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

In the Matter of **Docket No. 96-4-SP**

CHRISTIAN BROTHERS UNIVERSITY, Student Financial Assistance Proceeding
Respondent.

PRCN: 94304229

Appearances: Leigh M. Manasevit, Esq., and Diane L. Vogel, Esq., Brustein & Manasevit, Washington, D.C., for Christian Brothers University.

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

Before: Judge Richard I. Slippen

DECISION

Christian Brothers University (CBU) is a private, four-year university located in Memphis, Tennessee. CBU enrolls approximately 1800 students. CBU is accredited by the Commission on Colleges of the Southern Association of Colleges and Schools, and it participates in the Federal Family Education Loan (FFEL) Program[See footnote 1 *1*], the Perkins Loan Program (Perkins), the Pell Grant Program (Pell), the Supplemental Educational Opportunity Grant (SEOG) program, and the College Work Study (CWS) program.

On October 20, 1995, the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a final program review determination (FPRD) finding that CBU violated several regulations promulgated pursuant to 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*. The FPRD, which resulted from a June 1994 program review of CBU's Title IV compliance for the award years 1991-92 through 1993-94, contained three unresolved findings. These findings were that CBU incorrectly certified FFEL loan applications[See footnote 2 *2*] (Finding # 1); failed to conduct complete verification or failed to resolve conflicting information contained in student files (Finding # 2); and disbursed Title IV funds to students who were not maintaining satisfactory academic progress (SAP) (Finding # 4). For these findings, SFAP assessed a liability of $190,995 to the Department and $705,639 to purchase the loans from the current FFEL loan holders. SFAP based its assessment of liability on full file reviews that CBU conducted in response to the program review.

In its appeal of the FPRD, CBU does not challenge the substance of the findings; rather, it challenges how SFAP calculated the liabilities for these findings. First, CBU requests that the actual loss formula or, as it is otherwise known, the estimated loss formula, be used to calculate its FFEL and Perkins loan liabilities for all three findings. Second, CBU argues that the liability for the second finding is overstated because Title IV expenditures for nine of the students were proper. Third, CBU argues that the low error rate evidenced by their nearly complete full file review for Finding # 2 merits the use of that error rate to assess liability for the remaining 58 unreviewed student files.

Estimated Loss Formula

The estimated loss formula measures the estimated loss to the Department that has or will result from the ineligible loans certified by the institution. Under this formula, an institution's cohort default rate is multiplied by the total amount of ineligible loans disbursed during a given award year to yield an estimated expenditure of defaulted loans. *In Re*

Selan's System of Beauty Culture, Docket No. 93-82-SP, U.S. Dep't of Educ. (December 19, 1994) at 3. This estimate is added to estimated loan subsidies and interest payments made by the Department to yield the estimated loss formula liability. *Id*. The estimated loss formula has been relied upon by SFAP as an alternative assessment of liability against an institution found to have improperly disbursed FFEL loans and this tribunal has consistently held that this formula constitutes a fair calculation of the extent of the Department's losses where it has determined that an institution has improperly disbursed Title IV loans. *See e.g., In Re Muscular Therapy Institute*, Docket No. 94-79-SP, U.S. Dep't of Educ. (July 14, 1995) at 6.

SFAP's past use of the estimated loss formula, however, has been sketchy and inconsistent. The application of this formula has been both proposed and opposed by SFAP in cases both similar and inapposite to the instant proceeding. SFAP admits that there has been no clear standard in applying the estimated loss formula in the past but it indicates that it is attempting to standardize some of the situations where it is used. (Tr. at 40-41). At oral argument, SFAP stated that the formula would not be applicable in situations where the borrower

would lose, or where there are relatively few liabilities. (Tr. at 39-40). SFAP also identified satisfactory academic progress violations as a type of violation where it was inappropriate to use the estimated loss formula since the default rate among these students is likely to be higher than the institution's cohort default rate which includes all different kinds of students. (Tr. at 40).

