared by Southeastern. By letter to ED dated May 23, 1991, Mr. Freedman of this Firm addressed the reconciliation matter and stated--

[t]he University provided copies of bank statements, canceled checks and bank reconciliations of the federal fund bank accounts.

In light of the conflicting testimony between ED's program reviewer and Southeastern's business manager, and the representations by Southeastern's certified public accountants, it is concluded that ED has failed to satisfy its burden of proof on this aspect of the issue. [See footnote 12 12/](#)

With respect to Southeastern's failure to reconcile its 272 reports with its bank statements and Title IV general ledgers, ED's auditor also requested that Southeastern engage an independent certified public accountant to reconcile these accounts. The certified public accountants produced an unaudited report which determined that ED was owed \$64,725 by Southeastern. ED argues that the reconciliation is meaningless because it was based on unaudited information and, therefore, it should be rejected.

Southeastern responds that ED never insisted that the reconciliation must be in an audited form.

Southeastern is correct. ED's letter required only the engagement of a certified public accountant to reconcile its Title IV general ledgers to its bank accounts. It did not require that these records also be audited. [See footnote 13 13/](#) In any event, the 272 reports relied upon bank statements. Bank statements are reliable documents and, therefore, do not need to be verified for purposes herein. In light of the above, ED's finding that Southeastern did not properly maintain its fiscal and accounting records is rejected.

c. Improper cash management

ED next argues that Southeastern failed to maintain a cash management system under which Federal funds were used solely for their proper purposes. In ED's view, Southeastern utilized Federal funds as short-term, interest-free loans. In light of this initial determination, ED required Southeastern to submit the following information for the period June 30, 1986, through June 30, 1990--

[1] A chronological listing of all Title IV drawdowns;

[2] A chronological listing of the institution's initial and subsequent Title IV program authorizations. [Southeastern] must identify the date and amount of each Pell Grant authorization increase or decrease; and,

[3] A chronological listing which identifies the program, amount and date of each deposit of Federal funds to the institution's operating account.

ED concedes that Southeastern provided the above documentation and, therefore, conceded that no liability may be imposed with respect to the program review aspect in this combined proceeding. ED argues, however, that for purposes of the termination aspect of this proceeding, Southeastern must also demonstrate which student accounts were credited and, presumably, the dates on which such accounts were credited in order to establish that the funds were used for proper purposes.

Under 34 C.F.R. §§ 668.16 and 690.81(c), an institution holds Federal funds in trust for student beneficiaries and the Secretary and, thus, it may not use or hypothecate Federal funds for any other purpose, including its own use.

In the instant case, Southeastern utilizes a three-step system to credit Federal funds to a student's account. Initially, Federal funds are electronically transferred from the Department to Southeastern's EDPMTS account. Under the second step, an EDPMTS check is negotiated which transfers funds to a program account such as Pell, College Work-Study, or Supplemental Educational Opportunity Grant. In the third step, a program account check is issued which transfers the funds from a program account into the institution's general operating fund. At this point, the appropriate amount is credited against the student's account for the tuition and other related institutional charges. Southeastern may then utilize these funds for its purposes. Any excess funds over the tuition and other charges are disbursed to the student.

The record establishes that, in most instances, Southeastern withdrew from the EDPMTS account amounts less than \$15,000 and that, in many instances, these amounts were in \$1,000 increments. Southeastern then passed these amounts through the program accounts and into its operating account. [See footnote 14 14/](#) Based on these facts, ED maintains that Southeastern used at least some of these funds as short-term, interest-free loans.

These facts are insufficient to establish that any of the funds were used as short-term, interest-free loans. It is incumbent upon ED, due to its burden of proof, to provide some evidence that some of these funds were not, in turn, credited or were improperly credited to the student accounts when Southeastern transferred these amounts into its operating account. The record is silent in this regard. It is therefore concluded that ED failed to prove that Southeastern improperly maintained its cash management system.

d. Inadequate administration of Perkins Loan Funds

ED maintains that Southeastern did not properly administer its Perkins Loan account. First, ED argues that Southeastern withdrew funds from its Perkins account, deposited these funds into its operating account, and thereby utilized the funds for non-loan purposes. Second, ED asserts that Southeastern's default rate under the Perkins Loan program exceeded 20% of the principal of all loans that are in repayment status. [See footnote 15 15/](#) As a result, ED concludes that Southeastern's administrative capability is impaired under 34 C.F.R. §§ 668.15 and 668.16.

With regard to a Perkins Loan account, an institution, under 34 C.F.R. § 668.16, holds these Federal funds in trust for student beneficiaries and the Secretary and it may not use or hypothecate Federal funds for any other purpose. The record reflects, however, that Southeastern did not participate in the Perkins Loan program during the period in issue. As such, the Department's first contention is incorrect and, accordingly, is rejected.

Under 34 C.F.R. § 668.15(a)(2), an institution has an impaired administrative capability in administering Title IV programs if--

[t]he default rate . . . under the Perkins Loan program . . . exceeds 20 percent of the principal of all those loans that have reached the repayment period.

In the instant case, it is clear that, based on the FISAP's prepared by Southeastern, its Perkins

loan default rate exceeded the 20% threshold in each year during the period under review. [See footnote 16 16/](#)

Southeastern responds, however, that it did not participate in the Perkins Loan program during the 1986-87 through 1989-90 period under review and, therefore, this charge is inappropriate. Southeastern argues, in effect, that default rates based on past participation are not grounds for terminating future eligibility.

It is clear that Southeastern is not relieved of its continuing obligation regarding the Perkins program simply because it did not participate in the program during the program review period. In Association of Accredited Cosmetology Schools v. Alexander, 979 F.2d 859, 865 (D.C. Cir. 1992), the District of Columbia Court of Appeals held that past default rates were an appropriate vehicle for determining future eligibility and that “[w]e regard this requirement as no different in substance than a lender's rule against extending credit to applicants with negative credit histories.” Accordingly, it is proper to utilize default rates based on past participation to determine future eligibility.

As a result of the Perkins default rate in excess of 20%, ED required Southeastern to provide a list of all borrowers currently in default, copies of all Perkins Loan promissory notes for the identified students, a list of borrowers for whom the school had performed due diligence, an analysis of its entire Perkins Loan portfolio to determine what must be done to reduce its default rate, and a requirement to restore to the Perkins Loan fund all student financial assistance funds which were erroneously withdrawn.

The parties disagree whether Southeastern responded adequately to ED's request for additional documentation. According to ED's Institutional Review Specialist, Southeastern only furnished a list of unpaid borrowers and some of the Perkins promissory notes.

Southeastern proffers the testimony of its Director of Administrative Support who indicated that Southeastern forwarded to the Department “a large volume of documentation responsive to the request, including a list of Perkins borrowers and promissory notes.”

The record reflects that Southeastern provided only a listing of unpaid Perkins loan borrowers and copies of Perkins Loan promissory notes. It did not provide a list of borrowers for whom the school had performed due diligence, an analysis of its entire Perkins Loan portfolio to determine the steps necessary to reduce its default rate, or a complete restoration of Perkins funds erroneously withdrawn. Accordingly, the record establishes that Southeastern did not submit the material as requested by the Department.

This determination is further supported by the testimony of Southeastern's Director of Administrative Support. On cross examination, this official testified that Southeastern has been attempting to reconcile its Perkins Loan disbursements for approximately a decade and, at the time of the hearing in this matter, the undertaking was still proceeding. In light of the above, it is concluded that Southeastern's management of its Perkins Loan program reflects that it lacks administrative capability.

2. Financial responsibility

ED also alleges that Southeastern failed to demonstrate that it is financially responsible to participate in the student financial assistance programs. Under 34 C.F.R. § 668.13(c)(3), an institution is not financially responsible if, “[u]nder a fund accounting system, its unrestricted current or operating fund reflects sustained material deficits over at least its two most recent fiscal years.”

It is undisputed that the material deficit test is measured against the most recent audited financial statements. See In re Technical Career College, Dkt. No. 92-91-ST, U.S. Dept. of Education (Oct. 8, 1993), certified by the Secretary (Nov. 23, 1994). In this instance, Southeastern had a deficit unrestricted fund balance of \$83,063 for the fiscal year ended August 31, 1991, and a positive unrestricted fund balance of \$7,134 for the fiscal year ended August 31, 1992.

