THE SECRETARY OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

WESTCHESTER SCHOOL OF BEAUTY CULTURE,

Docket No. 98-97-ST
Student Financial Assistance Proceeding

Respondent.

DECISION OF THE SECRETARY

Procedure

Westchester School of Beauty Culture (Respondent) is a postsecondary vocational school that operates within the State of New York. The institution filed this appeal challenging the Initial Decision issued by Administrative Judge Frank K. Krueger, Jr. Judge Krueger determined, on the basis of the institution's excessive fiscal year 1994 cohort default rate, that Respondent must be terminated from participation in Title IV programs pursuant to the Department's regulations and the Higher Education Act of 1965 ("HEA"), 20 U.S.C. § 1070 *et seq.*

On January 8, 1998, the Office of Student Financial Assistance Programs (SFAP) notified Respondent that its Federal Family Education Loan (FFEL) Program cohort default rate (CDR) for fiscal year (FY) 1994 was 43.8 percent. As a result of Respondent 's appeal under the procedures provided under 34 C.F.R. § 668.17(h), the institution's CDR was reduced to 42.7 percent. Under 34 C.F.R. § 668.17(h), an institution has the right to challenge the calculation of a CDR through a "pre-deprivation" appeal process. In a pre-deprivation appeal, the institution may challenge, *inter alia*, the accuracy of the data used to compute the CDR - - known as an erroneous data appeal - - or may challenge the propriety of including a given loan in the calculation of the CDR - - known as a loan servicing appeal. In the case at bar, the record reveals that Respondent pursued two unsuccessful pre-deprivation appeals with regard to its FY 1994 CDR. As a result of those final agency determinations, Respondent's eligibility to participate in the FFEL program was terminated. Thereafter, Respondent filed a timely request for a hearing under 34 C.F.R. Part 668, subpart G to challenge the proposed termination.

Issue

The issue on appeal is whether SFAP correctly determined that Westchester's cohort default rate meets the conditions set forth in 34 C.F.R. § 668.17(a)(2) and (3) and, if so, what sanction is warranted. The parties dispute whether the Administrative Judge followed the proper standard of review set forth under 34 C.F.R § 668.17, concerning a CDR appeal. Accordingly, my review of this case will set forth the appropriate standard of review.

Rule of Law

Regulation 34 C.F.R. § 668.17 (a)(2) provides that the Secretary may initiate a proceeding under Subpart G (Fine, Limitation, Suspension, and Termination proceedings) if an institution has a cohort default rate 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 at this point may exercise their right to request a hearing, but if the Hearing Official finds that SFAP has accurately determined that the institution's CDR is above 40 percent, then the Hearing Official must find the sanction sought by SFAP is warranted. 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 40 percent threshold. 34 C.F.R. § 668.90(a)(3)(iv).

Discussion

On appeal to this tribunal, Respondent contends that the Administrative Judge erred in finding that he had no "jurisdictional authority to evaluate the integrity of the CDR [a]ppeal process." Respondent also contends that the Administrative Judge failed to evaluate the "correctness" of SFAP's calculation of the CDR.

In his Initial Decision, the Administrative Judge determined that he was prevented from considering whether SFAP had applied the correct legal standard in its calculation of the institution's CDR. Judge Krueger noted that his determination was based on the relevant regulations and my decision in *In the Matter of Aladdin Beauty College #32,* Dkt. No. 97-108-ST, U.S. Dep't Educ. (August 20, 1998) (*Aladdin*). Applying this standard of review, the Administrative Judge summarily found that "SFAP made a final determination under 34 C.F.R. § 668.17 (1997) that Respondent's FFEL program cohort default rate for fiscal year 1994 was 42.7 percent." Judge Krueger concluded that "SFAP seeks an order terminating Respondent's eligibility" and, therefore, "Respondent is terminated from participation in all programs authorized under Title IV of the Higher Education Act."