Contrary to SFAP's assertions, the estimated loss formula has been proposed by or used by this tribunal in many of the aforementioned circumstances. Moreover, the estimated loss formula has been proposed by SFAP and/or used by this tribunal in cases involving violations similar to the ones at issue in this proceeding. *See generally*, *In Re Hallmark Institute of Technology*, Docket No. 94-127-SP, U.S. Dep't of Educ. (August 23, 1995) (The formula was used to calculate the institution's liability for overawards.); *In Re Bryant & Stratton Business Institute*, Docket No. 94-190-SA, U.S. Dep't of Educ. (September 16, 1996) (SFAP proposed use of the estimated loss formula in a case involving SAP violations.); *In Re Chauffeur's Training School*, Docket No. 92-113-SP, U.S. Dep't of Educ. (September 4, 1994) (SFAP proposed use of the estimated loss formula for ability-to-benefit violations, incorrect file verifications, missing financial aid transcripts, disbursements made to students not currently enrolled, and undocumented adjustments to estimated family contributions.); *In Re Knoxville College*, Docket No. 94-175-SP, U.S. Dep't of Educ. (July 31, 1995) (The institution was given the option of either purchasing the FFEL loans or reimbursing the Department for its estimated loss for FFEL loans disbursed without conducting required verifications of student aid reports); *In Re Monmouth County Vocational School District*, Docket No. 94-144-SP, U.S. Dep't of Educ. (April 25, 1995) (SFAP used the estimated loss formula to calculate the institution's liability for failing to perform the required verification of Title IV eligibility documentation and failing to perform needs analysis prior to certifying FFEL loans.); *In Re Parks College*, Docket No. 95-92-SP, U.S. Dep't of Educ. (November 7, 1995) (SFAP had no objection to the use of the estimated loss formula for failing to adequately document the independent status of students receiving Title IV aid.) This tribunal also notes that SFAP has opposed the use of the estimated loss formula in a case involving a Title IV violation similar to FPRD Finding # 2 in this proceeding. *See In Re Fisk University*, Docket No. 94-216-SP, U.S. Dep't of Educ. (October 5, 1995) (Due to the relatively small amount and clearly identifiable nature of the FFEL loans, the tribunal found it unnecessary to apply the estimated loss formula for the institution's failure to verify student aid applications.)

In a July 17, 1996, memorandum,See footnote 3 *3* SFAP articulated standards governing the use of the estimated loss formula.See footnote 4 *4* SFAP's policy states that the estimated loss formula is to be used in lieu of requiring an institution to repurchase ineligible Stafford or SLS loans. SFAP explains that although the phrase ineligible loans typically refers to loans made to ineligible borrowers, it can also mean loans made to eligible borrowers in excess of the permissible amounts. SFAP has also spelled out specific instances in which the estimated loss formula should not be applied. First, the formula should not be used in cases where all of the loans are currently in default. Second, the estimated loss formula should not be used where the borrowers may be eligible for loan relief such as a false certification or Closed School loan discharge. Third, the formula is not applicable when student refunds are due. Fourth, estimated loss may be inappropriate where the institution knows it is certifying ineligible loans. SFAP also identified one situation in which the estimated loss formula must always be used. In any case that involves a projection from a statistical sample, SFAP states the formula must be used because it does not know which specific students received ineligible loans. Therefore, according to SFAP, the estimated loss formula is the only realistic alternative.

For cases that do not fit into the specific rules laid out above, SFAP has provided the following guidance: the formula should not be used in cases involving a small number of ineligible loans because generalized estimates of default and subsidy costs are significantly less reliable when dealing with a small number of loans. In cases involving larger number of loans, the estimated loss formula should be applied since the burden to the institution in identifying and purchasing all ineligible loans increases as does the burden on the Department to monitor and enforce the repurchase of the FFEL loans.See footnote 5 *5*

SFAP's stated policy is consistent with the tribunal's use of the estimated loss formula in previous cases. This tribunal has favored use of the estimated loss formula to calculate FFEL liability. "It makes little sense to require the institution to purchase FFEL loans from the lenders since the only loss to the Department for the unauthorized loans is interest subsidies, special allowances, and any sums spent to cover defaults on the loans." *In Re Morgan Community College*, Docket No. 94-152-SP, U.S. Dep't of Educ. (September 28, 1995).