ED argues that the 1992 unrestricted fund balance of \$7,134 does not reflect the actual financial condition of Southeastern and is, in fact, significantly overstated. In ED's view, there is a \$4.6 million contingent liability owed to the Department which it feels should be reflected in the fund balance and this, in turn, would result in a deficit fund balance of approximately \$4.6 million for fiscal year 1992. ED concedes, as it must, that, traditionally, contingent liabilities are not included within the financial statements. When a contingent liability is owed to the Department however, ED asserts that it possesses “inside information” regarding the veracity of the allegations which gave rise to the liabilities, and therefore, that amount may be included within the financial statements depending upon the circumstances of the situation.

Southeastern counters that it satisfied the financial responsibility regulation inasmuch as its 1992 unrestricted fund balance was positive. In its view, contingent matters are contested liabilities which, pursuant to “generally accepted accounting principles” (GAAP), are not used in calculating its unrestricted fund balance. Southeastern contends that its contingent liability with respect to the Department was properly disclosed in a footnote and, as such, is not part of the determination of the fund balance. In light of its positive balance in 1992, Southeastern concludes that it has not sustained a material deficit over at least its two most recent fiscal years.

Under GAAP, “[a] contingency is an existing condition . . . involving varying degrees of uncertainty that may, through one or more related future events, result in the . . . incurrence . . . of a liability. . . . Accounting for [such] a contingency is based upon the degree of probability that one or more future events will occur which will confirm [that liability].” Jan R. Williams & Martin A. Miller, 1993 HBJ Miller Comprehensive GAAP Guide § 7.01 (1993). The degree of probability may be (1) probable (likely to occur and therefore must be included in the body of the financial statement); (2) reasonably probable (between probable and remote and therefore presented in a footnote); and (3) remote (slight chance of occurring and therefore not included in the financial statement). Accounting for Contingencies, Statement of Financial Accounting Standards No. 5, § 7.02 (Fin. Accounting Standards Bd. 1975).

In general, the preparation of a financial statement is the responsibility of the management of an entity. The responsibility of the certified public accountant is to render an opinion as to whether the financial statements are free from material misstatement and present fairly, in all material

respects, the financial position of the entity in issue. Larry P. Bailey, 1995 Miller GAAS Guide § 2.03 (1995).[See footnote 17 17/](#) In the instant case, Southeastern's certified public accountant accepted Southeastern's classification of the contingent liability in question as reasonably probable, and, therefore, agreed that it should be presented in a footnote. The certified public accountant's opinion was based, in part, on Southeastern's intention to "vigorously contest" its proposed termination and related matters. Under this circumstance, the contingent liability is not required to be reflected in the body of the financial statements and, therefore, is not part of the determination of Southeastern's operating fund balance. Inasmuch as Southeastern did not reflect a sustained material deficit for fiscal year August 31, 1992, it is concluded that Southeastern was financially responsible under 34 C.F.R. § 668.13(c).[See footnote 18 18/](#)

3. Improper Disbursements to Students

In general, ED alleges that Southeastern made improper disbursements of financial assistance to its students due to its failure to conduct the required verification of information submitted by the students, its failure to apply properly its satisfactory academic progress policy, its failure to obtain all the required financial aid transcripts for students who attended another eligible institution, and its payment of FFEL funds to students enrolled as less than half-time students.

a. Failure to verify information

Verification is the process of checking the accuracy of the information submitted by students when they apply for federal student aid, especially as it pertains to the calculation of the expected family contribution. 34 C.F.R. § 668.51(a). With respect to verification, an institution is required to--

establish and use written policies and procedures for verifying information contained in a student aid application . . . [which] must include--

- (1) [t]he time period in which an applicant shall provide the documentation;
- (2) [t]he consequences of an applicant's failure to provide required documentation within the specified time period;

...

34 C.F.R. § 668.53(a).

Moreover, an institution also is required, under the standards of administrative capability, to develop "an adequate system to verify the consistency of the information it receives from different sources with respect to a student's application for financial aid" which includes the review by an institution of applications, need analysis documents, and tax returns collected to validate information received from other sources presented by or on behalf of applicants. 34 C.F.R. § 668.16(f) (1986). Lastly, an institution must maintain, on a current basis, records regarding the verification of student aid application data. 34 C.F.R. § 668.23(f)(1)(vii).

Applications may be subject to verification due to their selection by the institution or by the Department as required by 34 C.F.R. § 668.54(a). Verification requires an institution to review and correct any discrepancies in the data elements used in calculating the expected family

contribution such as the number of family members in the applicant's household, the applicant's dependency status, and various income tax and other similar type of information. 34 C.F.R. §§ 668.55 and 668.56 (1992).

As a result of the audit, ED charges that Southeastern failed to conduct the verification as required by the above regulations. It maintains that Southeastern did not properly complete and/or document verification in 17 of 26 instances reviewed involving 20 students. [See footnote 19 19/](#) The record supports ED's charge. Southeastern failed to verify in 17 of the 26 instances investigated by the auditor. This infers, quite strongly, that Southeastern did not have a practice of verifying applications on a regular basis as required by the regulations.

Southeastern maintains that subsequent verifications performed after the issuance of the program review and before the hearing indicated that three of the students received small overawards and four students received the proper amount or a lesser figure. This information, however, is not relevant and does not diminish or address ED's charge that Southeastern failed to verify applications on a regular basis.

b. Failure to apply its satisfactory academic progress policy

ED asserts that Southeastern failed to apply properly its satisfactory academic progress standard which, in turn, resulted in the improper disbursement of financial assistance to various students. This action, according to ED, reflects that Southeastern lacks the administrative capability to oversee the student financial assistance programs.

Under 34 C.F.R. § 668.16(e) (1987), an institution possesses administrative capability if, *inter alia*, it establishes, publishes, and applies "reasonable standards for measuring whether a student, who is otherwise eligible for aid under any Title IV, HEA program, is maintaining satisfactory progress in his or her course of study." [See footnote 20 20/](#) In addition, an institution shall establish and maintain, on a current basis, a record regarding whether, according to the written standards and practices of the institution, the student is making satisfactory progress toward completion of his or her course of study. 34 C.F.R. § 668.12(c)(1) (1987).

Southeastern's satisfactory academic progress policy had two elements: a minimum course completion factor and a grade point average factor. The policy required a student to complete 50% of the courses attempted in his or her first year of study and, thereafter, 75% of the courses attempted in each year of study. In addition, an undergraduate was required to maintain a cumulative grade point average of 2.0 and a graduate student was required to maintain a 3.0 cumulative grade point average.

ED maintains, initially, that Southeastern failed to enforce the minimum course completion rate factor of its academic progress policy. [See footnote 21 21/](#) Based upon a sample of 70 students, ED contends that 5 students (numbers 45, 60, 64, 66, and 79) had not satisfied the requisite minimum course completion rate under the satisfactory academic progress policy. [See footnote 22 22/](#)

In addition, ED asserts that Southeastern failed to terminate the financial assistance for 8 students in its sample (number 22, 29, 35, 45, 57, 60, 66, and 75) who had not maintained the requisite minimum grade point average. Eliminating the overlap of students, ED concludes that a total of 10 of the 70 students in its sample were improperly awarded some Federal financial assistance.

Southeastern responds that there was not a systemic problem which warranted ED's request to reconstruct its records and to ascertain the students who had improperly received financial assistance. [See footnote 23 23/](#) Southeastern also maintains that, to the extent of any problem, it is relatively insignificant. In its view, the OIG's sample of 70 students revealed 86% compliance (60 of 70 students) on behalf of Southeastern. In addition, Southeastern's analysis of the 20 student sample taken in the program review reflected only 1 instance of noncompliance.

It is apparent that Southeastern did not implement all aspects of its satisfactory academic progress policy. The OIG's sample correctly reveals that students were awarded financial assistance even though their cumulative grade point averages or their course completion rates violated Southeastern's satisfactory academic progress policy. This deficiency is particularly significant because it affects only those students who have not shown the progress which warrants the continued Federal assistance. The OIG's sample projects that approximately 14% of the students may have improperly received some Federal assistance. [See footnote 24 24/](#) As such, this is a matter of serious concern and adversely reflects upon Southeastern's administrative capability to oversee the student financial aid assistance programs.

Lastly, ED charges that Southeastern failed to implement its grading policy regarding an incomplete grade received by a student in a course. Under its policy, an incomplete grade may be changed to a letter grade if the student completes the work by the last day in the next term in which grades may be changed. If the work is not completed and absent an extension granted by the Dean, the incomplete grade automatically is replaced with an "F." Of the sample of 70 students, ED asserts that the grades of 3 students (numbers 39, 60, and 79) did not reflect the "F" grade. This omission inflated their cumulative grade point averages and permitted them to obtain student financial assistance for which they were not otherwise entitled.