The *Aladdin* decision expressly held that "once a final determination is made that a school's default rate exceeds 40 percent, the Hearing Official must order the sanction sought by

SFAP."[1] In that decision, I also rejected the tribunal's invitation to remand the case to the Administrative Judge for an evidentiary hearing on whether to impose a remedy other than the one sought by SFAP. To determine what sanction is warranted under a section 668.17 CDR appeal, the judge can choose not to impose a sanction, if the institution rebuts SFAP's case, or impose the sanction sought by SFAP, if SFAP shows that the CDR meets the conditions in 668.17(a)(2) and (3). In other words, my decision in *Aladdin* made clear that in a CDR appeal, the court has no discretion to select among a range of sanctions as it may in other subpart G actions.[2] Accordingly, I rejected Aladdin's argument that its presentation of mitigating circumstances should warrant the imposition of a fine or some other remedy. Considerations regarding potential mitigating circumstances are not properly before the court in a CDR appeal.

Under the applicable regulations, the court must first determine whether SFAP has shown that the CDR was correctly calculated. 34 C.F.R. § 668.17(d). In other words, 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. Accordingly, the court should begin this assessment by determining 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 court should note whether SFAP presented probative evidence that the elements noted in the CDR definition were met, including whether the minimum number of students entered repayment status for the fiscal year at issue as required by the HEA. In the instant case, the parties vigorously dispute the number of loans that entered repayment in FY 1994. Therefore, I am hesitant to rule on this matter without the benefit of the lower court's fact-finding.

Second, the court must determine whether the institution established, by clear and convincing evidence, that the rate used for the proposed action is not the final rate, and therefore

---

[1] This determination is consistent with 34 C.F.R. § 668.17(h)(3)(v)(vii), which similarly provides that improper loan servicing or collection appeals are final agency decisions subject to judicial review. Respondent, along with two other vocational education schools, exercised its right to challenge the pre-deprivation proceedings regarding the institution's CDR for fiscal years 1991, 1992, and 1993 in court in *Calise Beauty School, Inc., v. Riley,* 941 F.Supp. 425 (1996) (*Calise).* While the court's guidance in *Calise* is instructive, Respondent is incorrect in its position that *Calise* is relevant to the outcome of this case. *Calise* is limited to the issues in pre-deprivation proceedings.

[2] 34 C.F.R. §§ 668.90(a)(3); sections 668.90(a)(3)(i), 668.90(a)(3)(v), 668.90(a)(3)(vi), and 668.90(a)(3)(vii), all restrict the Administrative Judge to the finding that the sanction sought is the one warranted. The fact that these provisions prescribe a specific remedy does not alter the requirement that the tribunal engage in fact-finding under the relevant circumstances.

no sanction is warranted.[3] 34 C.F.R. §668.909(a)(3)(iv). This is clearly an evidentiary issue that should require the court to engage in fact-finding. SFAP improperly broadens the language of section 668.90(a)(3)(iv), by arguing that the provision not only reallocates the burdens of proof in a Subpart G proceeding but also ostensibly removes its need to present a prima facie case in a CDR appeal, and binds the court to upholding the proposed Notice of Termination.[4]

Finally, the court must rule on whether the institution established that the final CDR did not meet or exceed the regulatory threshold that would subject the institution to further action, such as termination. 34 C.F.R.§ 668.17.

Although Judge Krueger may be correct in his determination that Respondent must be terminated from participating in Title IV programs, the Initial Decision in this case provides insufficient detail to allow me to uphold the court's determination. Upon remand, the court should reconsider its decision in light of the standard of review set forth above. Based on the record before me, I remand this case to the Administrative Judge for further proceedings consistent with this decision.

So ordered this 16th day of August 1999.

Richard W. Riley

Washington, D.C.

[3] Respondent may prevail in a CDR appeal, if it persuades the tribunal by clear and convincing evidence that the CDR on which the proposed action is based is not final, and that the correct CDR is below the regulatory threshold.

[4] *See, In the Matter of Hair Design Institute,* Dkt. No. 97-122-ST (July _, 1999)(clarifying one of the important purposes of the regulatory change in the CDR appeal process).

Docket 98-9757

SERVICE LIST

Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, D.C. 20202

Pamela Gault, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110

Ronald Holt, Esq.
Watkins, Boulware, Lucas, Miner, Murphy & Taylor, LLP
Suite 600 North Pointe Tower
10220 North Executive Hills Blvd.
Kansas City, MO 64153