Federal regulations do not specify how the liability for unauthorized FFEL loans should be calculated. *In Re Parks College* at 5. SFAP argues that the use of the formula is completely within its discretion. However, this tribunal has applied it in cases where SFAP has opposed its use. *See In Re Nettleton Junior College*, Docket No. 93-29-SP, U.S. Dep't of Educ. (June 8, 1994), *In Re Muscular Therapy Institute*, Docket No. 94-79-SP, U.S. Dep't of Educ. (July 14, 1995), and *In Re Fisk University*, Docket No. 94-216-SP, U.S. Dep't of Educ. (October 5, 1995). This tribunal has also held that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *In Re Nettleton Junior College* at 18 (citing *Motor Vehicle Manufacturers Association of U.S. Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983)). An "agency must make findings that support its decision, and those findings must be supported by substantial evidence." *Id*. (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 168 (1962)). As detailed above, SFAP's use of the estimated loss formula has been uneven. This tribunal finds SFAP's policy to be a reasonable standard governing the use of the estimated loss formula. Further, SFAP has already proposed the use of the estimated loss formula in cases similiar to the one before me. Additionally, SFAP's policy is consistent with prior decisions of this tribunal. Therefore, SFAP's own standards will be used to determine the applicability of the estimated loss formula in this proceeding.See footnote 6 *6*

SFAP's policy indicates that the formula should not be applied where the borrower is eligible for loan relief. For FPRD Finding # 1, SFAP first argued that, in cases where a student has received an overaward, 20 U.S.C. § 1078-7(d)(2) creates a legal obligation to credit the student's loan account thereby reducing his or her educational loan debt:

If the sum of a disbursement for any student and the other financial aid obtained by such student exceeds the amount of assistance for which the student is eligible under this subchapter, the institution such student is attending shall withhold and return to the lender or escrow agent the portion (or all) of such installment that exceeds such eligible amount, except that overawards permitted pursuant to section 2753 of Title 42 shall not be construed to be overawards for purposes of this paragraph. Any portion (or all) of a disbursement installment which is so returned shall be credited to the borrower's loan and treated as a prepayment thereon.

In its August 8, 1996, post-hearing submission, SFAP reversed its position concerning overawards. Pursuant to its articulated policy, the estimated loss formula is now to be applied to

overawards.See footnote 7 *7* If, however, the finding had concerned overawards made because an institution charged students for an invalid cost of attendance for which Title IV funds should not have been used, a different outcome may be required. For example, in cases where students are charged for an invalid cost of attendance, the students may benefit from a reduction in their educational loan debt. Therefore, it may not be appropriate to use the estimated loss formula for all cases involving overawards. However, these circumstances do not exist in the instant proceeding. Since CBU could collect the overaward amount directly from the students rather than having the students owe it to their FFEL lenders, the students are not benefitted by the institution reimbursing the lenders for the amount of the overaward.See footnote 8 *8* Further, this tribunal has already allowed the use of the estimated loss formula in a case involving overawards. *See In Re Hallmark Institute of Technology*, Docket No. 94-127-SP, U.S. Dep't of Educ. (August 23, 1995). It is clear from the *Hallmark* decision that the FFEL overawards also resulted from the institution's failure to include other financial aid the students received in calculating the amounts of their FFEL loans. *Id*. at 6.

According to SFAP's articulated policy, there is no reason to deny the use of the estimated loss formula for the FFEL liabilities identified in FPRD Findings # 2 and # 4. Further, pursuant to SFAP's guidance, since this case involves a large number of loans, the use of the estimated loss formula is the mandated method to calculate an institution's FFEL loan liability. In the past, SFAP has proposed using the estimated loss formula in cases very similar to the one before me. Although SFAP argues that use of the estimated loss formula will never be "completely standardized," this should not be used as an excuse to deny the use of the formula in clear contradiction of its own policy, as discussed in this decision, and in the absence of a valid

articulated reason.See footnote 9 9 Therefore, I find that the use of the estimated loss formula is appropriate for the FFEL liabilities in both these findings.

The issue of whether the estimated loss formula may be applied to Perkins loan liabilities has been brought before this tribunal. SFAP argues that the use of the estimated loss formula is not permitted as a matter of law and is also impracticable. (Tr. at 37). SFAP argues that the Perkins Loan Program, a campus-based loan program, in which the funds loaned out by the institution are Federal monies, is very different from the FFEL program. (Tr. at 37). According to SFAP, since the institution is the lender under the Perkins Loan Program, there is no difficulty in getting the "lender" to agree to sell the loan to the institution under a repurchase remedy. (Tr. at 38). Additionally, SFAP explains that FFEL cohort default rates would not be applicable to Perkins loans and that there is no reason to assume that Perkins default rates are a reliable substitute since these rates are not tested by an appeal process. CBU argues that the applicability of the formula is a question of logic and fairness. (Tr. at 26). CBU admits that there is no precedent addressing whether or not the formula should be applied to Perkins loans, but argues that there is no reason not to apply it to Perkins loans. (Tr. at 26).