The tribunal determines that Southeastern did not apply its policy regarding incomplete grades with respect to students 39, 60, and 79. This is simply more evidence regarding Southeastern's lack of administrative capability to administer the student financial aid assistance programs. [See footnote 25 25/](#)

c. Failure to obtain financial aid transcripts

ED alleges that Southeastern disbursed Federal funds before it obtained the students' financial aid transcripts from the institutions previously attended by the students. In ED's view, this violates 34 C.F.R. § 668.19. Under this provision, the current institution may release only one Pell Grant or campus-based award and may not release any GSL, SLS, or PLUS proceeds until the institution receives a financial aid transcript from each of the institutions previously attended.

Based on a sample of 70 students, ED determined that 55 students attended another postsecondary institution prior to attending Southeastern. Of these 55 students, ED asserts that Southeastern was missing, with respect to 33 students, at least one financial aid transcript at the time of the first disbursement of funds under the GSL, SLS, or PLUS programs or the second disbursement of a Pell Grant or campus-based award.[See footnote 26 26/](#)

Southeastern argues that most of the purportedly missing financial aid transcripts were, in fact, subsequently obtained and demonstrates that the students in question were fully eligible to receive Federal funds. Further, Southeastern asserts that there is no evidence that any funds were incorrectly disbursed to students whose financial aid transcripts would have made them ineligible for Federal funds. In addition, Southeastern indicates that it has revised its procedures to prevent the premature disbursement of Federal funds in the future.

Southeastern's argument sidesteps the issue. The regulations prohibit Southeastern from disbursing any GSL, SLS, or PLUS awards or disbursing more than one Pell Grant or campus-based award prior to receiving financial aid transcripts from the institutions previously attended by its students.

Regarding the merits of this charge, ED must establish that GSL, SLS, or PLUS funds were released or that a second Pell Grant or campus-based award disbursement was made prior to receipt of the financial aid transcripts. As to 14 of the 33 students, ED failed to prove that Southeastern disbursed any Federal funds.[See footnote 27 27/](#) Accordingly, dismissal of the charges regarding these 14 students is warranted regardless of whether Southeastern obtained a financial aid transcript from each institution that the student previously attended.

Of the remaining proposed violations, either GSL, SLS, or PLUS program funds were disbursed or a second disbursement of Pell or campus-based funds was made to 16 students prior to the receipt of a financial aid transcript from each institution that the student previously attended.[See footnote 28 28/](#) Such disbursements were in contravention of 34 C.F.R. § 668.19. Accordingly, there were disbursements totaling \$107,140.01 which violated 34 C.F.R. § 668.19.[See footnote 29 29/](#)

d. Payment of FFEL funds to less than half-time students

Next, ED and Southeastern agree that a student is only entitled to receive FFEL program funds during a period in which the student is enrolled on at least a half-time basis. ED charges, however, that, as a matter of law, FFEL funds received during an enrollment period (e.g. semester, quarter) may not be used by the student to reduce his or her indebtedness to the school which was incurred in an enrollment period in which the student was less than a half-time student. ED alleges that Southeastern violated this standard with respect to 10 of the 70 students that it sampled.

The tribunal agrees with Southeastern that, as a matter of law, a student may apply his or her excess funds in a current enrollment period toward an outstanding liability for a prior period in which he or she was not at least a half-time student.

A student's eligibility, among other things, is used to determine whether an institution may release Federal funds. 34 C.F.R. § 682.604(b)(2). Eligibility is governed by 34 C.F.R. § 668.7(a)(1)(ii) which provides, in pertinent part, that a student is eligible to receive FFEL funds if the student is “enrolled as at least a half-time student in a course of study necessary for enrollment in an eligible program for no longer than one twelve-month period.” See also 34

C.F.R. §682.201(a)(1).

ED's characterization of 34 C.F.R. §§ 668.7 and 682.201 is contrary to their plain meaning. These regulations address the situation as to when FFEL funds may be released. They do not govern the particular liabilities which may be satisfied by FFEL funds except that the funds may not be used to purchase a vehicle. 34 C.F.R. § 682.200(b). As such, there is no prohibition against a student using funds received in one enrollment period to satisfy charges for a prior period. Thus, once these funds are released, a student may utilize them in any manner.

In the instant case, Southeastern agrees that five of the ten students were not at least half-time students when they received the FFEL funds and, therefore, they were never entitled to these funds. Accordingly, these disbursements represent five violations. See footnote 30 30/ As to the remaining five students, FFEL funds were properly disbursed in an enrollment period in which they were at least half-time students, and, as determined above, may be used to pay liabilities incurred in a prior enrollment period in which the students were less than half-time students. See footnote 31 31/

In summary, Southeastern's books and records were in total disarray and it failed to manage properly its Perkins Loan program. In addition, Southeastern improperly disbursed student loan assistance due to several shortcomings. It failed to verify the accuracy of information submitted by its students, did not enforce its satisfactory academic progress policy, failed to obtain transcripts from institutions previously attended by its students, and disbursed FFEL funds to students who were ineligible. Based upon the above, it is concluded by overwhelming evidence that Southeastern lacks the administrative capability to administer the Title IV programs and that its actions also reflect that it failed to act in a manner consistent with its fiduciary duty. The nature and extent of these violations warrants termination of its eligibility to participate in Title IV programs.

B. Fine Issues

In addition to the termination action, ED proposes to fine Southeastern \$206,500 for various infractions cited in the termination action. The following table reflects the amount of the proposed fines and the amount of the potential fines, as reduced, to reflect the determinations in the opinion, supra:

| Charge | Original Fine | Revised | Potential Fine |
|--------------------------------|---------------|----------|----------------------------|
| Inadequate checks and balances | \$25,000 | \$25,000 | |
| Inadequate accounting records | 25,000 | -0- | <u>See footnote 32 32/</u> |
| Improper cash management | 25,000 | -0- | <u>See footnote 33 33/</u> |

Nonapplication of satisfactory
academic progress policy 25,000 25,000
Improper student disbursements
Verification 91,500 91,500 [See footnote 34 34/](#)
Financial aid transcripts 10,000 3,500 [See footnote 35 35/](#)
FFEL 5,000 106,500 2,500 [See footnote 36 36/](#)
Total \$206,500 \$147,500

Upon review of the record, it is concluded that no civil penalty is warranted in this case. Southeastern's transgressions have resulted in its termination from participation in the Title IV programs. This is the ultimate sanction for its negligent actions and there is no evidence that these actions represented fraud or were performed for personal financial gain. Moreover, as set forth below, ED may recoup the Federal funds wrongfully disbursed due to Southeastern's transgressions.

C. Monetary Recovery Issues

This consolidated proceeding also encompasses a final program review determination issued by ED on October 23, 1992, in which ED seeks to recover a liability in the amount of \$3,674,480. This proposed recovery is based on the same determinations which were raised in the termination action, *i.e.* Southeastern's lack of administrative capability, its failure to properly perform the required monthly reconciliations of its accounts regarding its Pell Grant and campus-based programs and the required reconciliations of its bank statements and Title IV general ledgers with its quarterly reports (272 reports), its failure to maintain a cash management system under which Federal funds were used solely for their proper purposes, its failure to perform proper verification, its failure to properly apply its satisfactory academic progress standard, its use of FFEL funds to reduce student indebtedness to the institution which was incurred in an enrollment period in which the student was less than a half-time student, and its failure to properly administer the Perkins Loan program.

Based on Southeastern's purported lack of administrative capability, ED seeks to recover the student financial assistance funds and other related monies disbursed during the fiscal years 1987 through 1990. Since this proposed recovery subsumes all other liabilities contained in the final program review determination, ED chose not to determine a monetary finding for each of the other purported violations.

The remedies in a Subpart H proceeding, such as this one, are contractual in nature and, therefore, provide only for the recovery of proven compensatory damages. [In re Selan's System of Beauty Culture](#), Dkt. No. 93-82-SP, U.S. Dep't of Education at 4 (Dec. 19, 1994); [In re Phillips Junior College, Melbourne](#), Dkt. No. 93-90-SP, U.S. Dep't of Education at 2 n.1 (Nov. 23, 1994). Inasmuch as ED failed to determine the monetary harm to the Federal interest with respect to all of the findings referenced above except the finding regarding administrative capability, this tribunal cannot ascertain the amount of any damage to ED with respect to these findings. [See In re Macomb Community College](#), Dkt. No. 91-80-SP, U.S. Dept. of Education at 6 (May 5, 1993). Accordingly, there can be no recovery with respect to the following findings: Southeastern's failure to properly perform the required monthly reconciliations, its failure to

maintain an appropriate cash management system, its failure to perform proper verification, its failure to properly apply its satisfactory academic progress standard, its improper use of FFEL funds to reduce student indebtedness to the institution, and its failure to properly administer the Perkins Loan program.

