IN THE MATTER OF LITTLE FRENCH BEAUTY ACADEMY,
Respondent.

Docket No. 91-62-ST
Student Financial Assistance Proceeding

DECISION

Appearances: James Fox, Esq., Jory & Smith, for the Little French Beauty Academy.

Donald C. Philips, Esq., Office of the General Counsel, for the Office of Student Financial Assistance, United States Department of Education.

Before: John F. Cook, Chief Administrative Law Judge.

I. PROCEDURAL BACKGROUND

On August 1, 1991, the Director of the Division of Audit and Program Review, Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (Education) issued a notice as to a review of a July 23, 1991 action taken by the Higher Education Assistance Foundation (HEAF) in terminating the eligibility of the Little French Beauty Academy (LFBA or Little French) to participate in the loan guarantee programs administered by HEAF.

The August 1, 1991, notice informed LFBA of OSFA's intent to review HEAF's July 23, 1991, termination of eligibility in order to determine whether LFBA should be disqualified nationwide from further participation in the Stafford Loan Program, the Supplemental Loans to Students Program, and the PLUS Program.

On August 14, 1991, LFBA filed a request for hearing concerning the August 1, 1991, notice as to review of the HEAF termination action.

Pursuant to a prehearing order and an order based upon a joint motion to extend a filing deadline, LFBA and OSFA filed briefs and a joint statement as to stipulations and issues.

A notice of hearing was sent on August 11, 1992, setting the hearing for September 29, 1992. A telephone conference was held with both counsel on August 18, 1992, at which time both counsel agreed to submit a joint motion setting out a schedule for written presentations in lieu of a hearing.

On October 1, 1992, the parties submitted their joint motion. The order granting a joint motion for continuance and entry of scheduling order was issued on October 5, 1992. Pursuant to that

order the parties filed supplemental briefs. The last brief was filed by OSFA on November 23, 1992.

II. ISSUES

A. Did HEAF take action on the basis of substantive agency requirements regarding eligibility that were not more onerous than those in effect for schools participating in the Federal Insured Student Loan Program as of January 1, 1985?

B. Did HEAF take that action in accordance with procedures that were substantially the same as those that govern the limitation, suspension, or termination of a school's eligibility under the Federal Insured Student Loan Program?

C. Are the factual findings of HEAF insupportable as a matter of law?

III. EXHIBITS

Neither party has objected to the authenticity or admissibility of the exhibits offered herein.

A. OSFA's Exhibits

Ex. E-1. Cover letter and program review report performed by HEAF detailing the findings resulting from a Program Review at Little French. Since Little French's disqualification is based upon the findings set forth in the Program Review, OSFA submits that all pages are relevant to this proceeding.

Ex. E-2. Little French's first response.

Ex. E-3. HEAF's reply dated November 21, 1990.

Ex. E-4. HEAF's second reply dated January 28, 1991 (best copy available).

Ex. E-5. Little French's response dated February 27, 1991.

Ex. E-6. HEAF's April 23, 1991 response.

Ex. E-7. HEAF's June 6, 1991 response.

Ex. E-8. Little French's June 25, 1991, one page acknowledgement and notice that specific responses will be forthcoming.

Ex. E-9. HEAF's Notice of Intent to Terminate Little French's participation in their programs and HEAF's procedures regarding, inter alia, termination actions.

Ex. E-10. HEAF's notice of termination dated July 23, 1991.

Ex. E-11. HEAF's notice to OSFA regarding Little French's termination.

Ex. E-12. OSFA's letter of intent to disqualify Little French's national participation dated August 1, 1991.

Ex. E-13. Little French's request for review dated August 14, 1991.

Ex. E-14. Notice of Little French's request for review from OSFA to the Office of Hearings and Appeals, dated August 22, 1991.

Ex. E-15. Seriatim Listing of Violations charged by HEAF with copies of (a) Substantive HEAF requirements applied (Statutes and Regulations), and (b) Corresponding FISLP

substantive requirements as of January 1, 1985 (Statutes and Regulations).

