THE SECRETARY OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

ALADDIN BEAUTY COLLEGE
#21 & #26,
Respondent.

Docket No. 97-109-ST; 97-157-ST
Student Financial
Assistance Proceeding

DECISION OF THE SECRETARY

Procedure

The U.S. Department of Education, Office of Student Financial Assistance Programs (SFAP), terminated Respondent from participation in programs authorized under Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1070 et seq. Respondent appealed. On July 1, 1998, Judge Richard F. O'Hair upheld SFAP's decision to terminate Aladdin, finding that Respondent's cohort default rate (CDR) exceeded 40 percent, as prohibited by 34 C.F.R. § 668.17 (a)(2).

Rule of Law

The applicable regulations in this proceeding provide, in pertinent part that:

> The Secretary may initiate a proceeding under the subpart G of this part to limit, suspend, or terminate the participation of an institution in the Title IV, HEA programs, if the institution has a FFEL Program cohort default rate ... that exceeds 40 percent for any fiscal year.
>
> 34 C.F.R. § 668.17(a)(2)

> .. [I]f the hearing official finds that the institution's FFEL Program cohort default rate .. meets the conditions specified in § 668.17(a) (2) and (3) for initiation of limitation, suspension or termination proceedings, the hearing official also finds that the sanction sought by the designated department official is warranted, except that the hearing official finds that no sanction is warranted if the institution presents clear and convincing evidence demonstrating that the FFEL Program cohort default rate ... on which the proposed action is based is not the final rate determined by the Department and that the correct rate would result in the institution having an FFEL cohort default rate ... that is beneath the threshold ...
>
> 34 C.F R. § 668.90(a)(3)(iv)

Mitigating Factors

On appeal, Respondent claims that the Initial Decision's order of termination should be reversed. Respondent first argues that under the authority of In the Matter of Cannella Schools of Hair Design (Cannella), Dkt. No. 95-141-ST (March 20,1997), two mitigating circumstances should be considered to avoid its termination: 1) the school's implementation of default reduction measures under Appendix D and; 2) the school's 1995 CDR, which was below 40 percent.

In response, SFAP states that Respondent's claims are meritless. SFAP argues that Cannella does not support the consideration of mitigating factors in this case. I agree. In In the Matter of Aladdin Beauty College #32, Dkt. No. 97-108-ST (December 15, 1997), affirmed by the Secretary (August 20, 1998) the school contended that its implementation of default reduction measures should be considered to mitigate against termination. In that proceeding I dismissed Aladdin's argument stating, "[t]he circumstances in Cannella are unique and not applicable in the case at hand." Decision of the Secretary at 2. Cannella is also not relevant in the instant matter. In the instant case, Judge O'Hair properly found that Aladdin's implementation of default reduction measures was not a discretionary act, but instead is required under 34 C.F.R. § 668.17(b)(1994) since Respondent's CDR exceeded 20 percent. Thus, the fact that Aladdin implemented such measures should not be considered as a factor that mitigates against the school's termination and Aladdin should not benefit from its mandatory compliance with this regulatory requirement.

The second mitigating factor that Respondent presents for consideration is its1995 CDR, which was below 40 percent. Aladdin argues that this lower CDR is evidence that the school is able to properly administer Title IV programs. SFAP disagrees contending that Aladdin's CDR history must be considered as a whole. SFAP points out that Aladdin # 21's CDR exceeded the statutory threshold of 25 percent from 1990 through 1992. As a result, the school lost its eligibility to participate in the FFEL programs in August of 1996. Aladdin #26 also lost its FFEL eligibility in September 1996 because its CDR exceeded the statutory threshold of 25 percent from 1990 through 1992. SFAP argues that this pattern of high cohort default rates cannot be mitigated by one year of a lower rate. One year of a lower cohort default rate, weighed against the school's CDR history, does not negate Aladdin's failure to properly administer the Title IV program at issue.