With respect to Southeastern's lack of administrative capability including its inability to reconstruct its records thereby precluding a determination of actual damages, ED proposes a recovery of damages in the amount of \$3,674,480. This amount reflects \$622,273 in Pell Grant, SEOG, and College Work-Study funds disbursed during the fiscal years 1987 through 1990 and an estimated \$3,052,207 in Stafford and SLS loans and related interest and special allowances disbursed during the same period.[See footnote 37 37/](#)

The damages relating to the Stafford and SLS loans reflect primarily an estimate of the amount of loss sustained due to the nonpayment of loans by the student borrowers. This estimated loss may be determined, according to ED, through the application of its "actual loss formula." Under this formula, the estimated loss is the product of Southeastern's rate of loss on its student loans, *i.e.* Southeastern's cohort default rate, and the total amount of loans disbursed during each fiscal year.[See footnote 38 38/](#)

Southeastern maintains that the amount of damages should be determined by an appropriate method rather than utilizing the total amount of the disbursed loans as the measure of damages. Southeastern, however, fails to proffer any appropriate method.

It is well-settled that the actual loss formula, as proposed by ED in this case, produces a reasonable estimate of ED's losses where it is determined that an institution improperly disbursed Title IV funds. *In re Fisk University*, Dkt. No. 94-216-SP, U.S. Dept. of Education (Oct. 5, 1995); *In re Muscular Therapy Institute*, Dkt. No. 94-79-SP, U.S. Dept. of Education (July 14, 1995).[See footnote 39 39/](#) In the case at bar, Southeastern does not dispute the accuracy of the mathematical computations under the actual loss formula or the figures employed therein.

Inasmuch as this tribunal determined that Southeastern's records did not provide adequate assurances that Federal funds were properly expended and that Southeastern lacked administrative capability, the damages, as computed under the actual loss formula, are \$3,052,207 relating to the Stafford and SLS loans. The damages concerning the Pell Grant, SEOG, and College Work-Study programs are the actual dollars expended under these programs or \$622,273. Accordingly, the total amount of damages which ED may recover is \$3,674,480.

III. ORDER

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is HEREBY ORDERED that--

1. The eligibility of Southeastern University to participate in the student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended, is terminated.

2. Southeastern University immediately and in the manner provided by law pay the United States Department of Education the sum of \$3,674,480.

Allan C. Lewis
Chief Administrative Law Judge

Issued: September 20, 1996
Washington, D.C.

Footnote: 1 1/ This subchapter refers to part F of subchapter IV of chapter 28 of Title 20.

Footnote: 2 2/ The programs which require additional records are the Pell Grant Program (34 C.F.R. § 690.82); the Federal Family Education Loan Program (34 C.F.R. § 682.610); the Federal Perkins Loan Program (34 C.F.R. § 674.19); the Federal Work-Study Program (34 C.F.R. § 675.19); and the Federal Supplemental Educational Opportunity Grant (34 C.F.R. § 676.19).

Footnote: 3 3/ In its Final Report dated August 15, 1990, Thompson & Associates outlined the specific obstacles to reconstruction--

*

Unacceptable Cost of Attendance [calculations] for the award year 1988 through 1990

*

Lack of systemic application of acceptable Satisfactory Academic Progress Standards

*

Unresolved, conflicting documentation within the financial aid files, within an award year, and across award years

*

Missing documentation

*

Lack of organization within student financial assistance files

*

Certification and disbursement of Title IV funds for students not enrolled at the institution

*

Lack of verification of enrollment status for financial aid recipients

ED Ex. 4-32-33.

This report is buttressed by the testimony of three consultants of Thompson & Associates. First, Denise Boulanger indicated that the "files were very disorganized." (Ct. Ex. 5-3). Doug Bucher described the condition of the student files as a "nightmare, with no organization whatsoever" and that "it simply could not be determined from the school's records what, if any,

disbursements were proper.” (Ct. Ex. 6-3; 6-4). Finally, Mark Lindenmeyer testified that “[t]he files were very disorganized.” (Ct. Ex. 7-4).

Footnote: 4 4/ Neither party called an employee or contractor of Fred Jurash and Co. as a witness to testify regarding the condition of Southeastern's books and records. Colleen Russo appeared as an expert witness to testify on behalf of Southeastern concerning the program review process. On cross-examination, it was revealed that Ms. Russo worked as a subcontractor for Fred Jurash and Co. in the reconstruction of Southeastern's books and records. Ms. Russo's testimony was ambiguous regarding the condition of Southeastern's books and records and indicated that some student files were missing documents and that others were complete. Based on the record herein, it appears that Fred Jurash and Co. was engaged by Southeastern to assist in reconstruction for approximately five months, after which time Southeastern terminated this relationship for lack of progress. During this five month period, Southeastern paid nearly \$93,000 for the reconstruction efforts by Fred Jurash and Co. The record is unclear as to the number of files which were reconstructed, although it appears insignificant in relation to the approximately 600 files which were required to be reconstructed.

Footnote: 5 5/ IRB-S-89-11 provides, in general, that an error rate in excess of 10% of the student file sample is sufficient to require a reconstruction of the files for that violation and an error rate in excess of 35% may result in the expansion of the reconstruction period from the normal, two year audit period to a five year period.

Footnote: 6 6/ Specifically, Southeastern cites PRB-S-88-4, a memorandum issued by the Program Review Branch, which urges program reviewers to promptly follow up on demand letters to, and missed deadlines by, the institution.

*In addition, Southeastern refers to IRB-93-3 which, in its view, indicates that when an institution is unresponsive, ED must issue a final warning letter prior to the issuance of a final program review determination. Without deciding the merits of Southeastern's view regarding this IRB, this document provides little guidance. First, as noted *supra*, an IRB memorandum has no binding effect. See *Gille v. United States*, 33 F.3d 46, 48 (10th Cir. 1994); *Groder v. United States*, 816 F.2d 139, 142 (4th Cir. 1987); *In re MBTI Business Training of Puerto Rico*, Dkt. No. 93-147-SA, U.S. Dept. of Education at 5,6 (Apr. 15, 1994); *In re Denver Paralegal Institute*, Dkt. Nos. 92-86-SP and 92-87-SA, U.S. Dept. of Education at 4-5 (Mar. 14, 1994). Second, this memorandum was issued four months after the final program review determination was issued in this proceeding. A retroactive application of this memorandum is unwarranted. See *In re Arizona Department of Education*, Dkt. No. 93-16-O, U.S. Dept. of Education at 3-4 (July 21, 1995); *Denver Paralegal Institute* at 17.*

Footnote: 7 7/ Southeastern was first advised in February 1990 during the exit interview in program review that ED would require a reconstruction of its student records. Southeastern was subsequently notified of the reconstruction requirement in the preliminary program review letter (March 8, 1990); the initial program review report (June 25, 1990); and the final program review determination (October 23, 1992).

[Footnote: 8](#) 8/ See 34 C.F.R. §§ 668.23, 674.19, 675.19, 676.19, 682.610, and 690.82.

[Footnote: 9](#) 9/ The 272 report is a quarterly report which reflects the institution's expenditures of Title IV funds received during that quarter. It contains the Federal cash-on-hand at the beginning of the reporting period, the total amount of Federal funds advanced to the institution during the quarter, the total amount Federal funds disbursed by the institution during the quarter, and the remaining amount of Federal cash-on-hand. It also lists the expenditures on a program-by-program basis during the quarter and a cumulative total of expenditures for each program.