The estimated loss formula was developed by SFAP as an alternative method to calculate liability for ineligible FFEL loans. The formula is specifically tailored to calculate SFAP's loss in default costs and the interest and special allowances (ISA) paid to lenders for improperly disbursed FFEL loans. In the Perkins Loan program, the institution acts as the lender drawing on a pool of Federal funds at its disposal. There are no loans made by private lenders that are, in turn, guaranteed by state guaranty agencies, and, ultimately by the Federal government. Simply put, the estimated loss formula does not, in any respect, contemplate the loss to SFAP from improperly disbursed Perkins loans. Since the Perkins loan fund is composed entirely of Federal monies, reimbursement of the fund is the only way to make the Department whole. Further, federal regulation specifies that an institution reimburse the Perkins loan fund for ineligible overawards. 34 C.F.R. § 674.13(a)(1) (1991). As such, I find that SFAP's existing estimated loss formula is not applicable to Perkins loan liabilities.

The parties have argued over which cohort default rate should be used to calculate the estimated loss liability: an average of several cohort default rates, the cohort default rates

spanning the program review period, or the most recent cohort default rate. SFAP states that in this and any future case, it will use the rates applicable to the period under review, if final, or, if not, the most recent cohort default rate. To this end, SFAP used the FY 1992 cohort default rate for the FFEL loans made during the 1991-92 award year and the FY 1993 cohort default rate for the FFEL loans made during the 1992-93 and 1993-1994 award years. At oral argument, SFAP also argued that an institution's pre-publication default rate should never be used because it is not a final rate. (Tr. at 41). CBU asks that an average of the institution's cohort default rates from fiscal year (FY) 1989 through FY 1993 be used.See footnote 10 *10*

In prior cases, this tribunal has used both a single cohort default rate and an average of several cohort default rates to calculate estimated loss liability. In utilizing either of these two approaches, this tribunal has endeavored to use the best available evidence to determine SFAP's loss. As stated by CBU, very few of the students at issue in the FPRD have yet to enter repayment on their FFEL loans. (Tr. at 48). The use of any past cohort default rate(s) to estimate future defaults is, therefore, necessarily speculative. SFAP's stated policy on which cohort default rate to apply is reasonable. The policy connects the estimated loss liability with the program review period or, if a cohort default rate has yet to be issued for the program review period, the most recent rate. This tribunal does not intend to continue muddying the waters by creating a hybrid or "average" default rate based on several years of cohort default rates. CBU's proposal that this tribunal use cohort default rates going back to the institution's FY 1989 cohort default rate is also rejected because

CBU's older rates are too remote from the program review period. Therefore, since SFAP's policy regarding which cohort default rates to use in calculating the estimated loss formula is reasonable, this tribunal will follow SFAP's stated policy.

Another dispute concerning estimated loss liability is the calculation of the ISA the Department pays to lenders for subsidized Stafford loans. The Department is required to make interest subsidy payments until the borrower enters repayment while the special allowance payments continue over the life of the loan . 20 U.S.C. §§ 1077(a)(g)(2), 1078(a)(3)(A)(i), 1087- 1(b)(2)(E) (1991). These ISA payments are intended to compensate lenders for their loss of interest payments during the period when payments from subsidized borrowers are deferred and to ensure a reasonable rate of return on these loans. *In Re Student Loan Marketing Association (Sallie Mae)*, Docket No. 96-23-SL, U.S. Dep't of Educ. (September 26, 1996) at 4. SFAP argues that, in order to fairly compensate SFAP for its loss, the ISA should be calculated utilizing the steps contained in the estimated loss worksheet. CBU claims that SFAP should only be allowed to claim the ISA liability identified in the FPRD since CBU had no notice of any additional ISA amounts now claimed by SFAP. CBU asserts that this tribunal has, in the past, calculated the estimated default costs and simply added the ISA identified in the FPRD or that it did not add ISA costs at all.