Ex. E-16. Declaration of Howard Fenton.

Ex. E-17. Declaration of Wendie J. Doyle.

Ex. E-18. Second Declaration of Wendie J. Doyle.

Ex. E-19. No Exhibit

Ex. E-20. FISLIP Procedural Regulations as of January 1, 1985.

B. Little French's Exhibits

Ex. R-1. Little French Beauty Academy's February 27, 1991 Response to HEAF's Findings.

Ex. R-2. June 25, 1991 Letter from Nancy F. Smith, President of Little French Beauty Academy, to Michael S. Nelson.

Ex. R-3. October 11, 1991 Letter from Linda S. Schnautz, Certified Public Accountant, to Jory & Smith, Attorneys at Law, evidencing her commitment to complete an audit by October 31, 1991.

Ex. R-4. Affidavit of Nancy F. Smith dated September 29, 1992.

Ex. R-5. Affidavit of Nathaniel G. Jackson dated November 11, 1992.

Ex. R-6. Audit of Student Loan Program conducted by Linda S. Schnautz, C.P.A.

Ex. R-7. Affidavit of Nancy F. Smith dated November 12, 1992.

Ex. R-8. Copy of Revised Catalog for Little French Beauty Academy dated July 1991.

IV. FINDINGS OF FACT AND OPINION

A. STIPULATIONS OF FACT See footnote 1

1. On October 9, 1990, HEAF issued a program review report of Respondent's private for-profit vocational institution (Little French). E-1.

2. The report was based on a program review conducted by HEAF on July 24 and 25, 1990, at the institution. Id.

3. The review covered institutional activity as of June 30, 1990, and contained thirteen pages of seventeen detailed findings and comments. Id.

4. In a letter dated November 3, 1990, Little French responded to HEAF's Program Review. E-2.

5. Little French's response answered some, but not all, of HEAF's concerns. In a letter dated November 21, 1990, HEAF explained its continuing concerns and requested additional information. E-3.

6. On January 28, 1991, HEAF gave Little French until February 8, 1991 to address the concerns of the October 1990 Program Review. This letter asked for responses to all seventeen program findings. This letter mentioned the possibility of some Limitation, Suspension or Termination if Little French's response was inadequate. E-4.

7. Almost three weeks after this deadline had passed, Little French finally responded to HEAF's inquiry in a letter dated February 27, 1991. E-5.

8. This response was also inadequate and in a letter dated April 23, 1991, HEAF gave Little French a fourth opportunity to address the guaranty agency's concerns. In this letter, Little French was notified that an insufficient response could lead to administrative action by the guaranty agency. E-6.

9. Little French did not respond.

10. On June 6, 1991, HEAF gave Little French 15 days to address HEAF's eight month old issues. Failure to do so would result in administrative action and possible referral to Education for resolution. E-7.

11. Little French acknowledged the inadequacy of its previous responses and made an effort to address HEAF's problems in a one page, two paragraph letter dated June 25, 1991. E-8.

12. On July 3, 1991, HEAF notified Little French of its intent to terminate Little French from participation in HEAF's loan programs (Stafford Student Loans, SLS and PLUS). This action was based on failure to calculate and pay tuition refunds in accordance with Federal regulations together with a general failure to provide any meaningful response to any of the other issues raised during HEAF's program review. E-9.

13. Little French was given until July 18, 1991 to request a hearing in compliance with HEAF procedures. Little French was notified that failure to request review would lead to the school's termination and that the matter would be referred to Education for national disqualification. Id.

14. Little French did not request any review of this determination and, on July 23, 1991, HEAF notified the school that it had been terminated. In the same letter, HEAF notified Little French that the matter was being referred to Education for national disqualification. E-10.

15. In accordance with § 432(h)(3) of the Higher Education Act (20 U.S.C. § 1082(h)(3)), HEAF notified Education of its decision to terminate Little French's participation by letter dated July 24, 1991. E-11.