[Footnote: 10](#) 10/ ED also appears to advance several secondary arguments supporting the testimony of its program reviewer. First, ED argues that timely reconciliations are inconsistent with Southeastern's repeated, apathetic behavior in response to the program review. ED also argues that each of the findings, including the finding regarding unreconciled accounts, was explained to the responsible school officials during the exit conference, that no official objected to this purported inaccuracy, and that the institution subsequently submitted a formal response which concurred with this determination. ED also considers significant a report by a certified public accountant which did not mention that its reconciliation was redundant with a reconciliation prepared by Southeastern. Finally, ED asserts that Southeastern's independent certified public accountant found that the school was not performing monthly reconciliations with regard to its cash-on-hand and accounts receivable for fiscal years ended 1984, 1985, 1987, 1988, and 1989. These arguments do not address the merits of the allegation and seek to impugn the institution on matters which are not relevant, or, at best, are marginally related. Inasmuch as "guilt by association" arguments lack the appropriate legal foundation to establish and impute culpability, ED's secondary arguments are summarily rejected. See generally, United States v. Johnson, 64 F.3d 1120, 1129 (8th Cir. 1995) (Bright, J., dissenting); United States v. Romero, 57 F.3d 565, 570 (7th Cir. 1995).

[Footnote: 11](#) 11/ During the period in issue, however, Southeastern did not participate in the Perkins Loan program. Inasmuch as the Department's finding alleges, in part, that Southeastern did not prepare monthly account reconciliations of the Perkins account, this aspect of the finding is clearly incorrect and, as such, is dismissed.

[Footnote: 12](#) 12/ The record reflects that a reconciliation was performed for each account at the end of each month, with limited exceptions. Such exceptions existed in months in which no activity was transacted within that particular account. Specifically, a complete reconciliation for the Pell Account was performed. With regard to the College Work Study Account, the bank statement for September 1989 was missing. Accordingly, any reconciliation for that month was effectively rendered meaningless. Finally, with regard to the Supplemental Educational Opportunity Grant (SEOG) Account, it appears that all monthly reconciliations were performed. However, the record is unclear as to whether activity existed in this account between August 1989 and December 1989. Considering the scope of the period in issue, these transgressions are de minimis.

[Footnote: 13](#) 13/ ED wrote to Southeastern that it shall--

engage an independent CPA to reconcile its Title IV general ledgers and subsidiary accounts to the institution's bank accounts. Specifically, the following information [is] requested:

1. For each month, a copy of the Federal Funds bank statements, canceled checks and reconciliation reports;
2. For each month, an alphabetical listing of Title IV recipients. The listing must contain the student's name, social security number, the award year for which Title IV funds were disbursed, and the amount of each disbursement by Title IV program;
3. A report from the auditor comparing the reconciled Title IV expenditures to the previously reported amounts; and,
4. Amended ED/PMS 272 reports.

Footnote: 14 14/ The \$15,000 figure is significant only to the extent that, according to Southeastern's internal control structure, a member of the Board of Directors had to sign any check written in excess of that amount.

*Footnote: 15 15/ ED asserts a third argument that Southeastern improperly identified the repayment status of borrowers on its Application and Fiscal Operations Report (FISAP). A FISAP is an annual Federal report completed by institutions which provides information concerning the institution's administration and expenditures of campus-based program funds. ED uses this information to calculate an institution's campus-based program authorizations for the following award year. This matter was not raised in the termination notice. As such, it is not properly a matter of consideration in this proceeding. See *In re Fischer Technical Institute*, Dkt. No. 92-141-ST, U.S. Dep't of Education at 5-6 (Mar. 16, 1995); *In re Hartford Modern School of Welding*, Dkt. No. 90-42-ST, U.S. Dept. of Education at 16-17 (Jan. 31, 1991).*

Footnote: 16 16/ In its termination notice and on brief, ED asserts that Southeastern's Perkins Loan default rate was 69.83% for fiscal year 1986; 68.59% for fiscal year 1987; 59.33% for fiscal year 1988; 65.05% for fiscal year 1989; and 68.44% for fiscal year 1990. Based on the FISAP reports prepared by Southeastern that are part of the record, it appears that Southeastern's default rate, while correct for fiscal years 1986 through 1988, was 46.86% in fiscal year 1989 and 60.38% in fiscal year 1990. ED asserts the difference is based on the institution's improper identification of the borrower's repayment status. As noted above, ED's argument regarding a borrower's repayment status was not properly before this tribunal. To accept the fruits of this argument to modify another aspect of this finding would be to endorse its validity. In any event, the record does not reflect the manner in which ED arrived at its proposed default rate set forth in the termination notice for fiscal year 1989 and 1990. As such, for purposes herein, the appropriate Perkins Loan default rates are those set forth in the FISAP reports.

Footnote: 17 17/ GAAS is an acronym for generally accepted auditing standards.

Footnote: 18 18/ The Department is not without recourse. It promulgates the regulations and may, therefore, modify them to adopt the position urged in this case.

Footnote: 19 19/ The review was based upon a sample of 20 students in which more than one award year was reviewed for some of the students.

Footnote: 20 20/ This regulation was redesignated as 34 C.F.R. § 668.14(e) in 1989.

Footnote: 21 21/ In its termination letter and brief, ED refers to this factor as the "maximum time frame" component of the satisfactory academic progress policy.

Footnote: 22 22/ The charge in the termination letter also relies upon a finding in the program review that Southeastern did not follow the percentage completion aspect of its satisfactory academic progress standard. The evidence, including an review by Thompson & Associates, supports this general determination.

Footnote: 23 23/ The program review requested Southeastern to determine the amount of the improperly awarded assistance during the award years 1986-87 through 1989-90. Southeastern did not comply with this request.

Footnote: 24 24/ Southeastern argues that it complied with its satisfactory academic progress policy based upon its analysis of the sample used by the program reviewer, not the sample analyzed by the OIG. Under its analysis, noncompliance was present in only 1 of the 20 students in the sample. This argument is not, however, persuasive because Southeastern employed a policy which was not in effect during the period in which these students attended the institution.

Footnote: 25 25/ ED also maintains that there were a number of instances in which the computer record reflected a student's grade of "F," yet this grade was not reflected in the student's cumulative grade point average. This general charge was not supported by any specific instances. Accordingly, this charge is rejected based upon a lack of evidence.

Footnote: 26 26/ The 33 students are student numbers 4, 21, 26, 28, 29, 31, 32, 33, 38, 39, 42, 43, 44, 46, 49, 52, 58, 60, 62, 64, 65, 68, 70, 71, 73, 74, 75, 78, 79, 82, 87, 89, and 91. ED's termination notice apparently contains a typographical error whereby student 41 is erroneously identified as student 4. The parties recognize this error in their submissions.

Footnote: 27 27/ Student numbers 31, 39, 43, 44, 46, 49, 52, 65, 70, 73, 78, 79, 82, and 89. In addition, ED concedes on brief that Southeastern complied with the financial aid transcript requirements regarding students 21 and 71 cited in the termination notice. Further, the record provides that Southeastern released GSL funds to student 28 after it received the financial aid transcripts from the institutions that this student previously attended. As such, the charge regarding student 28 is dismissed.

Footnote: 28 28/ Student numbers 26, 29, 32, 33, 38, 41, 42, 58, 60, 62, 64, 68, 74, 75, 87, and 91.

Footnote: 29 29/ The 64 disbursements consisted of 6 Pell awards totaling \$3,058.00, 41 GSL awards totaling \$71,062.01, 14 SLS awards totaling \$27,200.00, and 3 PLUS awards totaling \$5,820.00.

Footnote: 30 30/ The five students are student numbers 50, 57, 63, 64, and 73.

Footnote: 31 31/ The five students are student numbers 40, 53, 56, 65, and 70.

Footnote: 32 32/ The inadequate accounting record charge was not sustained in the termination action, supra, and, therefore, the proposed fine is not warranted.

Footnote: 33 33/ The improper cash management charge was not sustained in the termination action, supra, and, therefore, the proposed fine is not warranted.

Footnote: 34 34/ Following the program review, Southeastern indicated that it has begun the reconstruction of 183 student files out of the 600 for which reconstruction was requested. Materials were gathered and submitted to ED. The materials were insufficient and too incomplete to resolve the verification matter. The proposed fine is based upon the failure to verify these 183 students and is calculated at \$500 for each student.

Footnote: 35 35/ The proposed fine was based upon \$500 per violation for each of the 20 students for whom, as ED asserts, that Southeastern did not obtain at least one financial aid transcript. As determined factually, there were only 7 instances which satisfy this condition (student numbers 26, 29, 60, 68, 75, 87, and 91). Accordingly, this reduces the proposed fine to \$3,500.

Footnote: 36 36/ Regarding the \$5,000 fine for less than half-time students in the FFEL program, this fine is based upon a fine of \$500 per student violation. Under the termination action discussion, only 5 of the 10 potential violations were sustained, and, therefore, the amount of the proposed fine must be reduced to \$2,500.

