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

In the Matter of **Docket No. 94-216-SP**

FISK UNIVERSITY, Student Financial Assistance Proceeding

Respondent.

Appearances: Leslie H. Wiesenfelder, Esq., Dow, Lohnes & Albertson, Washington, D.C., for Fisk University.

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

Before: Judge Richard F. O'Hair

DECISION

Fisk University (Fisk) participates in the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* These programs are administered by the Office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED). On October 13, 1994, SFAP issued a Final Program Review Determination (FPRD) based on the program review report for the 1989-90, 1990-91, and 1991-92 award years. Fisk filed a request for review on December 9, 1994. Both parties have filed submissions to this tribunal in response to the Order Governing Proceedings.

SFAP argues that Fisk must repay ED $294,456 for Title IV awards given to students whose student aid applications the school failed to verify, for overawards given to students, and for interest and special allowance payments made by ED on these ineligible distributions. Fisk responds that the directive of the program reviewers that Fisk conduct a full file review of all students selected for verification was illegal because § 484(f) of the HEA (20 U.S.C. § 1091(f)), which was in effect during the award years in question, stated that, in any award year, ED cannot require a school to verify more than 30% of the total number of its students who apply for Title

IV financial aid.See footnote 1 *1*

Institutions that participate in Title IV programs may be obligated to require student applicants for Title IV aid to verify specified U.S. income tax data contained in their applications, such as adjusted gross income, family size, and marital status, among others. This verification must be performed when either the Secretary of Education exercises his prerogative to direct that random student files be verified, or because a student application contains incorrect, missing, illogical, or inconsistent information. 34 C.F.R. §§ 668.54, 668.56. Under § 668.58(a)(1), an institution may not disburse Title IV funds to a student until the verification is complete. This verification requirement, however, was limited by § 484(f) of the HEA (20 U.S.C. § 1091(f)), which stated as follows:

Notwithstanding any other provision of law, the Secretary may not require, or prescribe regulations that require, institutions to verify the accuracy of data used to determine the eligibility for any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 for more than 30 percent of the applicants in any award year. In carrying out the provisions of this subsection no eligible institution shall be required to verify more than 30 percent of such applicants in any award year.

In the present case, the March 1992 program review found that Fisk failed to complete verification for seven students out of a sample of 25 students who had been selected for verification by the Secretary. As a result, the program review required Fisk to review the files of all Title IV aid recipients who were selected for verification for the 1989-90, 1990-91, and 1991-92 award yearsSee footnote 2 *2* to ascertain the full extent of either incomplete verification or the absence of verification. The school was then required to attempt to resolve all verification discrepancies. The program review warned that in cases where verification results in a change to a student's Pell Grant index, scheduled award, and expected disbursement, Fisk would be liable for the difference between the correct disbursement and the actual disbursement. The school would also be liable for the disbursement of Title IV funds in cases where the verification process cannot be completed.

Over the next two years, the school and ED exchanged numerous letters, as the school attempted to comply with the requirements of the program review. Not until May 1994 did Fisk claim that it had already verified more than 30 percent of its Title IV aid applicants for the award years in issue. Then, in May 1994, Fisk raised for the first time the argument that it should not be required to conduct the full file review because the Secretary was prohibited from ordering a verification of more than 30% of its student files. In the letter, the school acknowledged that during the program review, its files did not contain the information necessary to identify which students it had not verified because of its reliance on the 30% statutory limitation. In response to the program review, Fisk submitted a list of all students who had been selected for verification but for whom verification had not been completed (Appendix E) and a list of students for whom verification resulted in an award change (Appendix F). Based upon these submissions, the FPRD determined that Fisk was liable for $248,469 in Title IV funds disbursed to the students listed in Appendixes E and F, $10,471 in funds disbursed to two students out of the original seven identified by the program review, and $49,816 in interest and special allowance (ISA) payments.

SFAP contends that this tribunal owes deference to SFAP's position in this proceeding that Fisk may not raise the 30% "verification option" as a defense because Fisk was required to "elect" the 30% verification "option" at the time of the program review. In support of its deference argument, SFAP cites *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I do not agree that *Chevron* requires deference to SFAP's position on this issue. In *Chevron*, the Supreme Court required federal courts to defer to the agency's position if it is reasonable, but it did not require administrative tribunals within an agency to defer to the position of another component of that agency. As Judge Cross stated in *In re Technical Career Institute,* Dkt. No. 92-91-ST, U.S. Dep't of Educ. (Oct. 8, 1993), "*Chevron* deference is owed to the Secretary. In this proceeding [SFAP] is an advocate for its position and does not speak for or stand in the shoes of the Secretary and therefore is not entitled to clothe itself in the mantle of *Chevron* deference." *Id.* at 24. This decision was certified by the Secretary on November 23, 1994. Moreover, SFAP's citation to *In re Garces Commercial College,* Dkt. No. 92-23-SP, U.S. Dep't of Educ. (Nov. 25, 1992) and to 52 Fed. Reg. 30114 is inapposite because neither that case nor the Federal Register notice protect SFAP's interpretation if it is contrary to the plain meaning of the statute.