16. Education sent a notice to Little French's President and Director, Nancy Smith, dated August 1, 1991, informing her that Education would be reviewing HEAF's actions to determine if Little French should be disqualified nationally from further participation in the Stafford Loan Program, Supplemental Loans to Students Program and the PLUS Program. E-12.

17. OSFA notified Ms. Smith that Little French was entitled to a hearing on the determination of the limited issue whether HEAF's actions were taken in compliance with 20 U.S.C. § 1078(b)(1)(T), HEA § 428(b)(1)(T). Id.

18. In a letter dated August 14, 1991, Ms. Smith notified Education that Little French wished to contest the proposed disqualification. E-13.

19. The matter was referred to this tribunal on August 22, 1991. E-14.

20. Although Little French does not dispute that it received the correspondence from HEAF, there is no evidence in the record that Little French actually knew what the effect would be of its failing to request a hearing before an appropriate HEAF

official. (OSFA agrees to this fact's existence by reserves the right to object to its relevance).

21. There also is no affirmative evidence in the record that Little French was actually aware that if it did not request a hearing before an appropriate HEAF official that Little French would be unable to litigate the issues of its termination before Education. (OSFA agrees to this fact's existence but reserves the right to object to its relevance).

B. OPINION AND ADDITIONAL FINDINGS OF FACT

OSFA argues that in In the Matter of Michigan Paraprofessional Training Institute, Docket No. 90-7-ST, U.S. Dep't of Education (Sec. Dec. August 29, 1991), the Secretary of Education (Secretary) stated that a disqualification proceeding under section 432(h)(3) of Title IV of the Higher Education Act of 1965, as amended, (20 U.S.C. 1082(h)(3)) is limited in its scope. OSFA asserts that this tribunal cannot consider the substantive merits of the findings made below by the guaranty agency. OSFA contends that the Secretary's decision requires disqualification if 1) the agency took action on the basis of substantive agency requirements regarding either initial or continuing eligibility that were not more onerous than those in effect for schools participating in the Federal Insured Student Loan Program (FISLP) as of January 1, 1985; and 2) the agency took that action in accordance with procedures that were substantially the same as those that govern the limitation, suspension or termination of a school's eligibility under FISLP. OSFA also points to the Secretary's decision in In the Matter of Aristotle College, Docket No. 89-35-S, U.S. Dep't of Education (Sec. Dec. October 25, 1991). There, the Secretary held that national disqualification was appropriate when an institution, in the exact same manner as here, did not request a hearing after receiving HEAF's termination notice. OSFA Initial Brief at 5-7. OSFA Supplemental Initial Brief at 1-5.

Applying the law to the facts of this case, OSFA claims that disqualification is warranted here. OSFA argues that HEAF took action in accordance with procedures that were substantially the same as those that govern the limitation, suspension, or termination of a school's eligibility under FISLP. In support of this argument, OSFA states that the Secretary has previously held in the Michigan Paraprofessional case that HEAF's action meets the requirements of 20 U.S.C. 1078(b)(1)(T) and in the Aristotle case that HEAF's procedures were adequate even though the institution did not receive or request a hearing before HEAF. OSFA further argues that the HEAF procedures for compliance in its own programs were exactly the same as the FISLP procedures. OSFA also points to the decision on remand in In the Matter of Aristotle College, Docket No. 89-35-S, U.S. Dep't of Education (November 1, 1991), in which the administrative law judge

determined that HEAF's procedural rules governing termination were substantially the same as those that govern the limitation, suspension, or termination of a school's eligibility under the FISLP. According to OSFA, the specific procedures HEAF utilized in the Little French termination comply with both HEAF and Education procedures. OSFA Initial Brief at 7-9. OSFA Reply Brief at 1-2. OSFA Supplemental Initial Brief at 5-8.