The estimated loss formula is intended to calculate the Department's estimated payments in interest subsidies and special allowances for the life of the ineligible subsidized Stafford loans.See footnote 11 *11* Since SFAP proposed a repurchase remedy for the ineligible FFEL loans in the FPRD, it totaled the ISA in accordance with the repurchase of the loans. These ISA figures listed in the FPRD do not correspond to the ISA the Department spends on loans that are not repurchased. Thus, the FPRD's ISA figures should not be used since estimated loss will be used to calculate CBU's liability.See footnote 12 *12* CBU's argument that it was not given notice of the increased ISA costs when it requests use of the formula is categorically rejected. If CBU wishes the formula to be applied, it must accept that the ISA will be calculated in conformance with the estimated loss formula. CBU cannot pick and choose among the parts of the formula it finds the most beneficial. If the estimated loss formula is used, it must be used in its entirety. Thus, if SFAP's remedy changes from repurchase to estimated loss, it will necessitate changes in the ISA calculated in the FPRD. Moreover, an analysis of the worksheet reveals that if the default rate which this tribunal uses to calculate estimated loss changes, the calculation of ISA in Steps 4a and 4b of the estimated loss worksheet should also change. Therefore, even if SFAP proposes use of the formula in the FPRD and calculates the ISA liability accordingly, these ISA figures must be adjusted if the tribunal determines that an alternate default rate should be used.See footnote 13 *13*

Finding # 2

If an institution has reason to believe that the information included on the student's financial aid application is inaccurate, the institution may not disburse any Pell Grant or Campus- based funds to the applicant, certify any FFEL loan application or process any loan proceeds for a previously certified FFEL loan. 34 C.F.R. § 668.58(a)(1) (1991). If the institution does not have reason to believe that the information included on the student's financial aid application is inaccurate prior to verification, the institution may withhold payment of a Pell Grant, campus- based funds or may make one disbursement of a Pell Grant, Perkins loan, NDSL, SEOG funds for the student's first application period. 34 C.F.R. § 668.58(a)(2)(i) and (ii) (1991). An institution, however, remains liable for any overpayment discovered as a result of the verification process to the extent that the overpayment is not recovered from the student. 34 C.F.R. § 668.58(b) (1991).

An institution may withhold certification of the applicant's FFEL loan application or it may certify the loan application provided that it does not process the loan proceeds. 34 C.F.R.
§ 668.58(a)(2)(iii)(A) and (B) (1991). If the applicant does not complete the verification process within 45 days, the institution must return the loan proceeds to the lender. 34 C.F.R. § 668.58(c) (1991).

In FPRD Finding # 2, for the students listed in Appendix D, SFAP assessed liability for Pell Grant overawards because the applications for these students appeared to be accurate. For the students listed in Appendix E whose applications did not appear accurate, SFAP assessed liability for all Title IV funds awarded to these students. SFAP argues that its measure of liability is consistent with federal regulations. SFAP further argues that it is often impossible to determine how much aid a student would have received had the student provided complete and correct information.

Also, SFAP asserts that if institutions were only held liable for overawards for students whose applications were facially inaccurate, there would be no incentive for institutions to identify and resolve inaccuracies.

CBU presents numerous arguments as to why the liability is overstated for Finding # 2. First, CBU argues that the liability should be reduced to reflect the additional information that reveals that Title IV funds were properly disbursed to eight students and a difference of only $50.00 exists for a ninth student.See footnote 14 *14* Second, CBU argues that since SFAP did not assess liability for SEOG or FFEL loan funds for the students listed in Appendix D, SFAP should not be allowed to claim liability for these funds for the Appendix E students. Third, CBU argues that it should be able to use a 27 percent error rate developed from CBU's reverification process of the students listed in Appendix D to calculate the liability for the Appendix E students. Thus, SFAP should only be able to claim the Pell Grant decreases that would have been likely if verification had been complete for the 58 remaining students in Appendix E. Fourth, CBU argues that it was not legally obligated to conduct a full file review since it is only required to verify 30 percent of its student files. According to CBU, the students listed in Appendix E were above the 30 percent limit. Therefore, CBU cannot be held liable for these students.

Subpart H proceedings were intended to assess liability when an institution misused funds. This tribunal has held that there must be some harm to SFAP in order to assess liability. *In Re Macomb Community College*, U.S. Dep't of Educ., 91-80-SP, (May 5, 1993) at 7; *In Re Chicago State University*, Docket No. 94-172-SA, U.S. Dep't of Educ. (April 26, 1996) at 5. In *In Re Chicago State University*, this tribunal reduced the liability for the students the institution was able to demonstrate were eligible to receive Title IV funds despite financial aid folders that previously contained missing or incomplete information. *Id*. at 5. CBU submitted evidence that