Footnote: 37 37/ The amounts for each fiscal year are as follows--

| | 1987 | 1988 | 1989 | 1990 | Totals |
|--------------------|-------------|-------------|-------------|-------------|---------------|
| Pell Grant | \$107,789 | \$130,937 | \$32,243 | \$126,403 | \$397,372 |
| SEOG | \$27,939 | \$22,272 | \$22,273 | \$27,939 | \$100,423 |
| College Work Study | \$31,713 | \$31,713 | \$29,265 | \$31,787 | \$124,478 |
| Totals | \$167,441 | \$184,922 | \$83,781 | \$186,129 | \$622,273 |

| | 1987 | 1988 | 1989 | 1990 | Totals |
|----------------------------|-------------|-------------|-------------|-------------|---------------|
| Stafford/SLS (Actual Loss) | | | | | |

| | | | | | |
|---------------------------------|-----------|-----------|-----------|-----------|-------------|
| | \$255,583 | \$390,257 | \$316,457 | \$349,341 | \$1,311,638 |
| Interest and Special Allowances | \$320,472 | \$479,105 | \$442,782 | \$498,210 | \$1,740,569 |
| Totals | \$576,055 | \$869,362 | \$759,239 | \$847,551 | \$3,052,207 |

Footnote: 38 38/ The actual loss formula also computes, as damages, the amount of interest and special allowances paid by ED. This includes, for all loans, the interest incurred by the ED between the disbursement of the loans and the date that the repayment period begins and the special allowances paid for the period from the date of repayment to the date of default or the date that the loan is paid in full.

Footnote: 39 39/ A number of additional cases have endorsed the usage of the actual loss formula. See In re Manmouth County Vocational School District, Dkt. No. 94-144-SP, U.S. Dep't of Education at 2 (Apr. 21, 1995); In re Calvindade Beauty Academy, Dkt. No. 93-151-SA, U.S. Dep't of Education at 3-4 (Mar. 21, 1995), certified by the Secretary (Sept. 18, 1995); In re Berk Trade and Business School, Dkt. No. 93-170-SP, U.S. Dep't of Education at 4-5 (June 27, 1994), certified by the Secretary (May 15, 1995); In re Commercial Training Services, Dkt. No. 92-128-SP, U.S. Dep't of Education at 6-7 (Aug. 4, 1993), certified by the Secretary (Oct. 14, 1994).

APPENDIX

1. The United States Department of Education's Regional Office in Philadelphia conducted a program review at Southeastern on February 5-9, 1990.
2. The program reviewer from the Philadelphia Regional Office selected a sample of 20 student files to review for award years 1987 through 1990.
3. By letter dated March 8, 1990, the program reviewer informed Southeastern of his findings with respect to the program review conducted on February 5-9, 1990.
4. On February 9, 1990, ED placed Southeastern on reimbursement system for the receipt of Title IV funds.
5. On June 25, 1990, ED issued its initial program review report.
6. On August 27, 1990, Southeastern submitted its initial response to the program review report issued on June 25, 1990.
7. In May 1991 Southeastern submitted additional information with respect to the program review report.
8. The August 1990 submission and the May 1991 submission were resubmitted to ED in August 1991 after learning that ED had apparently misplaced the submissions.

9. By letter dated March 31, 1992, Southeastern informed ED that it was working toward completion of the reconstruction of its student files as required by ED and that it anticipated completion during August 1992.
10. By letter dated August 27, 1992, Southeastern informed ED that it was working toward completion of the reconstruction of its student files as required by ED and that it anticipated completion during October 1992.
11. ED issued its final program review determination on October 23, 1992.
12. On March 20, 1991, ED's Office of Inspector General initiated an audit of Southeastern's administration of student financial assistance programs for fiscal year 1991.
13. During the survey phase of the audit, the Office of Inspector General selected and reviewed 35 student files from a total of 221 students who applied for student financial assistance during fiscal year 1991.
14. The Office of Inspector General's initial sample of 35 students was reduced to 24 students as 11 of the student's selected did not receive Title IV funds during fiscal year 1991.
15. The Office of Inspector General subsequently expanded its audit scope to include 50 additional students.
16. At the completion of the survey phase of the audit, the Office of Inspector General expanded the audit scope to include activity for fiscal year 1990 for the student's sampled.
17. The Office of Inspector General's final sample size was 70 students.
18. The fieldwork for the audit by the Office of Inspector General was primarily performed from March 20, 1991, through August 23, 1991.
19. On August 23, 1991, Tim Sullivan of the Office of Inspector General met with Southeastern officials to discuss areas of concern discovered in its field audit.
20. Southeastern responded to the August 23, 1991, meeting with Mr. Sullivan by letter dated August 28, 1991.
21. The Office of Inspector General conducted an exit conference with Southeastern on December 18, 1991.
22. On March 25, 1992, the Office of Inspector General provided Southeastern with a draft audit report.
23. On June 30, 1992, Southeastern submitted documentation in response to the March 25, 1992, draft audit.

24. Subsequently in July 1992, the Office of Inspector General conducted follow-up work on the Southeastern audit.
25. On December 31, 1992, the Office of Inspector General issued its final audit report for fiscal years 1990 and 1991.
26. By letter dated March 26, 1993, ED's Office of Student Financial Assistance Programs initiated an action to terminate Southeastern's eligibility to participate in the student financial assistance programs under Title IV and to fine Southeastern \$206,500.
27. On or about July 2, 1991, Southeastern received a letter from the Chief of the Program Compliance Branch of the Division of Audit and Program Review which required Southeastern to provide a letter of credit in the amount of \$850,000 to remain eligible for participation in the student financial assistance programs under Title IV.
28. The program reviewer required Southeastern to reconstruct its Title IV records for award years 1987 through 1990 in accordance with all applicable statutes and regulations.
29. By letter dated August 27, 1990, Southeastern submitted an initial response to the June 25, 1990 program review report and indicated that it began reconstruction of its student files on May 4, 1990. Southeastern indicated that, to date, 183 files have been reviewed with missing documentation requested. Southeastern indicated that the process was very slow and was continuing. Southeastern further indicated that, as additional files were reviewed and documentation received, it would be forwarded to ED.
30. While the August 27, 1990, submission was addressed to John Kolotos, ED's program reviewer, and received by ED on the same date, Mr. Kolotos never saw the submission at any time between the date of submission and the time he departed from ED's regional office in Philadelphia, Pennsylvania, in February 1991.
31. There was no oral or written communication between ED and Southeastern with regard to the August 27, 1990, submission between the submission date and August 1991.
32. ED assigned Greg Martin to replace Mr. Kolotos in October 1991. During the interim period between Mr. Kolotos' departure from the Philadelphia office in February 1991 and Mr. Martin's assignment in October 1991, Anthony Gargano, Mr. Kolotos' former supervisor, was responsible for the Southeastern audit.
33. On May 23, 1991, Michael Freedman of the certified accounting firm of Gelman, Rosenberg & Freedman submitted the reconciliations required by ED and additional supporting documentation. Southeastern's response was based on ED's requirement that Southeastern engage an independent certified public accountant to reconcile its Title IV ledgers and subsidiary accounts to the institution's bank accounts.
34. ED did not respond to the May 23, 1991, submission.

35. In August 1991, Southeastern learned that the material submitted on August 27, 1990, was not in ED's files. At this time, Southeastern resubmitted the documentation.

36. By letter dated March 31, 1992, Southeastern provided a status report to ED which indicated that it was continuing in the reconstruction of its student files and anticipated completion in August 1992.

37. ED did not respond in writing to Southeastern's March 31, 1992, status report.

38. By letter dated August 27, 1992, Southeastern submitted a follow-up status report and informed ED that anticipated completion of the reconstruction of its student files by October 1992.

39. At the time of the August 27, 1992, status report, Mr. Gargano and Mr. Martin had decided to issue the final program review determination and determined that a response to the August 27, 1992, was unnecessary.

40. It is generally the practice of ED to provide an institution with a final deadline and warning prior to issuing a final program review determination based on an allegation of unresponsiveness by the institution.

41. On October 23, 1992, ED issued its final program review determination.

42. Southeastern never submitted a complete file reconstruction to ED.

43. In its final program review determination, ED proposed to disallow all Title IV funds for award years 1987 through 1990 as a result of Southeastern's failure to submit a completed reconstruction. The amount of the proposed recovery was \$3,674,480.