Here, SFAP's interpretation is contrary to the plain meaning of the statute. Fisk was not required to "elect" the 30% verification "option" at the time of the program review because this is not an "option" at all, but a statutory limitation on ED. The statute is very clear that notwithstanding any other provision of law, ED may not require an institution to verify more than 30% of its Title IV applicants in any given year.See footnote 3 *3* Nonetheless, the school must be able to prove that it verified at least 30% of these students, and that it did so during the 1989-90 to 1991-92 award years, before it disbursed Title IV funds to these students. Otherwise, the school is liable for these funds under 34 C.F.R. § 668.58(a)(1). The program reviewers were not

satisfied that Fisk had done so. Moreover, under § 668.116(d), Fisk has the burden of proof on this issue. To the extent that Fisk argues that it should not be required to demonstrate to the Department which 30% of its students had been verified because this is somehow a "modification" of the statute, I disagree. The statute may prohibit ED from requiring Fisk to verify more than 30% of its Title IV applicants, but in this Subpart H proceeding, Fisk still must prove that it complied with the statute by demonstrating that it actually verified at least 30% of its Title IV applicants. The fact that the school did not claim that it had already verified more than 30% of its Title IV applicants until 1994, more than two years after the program review, and after it had undertaken the file review requested by the program reviewers, certainly weakens the school's argument that it verified these students back in 1989-91.

In support of its claim that it verified more than 30% of its Title IV aid applicants during the award years in issue, Fisk has submitted the affidavit of Linda N. Ellison, the Chief Financial Officer of Fisk University. In her affidavit, Ms. Ellison states that "Fisk University in fact verified more than 30 percent of the financial aid applicants in each of the award years covered by the Review Period." She also states that "[t]he documentation supporting the verification of these students was forwarded to Region IV during the program review and is hereby incorporated by reference." Fisk submitted these documents as its exhibits 8 and 9 concurrently with its reply brief. These exhibits contain various worksheets and other documentation

demonstrating verification for Fisk students during the 1989-90 and 1990-91 award years. With its reply brief, Fisk attached Schedules 1 and 2, which listed the relevant pages in Exhibits 8 and 9 for each student (these schedules also included the students identified in Appendix F to the FPRD, which was a listing of students for whom Fisk had completed verification and for whom verification had resulted in an award change). According to Ms. Ellison's affidavit, Schedule 1 lists 196 students and the relevant portions of Exhibit 8 demonstrating that verification was completed for 30.15% of the 650 students who applied for and received Title IV aid during the 1989-90 award year. Schedule 2 lists 194 students and the relevant portions of Exhibit 9 demonstrating that verification was completed for 30.27% of the 641 students who applied for and received Title IV aid during the 1990-91 award year.

SFAP claims that 14 of the students listed in Respondent's exhibits 8 and 9 were not in fact verified. For the reasons discussed in Fisk's sur-reply brief, I agree with Fisk that SFAP cannot at this time reverse the finding of the FPRD that six of these students had been verified. Having reviewed the evidence as to the 14 students in question, I find that they were in fact verified during the award years in question.

In conclusion, I find that Fisk has satisfied its burden of proving that it verified at least 30% of its Title IV applicants during the award years in question. Under 20 U.S.C. § 1091(f), ED cannot require Fisk to verify more than 30% of its Title IV applicants. As a result, Fisk was not required to verify **all** of its Title IV applicants, and thus has no liability for its failure to verify the students listed on Appendix E.

Fisk has accepted liability, however, for the students listed in Appendix F for whom

verification resulted in a change of award. The amounts of these overawards total $28,539 in Pell grants, $17,394 in Federal Family Education Loans (FFELP) loans, $2,326 in Supplemental Educational Opportunity Grant (FSEOG) funds, $2,643 in Federal Work Study grants, and $3,489 in Federal Perkins Loan funds.

As for the $28,539 in Pell Grant overawards to certain students identified in Appendix F, the school contends that its liabilities for these overawards should be offset by the Pell Grant underawards to other students identified in Appendix F. Nonetheless, the statute cited by Fisk does not support this. 20 U.S.C. § 1094(c)(7) plainly states that institutions shall be permitted to offset "grants or other assistance provided by an institution" [emphasis added] against any sums determined pursuant to an audit to be owed by that institution. Here, the "underawards" claimed by Fisk represent amounts that it could have awarded to students, but did not. Since these amounts were never provided to students, Fisk is not entitled to offset them under 20 U.S.C. § 1094(c)(7).

Fisk also argues that the estimated actual loss formula should be applied to the $17,394 in FFELP loans listed in Appendix F in order to limit the school's liability. Under that formula, an institution's liability is determined by multiplying the total amount of ineligible loans by the institution's cohort default rate. SFAP opposes the use of the estimated actual loss formula in this case.