Title IV funds were properly disbursed to nine students. SFAP did not challenge the substance of this evidence, it merely argued that CBU's reverifications come too late and that this late evidence does not demonstrate that these students' files were reviewed at the time of disbursement. SFAP's argument is, at best, specious. The nature of this proceeding is to assess liability for actual harm. CBU has demonstrated that no harm occurred as to these nine students. Therefore, I find that CBU has met its burden under 34 C.F.R. § 668.116(d) in demonstrating that Title IV funds were properly disbursed to these nine students.See footnote 15 *15*

CBU's argument that only Pell funds should be recoverable for the students listed in Appendix E since SFAP only sought repayment of the Pell funds for the Appendix D students is without foundation. It is clear that the Department is entitled to assess liability for all Title IV funds when an institution disburses funds to students whose student aid applications are facially inaccurate. 34 C.F.R. § 668.58 (1991). Therefore, liability may be assessed for all Title IV aid disbursed to the 58 students at issue in Appendix E.

In a Subpart H proceeding, it is the institution's burden to prove that Title IV funds were properly disbursed. 34 C.F.R. § 668.116(d). Over the course of one year, CBU reviewed almost 2000 files and hired an accounting firm to validate and verify its work. (Tr. at 5-6). CBU argues that in reviewing such a large number of student files and in seeing a consistent pattern where verification reflects a very low error rate, it is reasonable to assume that this error rate is a close estimate of what errors would be found in the unverified files. For reasons unknown to this tribunal, SFAP set a June 21, 1995, completion date for the institution's full file review. By this date, CBU had completed verification of all but 67 student files. Subsequent to the June 21, 1995, cutoff date set by SFAP, CBU completed verification for nine additional students, leaving only 58 unreviewed files. (Tr. at 14). CBU submitted evidence for these nine students which has been accepted by this tribunal. CBU stated that if given additional time, many more of the remaining file reviews would have been completed.

In its brief, CBU correctly argued that the nature of this proceeding allows for the acceptance of evidence, demonstrating that Title IV funds were properly expended, at almost any stage in the process. Therefore, I must question why CBU did not complete the review of the remaining files and submit evidence to SFAP and/or this tribunal regarding the appropriateness of its expenditure of Title IV funds to these 58 students. If CBU had demonstrated that some or all of its expenditures for the 58 students were proper, as it did for the nine students, this tribunal would have further reduced CBU's liability. Since CBU did not submit evidence regarding these 58 remaining students, I find that CBU has failed to meet its burden of proof under 34 C.F.R.
§ 668.116(d).

Pursuant to Section 484(f) of the HEA, the Department cannot require an institution to verify more than 30 percent of the total number of its students who apply for Title IV financial aid

in a given award year.See footnote 16 *16* 20 U.S.C. § 1091(f) (1991). Institutions that participate in the Title IV programs may be required to verify student applicant financial aid information. This verification must be performed when the Secretary of Education directs that random student files be verified, or because the student application contains incorrect, missing, illogical, or inconsistent information. 34 C.F.R. §§ 668.54, 668.56 (1991). SFAP states that the 30 percent limitation only applies if, and when, the verifications were performed before disbursement.

CBU argues that it owes no liability for the students listed in Appendix E because it is not obligated to verify more than 30 percent of its files and these students are above the 30 percent limit. CBU points to an affidavit given by Mr. James Shannon, Director of Student Financial Resources at CBU. In his affidavit, Mr. Shannon stated that he "oversaw and directed the full file review and reconstruction for the ... 1991-92, 1992-93, and 1993-94 [award years]." (Resp. Ex. 4 at 1). Mr. Shannon also stated the full file review revealed that 827 students had been selected for verification over the program review period. (Resp. Ex. 4 at 2).

Although SFAP is prohibited from requiring that an institution verify more than 30 percent of its financial aid applicants for an award year, in a Subpart H proceeding, the institution must still demonstrate that it actually verified at least 30 percent of its applicants. *In Re Fisk University* at 4. In *In Re Fisk University*, the institution submitted evidence that satisfied the tribunal that it verified at least 30 percent of its students during the award years at issue. *Id*. CBU admits that the administration changed after the program review period and that the new administration, including Mr. Shannon, had no personal knowledge regarding whether this verification occurred. CBU has further admitted that its unfamiliarity with which student files were verified before Title IV funds were disbursed was one of the reasons they undertook such a comprehensive and exacting file review. Given his admitted lack of personal knowledge and unfamiliarity with what files were reviewed, Mr. Shannon's statement that at least 30 percent of the files were reviewed before Title IV funds were disbursed, is unpersuasive. I find that CBU has not satisfied its burden of proving that it verified at least 30 percent of its Title IV applicants during the award years in question. As a result, CBU remains liable for the Title IV funds disbursed to the 58 remaining students listed in Appendix E.