OSFA also argues that HEAF provided no restrictions with respect to Little French's eligibility that were more onerous than eligibility requirements for institutions under the FISLP as in effect on January 1, 1985. OSFA argues that Little French's failure to calculate refunds properly and make refunds to lenders or current holders in a timely manner according to applicable federal regulations is by itself a sufficient basis for termination. According to OSFA, Little French's additional failures as set forth in the HEAF program review are additional bases for disqualification. Therefore, OSFA argues, HEAF's termination of Little French should be given national effect. OSFA Initial Brief at 9-12. OSFA Supplemental Initial Brief at 8-12. OSFA Supplemental Reply Brief at 3-4.

In its first two briefs, Little French admits that it has "violated some of the guidelines", but argues that these violations occurred because of a lack of organization and administrative expertise and that these shortcomings have been addressed. The school claims that it intends to completely comply with the regulations and that it has hired a certified public accountant to conduct an audit of its Title IV student assistance program for the period beginning July 1, 1985 through June 30, 1990. Little French contends that even if the procedure followed by HEAF was similar to the procedures under FISLP, the school should not be terminated because termination is warranted only for the most egregious violations. Little French requests this tribunal to reverse the termination and reinstate Little French's participation in HEAF. Respondent's Initial Brief at 1-2. Respondent's Reply Brief at 2-3.

In its Supplemental Reply Brief, Little French argues that OSFA's statements that HEAF took action in accordance with procedures that are substantially similar to those governing the limitation, suspension, or termination of a school's eligibility under FISLP and that the restrictions applied by HEAF were not more onerous than the eligibility requirements for institutions under FISLP, are conclusory. Little French contends that this tribunal must determine whether the factual findings and the decision of the guaranty agency are supportable as a matter of law and whether the guaranty agency correctly interpreted and applied the substantive requirements as a matter of law. Respondent's Supplemental Reply Brief at 1-2.

Little French asserts that OSFA is concerned primarily with

Little French's calculation and payment of refunds. According to Little French, HEAF allowed the school only 60 days to complete the audit required by the program review, while 34 C.F.R. § 668.15 gives the school twelve months to complete this audit. Thus Little French alleges that HEAF prematurely terminated the school. The institution claims that the inappropriate refund calculation policy resulted in no detriment to HEAF, the Department, or the students. Little French argues that most of the findings of the program review relate to minor violations that were immediately resolved. Finally, Little French states that there is no evidence indicating that the school attempted to avoid its obligations or to defraud the government, and that there is no evidence that the school lacks administrative capability or has breached its fiduciary duty. Respondent's Supplemental Reply Brief at 2-5 and 19-20.

The Secretary's decisions in In the Matter of Michigan Paraprofessional Training Institute, Docket No. 90-7-ST, U.S. Dep't of Education (Sec. Dec. August 29, 1991), and In the Matter of Aristotle College, Docket No. 89-35-S, U.S. Dep't of Education, (Sec. Dec. October 25, 1991), are controlling here.

In both Michigan Paraprofessional and Aristotle, the Secretary described the disqualification proceeding under 20 U.S.C. § 1082(h)(3). The Secretary stated:

> The disqualification proceeding is an expedited procedure created by Congress in Section 432(h)(3) of the Higher Education Act of 1965, as amended by Section 402(a) of the Higher Education Amendments of 1986, Pub. L. No. 96-374, 100 Stat. 1263, codified at 20 U.S.C. § 1082(h)(3), which reads as follows--

(3) Review of sanctions on eligible institutions

(A) The Secretary shall, in accordance with sections 556 and 557 of title 5, review each limitation, suspension, or termination imposed by any guaranty agency pursuant to section 1078(b)(1)(T) of this title within 60 days after receipt by the Secretary of a notice from the guaranty agency of the imposition of such limitation, suspension, or termination, unless the right to such review is waived in writing by the institution. The Secretary shall disqualify such institution from participation in the student loan insurance program of each of the guaranty agencies under this part, and notify such guaranty agencies of such disqualification-

(i) if such review is waived; or

(ii) if such review is not waived, unless the Secretary determines that the limitation, suspension, or termination was not imposed in accordance with requirements of such section.