44. On March 8, 1990, ED issued a preliminary program review report which indicted that Southeastern was required to reconstruct its student records for awards years 1987 through 1990 in accordance with all applicable statutes and regulations.

45. Southeastern hired an independent contractor and consultant, Thompson & Associates, to reconstruct the student files for award years 1987 through 1990. Thompson & Associates produced a preliminary report --

[P]rogress in file reconstruction was hindered by conflicts within a student's file.... After file documents were sorted and assigned to award years, determining conflicting information and requesting the required documentation should have been fairly routine. However, this was not the case.... Most financial aid files did not contain accurate records of financial aid awarded nor did files indicate tuition remissions or sponsorship - both of which are necessary in considering students for Title IV funds.... In comparing AR (Accounts Receivable), financial aid files, and financial aid printouts, Thompson &

Associates discovered that, in most instances, the records were so poorly kept that it was impossible to determine what aid a student had received....

46. On June 25, 1990, ED issued an initial program review report to Southeastern consisting of seven findings based on a review of 20 student files.
47. An institution which receives funds under the student financial assistance programs must file with ED an ED/PMS 272 report on a quarterly basis.
48. The 272 report is a quarterly report which reflects the institution's expenditures of Title IV funds during that quarter. It contains the Federal cash-on-hand at the beginning of the reporting period, the total amount of Federal funds advanced to the institution during the quarter, the total amount of Federal funds disbursed by the institution during the quarter, and the remaining amount of Federal cash-on-hand. It also lists the expenditures on a program-by-program basis during the quarter and a cumulative total of expenditures for each program.
49. ED determined that Southeastern did not properly maintain its fiscal and accounting records. In this regard, ED determined that Southeastern's ED/PMS 272 reports did not reconcile with its bank statements or with its Title IV general ledgers. ED further determined that Southeastern did not perform the required reconciliations of its Pell Grant and campus-based programs. ED also determined that it was unable to establish an audit trail within the Pell Grant and campus-based programs from the records provided by Southeastern.
50. As a result of ED's determinations, Southeastern was required to engage a certified public accountant to reconcile its Title IV ledgers to its bank accounts.
51. Southeastern hired the certified public accounting firm of Gelman, Rosenberg & Freedman to assist in the reconciliation of its Title IV ledgers with its bank accounts for the period of July 1, 1986, through March 31, 1991.
52. The certified public accounting firm of Gelman, Rosenberg & Freedman produced an unaudited report which was submitted to ED's Regional Office in Philadelphia on May 23, 1991. This report was based on copies of bank statements, canceled checks, and bank reconciliations of the Federal fund bank accounts provided by Southeastern.
53. Based on the unaudited report, Gelman, Rosenberg & Freedman determined that Southeastern was liable to ED in the amount of \$64,725.
54. In its final program review determination, ED rejected the submission of Gelman, Rosenberg, and Freedman on three grounds. First, the submission was unaudited (not independently verified by the certified public accountant). Second, ED determined that the records on which the submission was based were deficient. Third, ED rejected this submission based on Southeastern's history of unreconciled records evidenced by prior audits.
55. In its request to Southeastern to engage a certified public accountant to reconcile its accounts, ED did not explicitly require that these accounts be audited.

56. The submission by Gelman, Rosenberg & Freedman dated May 23, 1991, accurately reconciled the accounts required by ED in the final program review determination dated October 23, 1992.

57. Southeastern contemporaneously prepared the required monthly reconciliations of its Pell, College Work-Study, and Supplemental Educational Opportunity Grant accounts except in months in which no activity was transacted within a particular account. Further, a contemporaneous reconciliation was not performed in September 1989 with respect to the College Work Study account. In addition, it is unclear whether any activity existed in the Supplemental Educational Opportunity Grant account between the period of August 1989 to December 1989. These monthly reconciliations were provided to ED in the May 23, 1991, submission by Gelman, Rosenberg & Freedman.

58. With respect to the determination that Southeastern had improper cash management, ED required Southeastern, for the period of June 30, 1986, through June 30, 1990, to submit--

[1] A chronological listing of all Title IV drawdowns;

[2] A chronological listing of the institution's initial and subsequent Title IV program authorizations. [Southeastern] must identify the date and amount of each Pell Grant authorization increase or decrease; and,

[3] A chronological listing which identifies the program, the amount and date of each deposit of Federal funds to the institution's operating account.

ED did not require Southeastern to indicate which student's accounts were credited nor did it require Southeastern to provide the date on which the credit was posted or the amount thereof.

59. Southeastern provided the information requested by ED in a submission by Gelman, Rosenberg, and Freedman dated May 23, 1991.

60. In its final program review determination and termination notice, ED erroneously concluded that, as of these issuances, the requested information had not been submitted by Southeastern.

61. ED subsequently acknowledged that, based on the submissions by Southeastern dated May 23, 1991, Southeastern satisfied the finding regarding cash management in the final program review determination. As such, ED does not seek recovery of the liabilities cited in its final program review determination.

62. Southeastern's unrestricted fund balance for fiscal year 1990 is <\$1,079,219>. For fiscal year 1991, Southeastern's unrestricted fund balance is <\$83,061>. For fiscal year 1992, Southeastern's unrestricted fund balance is \$7,134.

63. On August 22, 1990, Southeastern received a letter from the Institutional and Lender Certification Branch of ED which indicated that Southeastern had been selected to undergo a certification review.

64. On July 2, 1991, Southeastern was informed that, as a result of the certification review, it

would be required to post a letter of credit in the amount of \$850,000.

65. By letter dated August 26, 1991, Southeastern communicated to ED its difficulty in securing a letter of credit in the amount of \$850,000 and offered its real estate holdings as a source of security. Based upon an appraisal, Southeastern's real estate holdings included a building valued at \$3,407,000 as of July 17, 1990.

66. By letter dated February 19, 1992, Southeastern informed ED that it reduced its unrestricted fund balance from <\$1,079,219> to <\$83,061> for the year ended August 31, 1991. As a result of the reduction in Southeastern's unrestricted fund balance, ED reduced the letter of credit demand from \$850,000 to \$600,000.

67. Southeastern's expenditure of Title IV funds in fiscal year 1990 was \$1,031,559. Southeastern's expenditure of Title IV funds in fiscal year 1991 was \$1,171,115.

68. Based upon internal guidelines within ED, the amount of the letter is credit is set between 25 to 33% of the institution's Title IV participation.

69. By letter dated May 26, 1993, Southeastern informed ED that its 1992 unrestricted fund balance was \$7,134.

70. ED did not respond to Southeastern's letter of May 26, 1993, and did not revoke or reduce the amount of the letter of credit demanded from Southeastern.

71. In its response of August 27, 1990, Southeastern indicated that it had begun award recalculations based on verified data. The reconstruction documentation submitted by Southeastern included a list of 183 students out of a total of 600 for whom reconstruction had begun. These materials included letters to students requesting verification documents.

72. Of the 26 instances investigated for compliance with the verification requirement under 34 C.F.R. Part 668 Subpart E, Southeastern did not perform a verification in 17 instances at any time prior to the issuance of the program review dated June 25, 1990.

73. Southeastern conceded that it failed to perform proper verification for the award years 1988 and/or 1989 with respect to students #2, #3, #7, #8, #10, #12, #15, #16, #17, and #20.

74. With respect to student #5, verification for award year 1988 was not performed by Southeastern as of the issuance of the program review dated June 25, 1990. At some point prior to the hearing, Southeastern performed a verification and, with the inclusion of the revised data, it determined that student #5's student aid index (SAI) changed from 888 to 668. Therefore, the student's scheduled award increased and, accordingly, there was no overaward by Southeastern.

75. With respect to student #6, verification for award years 1987 and 1988 was not performed by Southeastern as of the issuance of the program review dated June 25, 1990. At some point prior to the hearing, Southeastern performed a verification for 1987 and, with the inclusion of the revised data, it determined that student #6's SAI changed from 363 to 677. Therefore, the

student's scheduled award decreased, and, accordingly, there was an overaward of \$420 for 1987 by Southeastern.

76. With respect to student #9, verification for award year 1988 was not performed by Southeastern as of the issuance of the program review dated June 25, 1990. At some point prior to the hearing, Southeastern performed a verification for 1988 and, with the inclusion of the revised data, it determined that there was no change in the SAI. Therefore, the student's scheduled award remained unchanged.