This tribunal has previously held that application of an institution's cohort default rate to each year's ineligible loans is an appropriate manner in which to determine the actual loss to SFAP. For example, in *In re Empire Technical Schools,* Dkt. No. 92-11-SP, U.S. Dep't of Educ. (April 24, 1995), this tribunal stated:

[W]hen an institution fails to submit a full file review in response to a program review, SFAP may be entitled to recover all Title IV funds disbursed to that institution during the time period covered by the program review, but only if the school has not provided relevant data with which to measure the actual loss to SFAP. Nonetheless, that data must be accurate and reliable.

Empire at 3.

Numerous additional cases have upheld the usage of the actual loss formula. See *In re Monmouth County Vocational School District,* Dkt. No. 94-144-SP, U.S. Dep't of Educ. (April 21, 1995), at 2. See also *In re Commercial Training Services, Inc.*, Dkt. No. 92-128-SP, U.S. Dep't of Educ. (Aug. 4, 1993), at 6-7; *In re Southeastern University*, Dkt. No. 93-61-SA, U.S. Dep't of Educ. (June 22, 1994), at 2; *In re Berk Trade and Business School*, Dkt. No. 93-170-SP, U.S. Dep't of Educ. (June 27, 1994), at 4-5; *In re Calvinade Beauty Academy*, Dkt. No. 93-151-SA, U.S. Dep't of Educ. (March 21, 1995). More recently, this tribunal not only has held that SFAP can use the actual loss formula as a fair and accurate assessment of liability, but also has required its usage even when SFAP opposed its application. In *In re Nettleton Junior College,*

Dkt. No. 93-29-SP, U.S. Dep't of Educ. (June 8, 1994), the school requested that its liability be determined using the actual loss formula. SFAP refused and argued that SFAP could select the method of repayment. The judge held that the school was entitled to have its liability determined according to the actual loss formula and this decision was certified by the Secretary on February 28, 1995. A very recent decision also mandated usage of the actual loss formula to reduce the school's liability. *In re Muscular Therapy Institute,* Dkt. No. 94-79-SP, U.S. Dep't of Educ. (July 14, 1995), at 5-6. Therefore, in the case before me, I reject SFAP's attempts to characterize the actual loss formula, which SFAP itself developed and which has been applied in other cases, as somehow being unfair to SFAP.

Nonetheless, due to the relatively small amount and clearly identifiable nature of the FFELP loans at issue in this case, I do not find it necessary to apply the estimated actual loss formula here. In other cases where the loan amounts were relatively small and the students were specifically identified, the school has been required to repurchase those loans from the holders. See *In the Matter of Empire Technical School,* Dkt. No. 91-53-SP, U.S. Dep't of Educ. (Dec. 13, 1993), at 54-55; *In the Matter of Rice College,* Dkt. No. 91-102-SA, U.S. Dep't of Educ. (Dec. 29, 1993), at 31-32. In those cases, the school was also required to contact the appropriate agencies to determine the total amount of interest and special allowances paid by ED for ineligible loans, and repay those amounts to ED. Therefore, Fisk should identify and repurchase from the holders the $17,394 in FFELP loans for the students listed in Appendix F. Fisk also should contact the appropriate agencies, determine the total amount of interest and special allowances paid by ED on those loans, and repay these amounts to ED.

In conclusion, Fisk must repay $28,539 in Pell Grant overawards, $2,326 in FSEOG overawards, and $2,643 in Federal Work Study overawards. Fisk also must repay $17,394 in FFELP loan overawards, contact the appropriate agencies to determine the total amount of interest and special allowances paid by ED on those loans, and repay these amounts to ED. Fisk also must deposit $3,489 into its Federal Perkins Loan Fund.See footnote 4 *4*

FINDINGS

1. Fisk has demonstrated that it verified at least 30% of its students during the award years in issue.

2. Fisk is not entitled to offset Pell Grant underawards that were never provided to students against overawards.

3. The actual loss formula should not be applied here to reduce Fisk's liability.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Fisk University shall repay $50,902 to the United States Department of Education in the manner authorized by law. Fisk also must contact the appropriate agencies to determine the total amount of interest and special allowances paid by ED on the ineligible FFELP loans listed in Appendix F, and repay these amounts to ED. Fisk also must deposit $3,489 into its Federal Perkins Loan Fund.

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Judge Richard F. O'Hair

Dated: October 5, 1995

SERVICE

On October 5, 1995, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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Footnote: 1 *1 § 484(f) was repealed by the Higher Education Technical Amendments of 1993, P.L. 103-208, enacted December 20, 1993. Nonetheless, the 30% verification limitation was retained by regulation. See 59 Fed. Reg. 61204 (Nov. 29, 1994), amending 34 C.F.R. § 668.54(a)(2)(i).*

Footnote: 2 *2 Verification for the 1991-92 award year is no longer in dispute.*

Footnote: 3 *3 Fisk argues that SFAP did not question whether Fisk had in fact verified more than 30% of its Title IV applicants until after the FPRD was issued. I disagree with this statement for two reasons. First, the FPRD specifically mentioned and rejected the school's claim that it had verified more than 30% of its Title IV applicants. Second, in this proceeding, it was Fisk who first raised that defense, and SFAP merely responded to this defense.*

Footnote: 4 *4 These amounts are derived from Appendix F to the FPRD.*