Invalid Regulation

Secondly, Aladdin claims that the applicable regulation, 34 C.F.R. § 668.90, violates the Administrative Procedures Act (APA), 5 U.S.C. § 701 et seq., and is therefore invalid. Specifically, Aladdin contends that the Department failed to adequately consider the public comments concerning the elimination of the Appendix D defense. On the contrary, the Secretary adopted this regulation in full compliance with the APA requirements, after full consideration of public comments and with sound rationale. The Appendix D defense was eliminated in accordance with the underlying

principle that the implementation of default reduction measures by an institution does not justify the continued participation of a high cohort default rate institution in the Title IV programs. *See* 60 Fed. Reg. 183, 49184 (September 21, 1995). Furthermore, it well established, as cited by SFAP, that the Secretary and the hearing official are bound to adhere to the agency's rules and regulations. *See* SFAP Brief at 8-9. Therefore, the duly adopted regulation, 34 C.F.R. § 668.90, has been properly applied to the facts in the instant case and the Respondent's claim that the applicable regulation is invalid is without merit.

Standard of Review

Regulation 34 C.F.R. § 668.90(a)(3)(iv) eliminated the Appendix D defense, which shielded schools from termination if default reduction measures were diligently implemented. SFAP claims that "the elimination of the Appendix D defense strictly limits the hearing official's scope of review in this type of termination proceeding to two factors: 1) whether it is clear and convincing that the rate is final as determined by the Department, and 2) whether it is clear and convincing that the rate is beneath the 40 percent threshold." SFAP Appeal Brief at 4. SFAP narrowly construes this standard of review. The appropriate standard of review should be applied as follows:

> Regulation 34 C.F.R. § 668.17(a)(2) provides that the Secretary may initiate a proceeding under Subpart G if an institution has a CDR that exceeds 40 percent for any fiscal year. During such a proceeding, SFAP must show that it has correctly calculated the cohort default rate for the institution and that it does indeed exceed 40 percent. The institution can prevail on appeal by establishing through clear and convincing evidence that the CDR calculated by SFAP is not the correct final rate, and that the correct rate would be less than the 40 percent threshold. 34 C.F.R. § 668.90 (a)(3)(iv).

In accordance with the applicable regulations, the Administrative Judge must first determine whether SFAP has shown that the CDR was correctly calculated. 34 C.F.R. § 668.17(d). Thus, while the Administrative Judge may not reconsider the substance of any pre-deprivation proceeding, the Judge should render a determination that the loans at issue did, in fact, default during the fiscal year in question, and were properly included in the subject cohort default year.

The Administrative Judge should determine whether SFAP has shown that the CDR was calculated in a manner consistent with the definition of a CDR. *See* 34 C.F.R. § 668.17(d). In addressing this factor, the Administrative Judge should examine whether SFAP presented probative evidence that the elements noted in the CDR definition are met, including whether the minimum number of students entered repayment status for the fiscal year at issue, as required by the HEA. If disputed, the Administrative Judge must also determine whether the institution established, by clear and convincing evidence, that the rate used for the proposed action is not the final rate and that the actual CDR does not meet or exceed the regulatory threshold. 34 C.F.R. § 668.90(a)(3)(iv); 34 C.F.R. § 668.17.

Although, it appears that Judge O'Hair did not apply the above standard of review in the case at hand, this tribunal has conducted the proper review. Therefore, remand is not necessary. The appropriate review of Aladdin # 21 and Aladdin # 26 revealed that each school's CDR for 1994 is 43.3 percent and 42 percent, respectively.

Findings

1. Respondent's implementation of default reduction measures does not mitigate against its termination.

2. Respondent's 1995 CDR does not mitigate against its termination.

3. Regulation 34 C.F.R. § 668.90 was adopted in full accordance with the APA requirements and was correctly applied in this case.

4. The cohort default rates for Aladdin # 21 and # 26 are 43.3 percent and 42 percent, respectively.

Accordingly, Judge O'Hair's decision to terminate Respondent's eligibility to participate in Title IV programs is hereby affirmed.

So ordered this 1st day of December, 1999.

Washington, DC

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