77. With respect to student #11, a verification for award year 1988 was performed by Southeastern and so noted by ED's auditor. As to award year 1987, Southeastern did not perform a verification prior to the issuance of the program review dated June 25, 1990. At some point prior to the hearing, Southeastern performed a verification for 1987 and, with the inclusion of the revised data, there was no change in the student's scheduled award. As to award year 1989, Southeastern did not perform a verification prior to the issuance of the program review dated June 25, 1990. At some point prior to the hearing, Southeastern performed a verification for 1989 and, with the inclusion of revised data, the student was overpaid \$50 for the Fall term.

78. With respect to student #13, verification for award year 1988 was not performed by Southeastern as of the issuance of the program review dated June 25, 1990. At some point prior to the hearing, Southeastern performed a verification for 1988 and, with the inclusion of the revised data, it determined that student #13's SAI changed from 485 to 415. Therefore, the student's scheduled award increased and, accordingly, there was no overaward by Southeastern.

79. With respect to student #18, verification for award year 1990 was not performed by Southeastern as of the issuance of the program review dated June 25, 1990. At some point prior to the hearing, Southeastern performed a verification for 1990 and, with the inclusion of the revised data, it determined that student #18's SAI changed from 23 to 71. Therefore, the student's scheduled award remained unchanged.

80. With respect to student #19, verification for award year 1989 was not performed by Southeastern as of the issuance of the program review dated June 25, 1990. At some point prior to the hearing, Southeastern performed a verification for 1989 and, with the inclusion of the revised data, it determined that student #19's SAI increased substantially. As a result, an overaward of \$363 was made by Southeastern.

81. Southeastern disbursed student financial assistance to OIG's student number 22, when he was not in compliance with Southeastern's satisfactory academic progress policy concerning the cumulative grade average required of a graduate student. He was a graduate student whose cumulative grade point average fell below 3.0 following the 1990 winter term and received \$3,500 in GSL and other assistance during the winter 91 term.

82. Southeastern disbursed student financial assistance to OIG's student number 29, when she was not in compliance with Southeastern's satisfactory academic progress policy concerning the cumulative grade average required of an undergraduate student. She was not in compliance for 5 consecutive terms and received two disbursements of \$2,200 over 2 years.

83. Southeastern disbursed student financial assistance to OIG's student number 35, when he was not in compliance with Southeastern's satisfactory academic progress policy concerning the cumulative grade average required of a graduate student. The student received approximately \$3,800 in financial assistance after he was not in compliance.

84. Southeastern disbursed student financial assistance to OIG's student number 45, when he was not in compliance with Southeastern's satisfactory academic progress policy. As an undergraduate, he did not maintain a cumulative GPA of 2.0 for 4 consecutive terms and did not complete the requisite 75% of his attempted courses for the 1989/90 academic year. He received approximately \$1,200 in financial assistance after he was not in compliance.

85. Southeastern disbursed student financial assistance to OIG's student number 57, when she was not in compliance with Southeastern's satisfactory academic progress policy. As a graduate student, she did not maintain a cumulative GPA of 3.0 for 4 consecutive terms and received \$1940 in financial assistance.

86. Southeastern disbursed student financial assistance to OIG's student number 60, when he was not in compliance with Southeastern's satisfactory academic progress policy regarding the completion rate and grade point average. .

87. Southeastern disbursed student financial assistance to OIG's student number 64, when she was not in compliance with Southeastern's satisfactory academic progress policy. As a graduate student, she did not maintain the minimum cumulative GPA and had a completion rate of 40% after two terms and received \$3,500.

88. Southeastern disbursed student financial assistance to OIG's student number 66, when he was not in compliance with Southeastern's satisfactory academic progress policy. As a graduate student, he did not maintain the minimum cumulative GPA for 7 consecutive terms and also failed to maintain the requisite minimum completion rate. He received approximately \$3,500 when he was not in compliance.

89. Southeastern disbursed student financial assistance to OIG's student number 75, when he was not in compliance with Southeastern's satisfactory academic progress policy. As a graduate student, he did not maintain the minimum cumulative GPA for 6 consecutive terms and also failed to maintain the requisite minimum completion rate for the 1989/90 academic year. He received approximately \$3,600 when he was not in compliance.

90. Southeastern disbursed student financial assistance to OIG's student number 79, when she was not in compliance with Southeastern's satisfactory academic progress policy. As an undergraduate student, she did not maintain the minimum cumulative GPA and received approximately \$500 when she was not in compliance.

91. Southeastern allowed an instructor to assign a grade of incomplete, "I", if the student had a satisfactory explanation of his or her inability to complete the work on time. In order to remove an "I", a student had to make the necessary arrangements with the registrar and the teacher, and complete the assigned work. In the event the work was not completed by the last day on which to

change grades in the following term, the "I" grade automatically became an "F", unless the Dean determined otherwise.

92. As of July 8, 1991, Southeastern had approximately 210 students who had an incomplete grade on his or her transcript which should have been previously changed to a "F" grade. Some of these students were attending Southeastern and many were not attending Southeastern at this time. The majority of these incompletes were awarded during the academic years 1988, 1989, and 1990 and a few were awarded during earlier academic years. On July 9 and 10, 1991, Southeastern changed the grades of 74 students. In most instances, the change was from an "I" to a "F." In several instances, the record does not reflect the nature of the change and, in 3 instances, the student was awarded a letter grade other than a "F."

93. The program review did not cite any specific students examples of a failure to properly apply the satisfactory academic progress standards including the 20 students whose files were reviewed. However, of the 20 student files, one student was, in fact, not in compliance with Southeastern's satisfactory academic progress policy.

94. The OIG audit sampled 70 students to determine whether a request for a financial aid transcript was necessary and, if so, whether Southeastern had, in fact, requested the transcript.

95. Fifty-five of the seventy students attended another postsecondary institution prior to attending Southeastern. In its Notice of Termination, ED alleges that, of the 55 students, 33 were missing at least one financial aid transcript at the time of the disbursement: students #4, #21, #26, #28, #29, #31, #32, #33, #38, #39, #42, #43, #44, #46, #49, #52, #58, #60, #62, #64, #65, #68, #70, #71, #73, #74, #75, #78, #79, #82, #87, #89, and #91. [See footnote 1 1/](#) Specifically, sixteen students for whom a financial aid transcript was required but not obtained: student #31, #32, #39, #42, #43, #44, #46, #49, #52, #65, #70, #73, #78, #79, #82, and #89; eight students for whom at least two financial aid transcripts were required with one financial aid transcript missing and the other obtained after Federal aid was disbursed: student numbers #26, #29, #60, #68, #71, #75, #87, and #91; and Southeastern improperly disbursed Federal funds to nine students prior to the receipt of the financial aid transcript: student numbers #21, #28, #33, #38, #41, #58, #62, #64, and #74.

96. ED failed to provide evidence that Southeastern disbursed any Title IV funds to fourteen students: #31, #39, #43, #44, #46, # 49, #52, # 65, #70, #73, #78, #79, #82, and #89.

97. The record reflects that Title IV funds were disbursed to sixteen students prior to receiving a financial aid transcript from each institution that the student previously attended. They are students # 26, #29, #32, #33, #38, #41, #42, #58, #60, #62, #64, #68, #74, #75, #87, and #91. The total amount of assistance awarded and disbursed to these students was \$107,140.

98. Southeastern released GSL awards after the receipt of the financial aid transcripts from each institution that student 28 previously attended. Accordingly, Southeastern received the financial aid transcripts timely. ED concedes that necessary financial aid transcripts for student #21 were received timely and that the financial aid transcript for student #71 was not needed.

SERVICE

On September 20, 1996, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

Stanley A. Freeman, Esq.
White, Verville, Fulton, & Saner
1156 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

Russell Wolff, Esq.
Office of the General Counsel
U.S. Department of Education
Room 5442, FOB-10
600 Independence Avenue, S.W.
Washington, D.C. 20202-2110

On September 20, 1996, a copy of the attached initial decision was sent to the following:

Nancy Hoglund, Chief
Loans and Accounts Receivable Branch
Financial Management Service
U.S. Department of Education
600 Independence Avenue, S.W.
FOB-10B, Room 3400
Washington, D.C. 20202-4330

Footnote: 11/ ED's termination notice apparently contains a typographical error whereby student 41 is erroneously identified as student 4. Since ED's proposed findings of fact and accompanying exhibits refer to student 41 and Southeastern has responded to the charge regarding this student, the record contains sufficient information to permit the tribunal to make a determination regarding Southeastern's compliance with the financial aid transcript requirement.