FINDINGS

1. CBU incorrectly certified FFEL loan applications, failed to conduct complete verification or failed to resolve conflicting information contained in student files, and disbursed Title IV funds to students who were not maintaining satisfactory academic progress as detailed in FPRD Findings
1, # 2, and # 4.

2. The estimated loss formula will be used to calculate CBU's FFEL and PLUS loan liabilities for FPRD Findings # 1, # 2, and # 4. CBU's liability under the estimated loss formula for all FFEL and PLUS loans is $246,602.See footnote 17 *17*

3. CBU has met its burden in proving that Title IV funds were properly disbursed to nine of the students listed in FPRD Finding # 2.

4. CBU remains liable for the Title IV funds disbursed to the 58 unverified students listed in Appendix E of FPRD Finding # 2.

ORDER

On the basis of the foregoing, it is hereby ORDERED that Christian Brothers University pay to the U.S. Department of Education the sum of $398,341 and reimburse $14,205 to the Perkins Loan fund account.

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Judge Richard I. Slippen

Dated: January 8, 1997

APPENDIX

In calculating the estimated loss, the tribunal relied upon the best available evidence: the liability assessed in the amounts stated in the FPRD and SFAP's Estimated Loss Worksheet submitted in its August 9, 1996, post-hearing submission. I determined that SFAP's policy to use the cohort default rate that corresponds to the program review period was reasonable. To that end, SFAP separated out the FFEL loan liabilities for each year of the program review period and calculated CBU's estimated loss liabilities using CBU's FY 1992 and FY 1993 cohort default rates. However, numerical discrepancies exist between SFAP's breakdown of the FFEL liabilities per finding and per award year and the figures identified in the FPRD. Further, these discrepancies were not corrected by SFAP's second post-hearing submission correcting its first estimated loss calculation. Therefore, I have used only CBU's FY 1992 cohort default rate of 11.1 percent to calculate the estimated loss liability for the entire FFEL liability identified in the FPRD since an exact amount per award year for the program review period was not available.

The following tables illustrate each step in the estimated loss calculation.See footnote 18 *1* In Step 2, the institution's cohort default rate is multiplied against the total amount of ineligible Stafford and SLS loans disbursed during the period at issue. This calculation yields the estimated loss in Title IV disbursements resulting from students defaulting on repayment of an ineligible loan. In Step 3, the amount of ineligible Stafford loans is multiplied against the daily ISA factor determined by SFAP.See footnote 19 *2* This number is multiplied against the average number of days the Department paid loan subsidies to lenders (from disbursement to repayment for 4-year public and private institutions). This calculation is similiarly used under Steps 4a and 4b to determine the special allowance amounts paid to lenders by the Department. Under Step 5, the amounts indicated in the last column of each table are added together to yield the institution's total estimated loss liability.

STEP 2: Estimated Defaults

FFEL Loan Liabilities	Amount of Ineligible Loans	Cohort Default Rate	Estimated Loss from Defaults
Stafford Loans	$653,670	11.1%	$72,557
SLS, Unsubsidized Stafford loans, and PLUS loans	$25,119	11.1%	$2,788

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

Ineligible Subsidized Stafford Loans	Daily ISA Factor	Average Number of Days	Total Subsidy
$653,670	.000247	969	$156,451

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

Ineligible Subsidized Stafford Loans	Cohort Default Rate	Daily ISA Factor	Average Number of Days	Total Allowance
$653,670	11.1%	.0000273	619	$1,226

STEP 4b: Estimated Special Allowance from Repayment to Paid In Full (PIF)

Ineligible Subsidized Stafford Loans Minus Estimated Loss in Step 2	One-half the Result of the Previous Column	Daily Special Allowance Factor	Average Number of Days	Total Allowance

$581,113	290,557	.0000273	1712	$13,580

STEP 5: Total Estimated Loss Liability

Estimated Loss	Subsidies Paid	Special Allowance	PIF	Total Estimated Loss Liability
$75,345	$156,451	$1,226	$13,580	$246,602

SERVICE

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 FFEL includes the Stafford Loan and the Supplemental Loan for Students (SLS) Programs.*

Footnote: 2 *2 For this finding, SFAP required CBU to pay back overawards of FFEL loan funds disbursed to students. Liability for the entire loan amount disbursed to each student was not assessed.*

Footnote: 3 *3 The memorandum was addressed to all Regional Directors and Institutional Review Branch (IRB) Chiefs through Bonnie LeBold, Director, Regional Operations Division, and Howard Fenton, Director, Institutional Monitoring Division, from Shirley Brown, Acting Chief, IRB.*

Footnote: 4 *4 This memorandum was attached to SFAP's August 8, 1996, post-hearing submission. All post-hearing submissions from SFAP and Respondent are admitted into evidence.*

Footnote: 5 *5 The tribunal notes, however, that if an institution wishes to repurchase the FFEL loans, that option should be available.*

Footnote: 6 *6 Although published after the issuance of the FPRD in this case, SFAP has admittedly chosen to limit and define its exercise of that discretion in its estimated loss policy. (SFAP's August 27, 1996, Post-Hearing Submission Response to Respondent's Submissions of August 22 and 23, 1996, at 4.) It is, therefore, strange that SFAP does not wish to follow its own stated policy in this proceeding.*

Footnote: 7 *7 At oral argument, SFAP asserted that if the estimated loss formula were to be applied to overawards, the total amount of the FFEL loans should be used in the calculation, not just the amount of the overawards. However, it would be unfair to hold an institution liable for the properly disbursed portion of the FFEL loans. See generally, In Re Berk Trade and Business School, Docket No. 93-170-SP, U.S. Dep't of Educ. (June 27, 1994) (This tribunal held that fairness dictates that the institution only be held liable under the estimated loss calculation for the amount of loans*

actually disbursed rather than the entire certified amount.)

Footnote: 8 *8 Even SFAP concedes that if forced to repay FFEL lenders for the amount of the overawards, CBU could, in turn, collect this money directly from the student borrowers. (SFAP Brief at 15).*

Footnote: 9 *9 For FPRD Finding # 4, SFAP has claimed that "it is delusional to say that the default rate on students who have failed to maintain ... satisfactory academic progress is going to be as good as the ordinary cohort default rate which includes all different kinds of students. If you are not making it in school, it is more likely you are going to default on your loan." (Tr. at 40). This tribunal has rejected SFAP's attempts to characterize the estimated loss formula, which SFAP itself developed and which has been applied in other cases, as somehow being unfair to SFAP." In Re Fisk University at 6. Moreover, SFAP has, in fact, chosen to use the estimated loss formula in a case involving a SAP violation. In Re Bryant & Stratton Business Institute, Docket No. 94- 190-SA, U.S. Dep't of Educ. (September 16, 1996).*

Footnote: 10 *10 CBU dropped its request that its FY 1994 pre-publication cohort default rate be included in an average of its cohort default rates because SFAP opposed the use of a default rate that was not final.*

Footnote: 11 *11 Since the Department does not pay lenders ISA for unsubsidized Stafford Loans or SLS loans, the estimated loss formula does not add ISA to the default costs for these two loan types. For purposes of calculating the estimated loss, SFAP also treats PLUS loans as SLS loans.*

Footnote: 12 *12 To the extent any prior cases used the ISA quoted in the FPRD under a repurchase remedy rather than the ISA that accrues on ineligible FFEL loans that are not repurchased, these cases used an incorrect ISA calculation.*

Footnote: 13 *13 The tribunal notes that it would also prove useful if SFAP included its estimated loss computation in future FPRDs.*

Footnote: 14 *14 According to CBU, the liability that would be eliminated by this tribunal's acceptance of the evidence that Title IV funds were properly disbursed to these students is $12,380 in Pell Grant funds, $3,100 in SEOG funds, $3,700 in Perkins loan funds, and $26,850 in Subsidized Stafford loans.*

Footnote: 15 *15 This finding excludes the $50.00 liability CBU accepts for one of these nine students.*

Footnote: 16 *16 Section 484(f) was repealed by the Higher Education Technical Amendments of 1993, P.L. 103-208, enacted December 20, 1993. The 30 percent verification limitation was retained by regulation. 34 C.F.R. 668.54(a)(2)(i) (1995).*

Footnote: 17 *17 See attached appendix.*

Footnote: 18 *1 Step 1 of the Estimated Loss Worksheet is not being done because this is not a case where a sampling error needs to be extrapolated to a universe of loans.*

Footnote: 19 *2 ISA payments are not applicable to the SLS loan program. For purposes of the estimated loss formula, unsubsidized Stafford loans and PLUS loans are treated as SLS loans.*