Congress has charged the Secretary with the straightforward duty to disqualify such an institution, unless the guaranty agency's termination action was not imposed in accordance with the requirements of 20 U.S.C. § 1078(b)(1)(T).

20 U.S.C. § 1078(b)(1)(T) reads as follows:

(1) Requirements of insurance program: Any State or any nonprofit private institution or organization may enter into an agreement with the Secretary for the purpose of entitling students who receive loans which are insured under a student loan insurance program of that State, institution, or organization to have made on their behalf the payments provided for in subsection (a) of this section if the Secretary determines that the student loan insurance program- ...

(T) provides no restrictions with respect to eligible institutions (other than nonresidential correspondence schools) which are more onerous than eligibility requirements for institutions under the Federal student loan program as in effect on January 1, 1985, unless-

(i) that institution is ineligible under regulations for the emergency action, limitation, suspension, or termination of eligible institutions (other than nonresidential correspondence schools) under the Federal student loan insurance program which are substantially the same as regulations with respect to such eligibility issued under the Federal student loan insurance program; ....

The plain language 20 U.S.C. § 1082(h)(3) [sic] limits the Secretary's review to whether the guaranty agency's termination was in accordance with 20 U.S.C. § 1078(b)(1)(T). 20 U.S.C. § 1078(b)(1)(T) limits the

appropriate scope of review to an investigation of whether the guaranty agency applied the appropriate standards and procedure in its termination action. While such a review may require a de jure review of the factual findings of the guaranty agency, it is inappropriate to relitigate the underlying facts determined during the guaranty agency action. The ALJ simply does not have

the statutory authority to substitute his judgment for that of the fact finder in the guaranty agency hearing.

The issues to be determined before the ALJ are:

1. Whether the agency took action on the basis of substantive agency requirements regarding either initial or continuing eligibility that were not more onerous than those in effect for schools participating in the Federal Insured Student Loan Program (FISLP) as of January 1, 1985; and,

2. Whether the agency took that action in accordance with procedures that were substantially the same as those that govern the limitation, suspension, or termination of a school's eligibility under the FISLP.

. . . .

Neither the statute, nor the Congressional Record, supports relitigating facts originally considered before the guaranty agency. The factual findings of the guaranty agency are relevant to the Secretary's review only to the extent that they are insupportable as a matter of law.

Aristotle (Sec. Dec.) at 3-5. [emphasis added and in original].

On remand in Aristotle, the administrative law judge discussed the Secretary's rulings in Aristotle and Michigan Paraprofessional. After discussing the issues, the judge stated:

On April 24, 1989, a guaranty agency, the Higher Education Assistance Foundation (HEAF), notified [the institution] that HEAF proposed termination of [the institution's] participation in its guaranteed student loan program. The proposed termination was effective on May 24, 1989, unless [the institution] requested a hearing or submitted written information pertinent to the alleged violations by May 9, 1989. [The institution] did not request a hearing or submit written materials within this period and, accordingly,

the termination was effective on May 24, 1989.

Aristotle (Decision on remand) at 2. Here, just as in Aristotle, HEAF notified Little French that HEAF proposed termination of Little French's participation in its guaranteed student loan program. Little French was given until July 18, 1991 to request a hearing in compliance with HEAF procedures. Little French was notified that failure to request review would lead to the school's termination. Little French did not request any review of this determination and, on July 23, 1991, HEAF notified the school that it had been terminated.

Similar to the termination in Aristotle, HEAF's termination here was based on 17 findings that detailed various violations of 34 C.F.R. Parts 668 and 682 (1990), the then current regulations of the Department governing the substantive rules of the student financial assistance program in general and the guaranteed student loan program in particular.See footnote 2 The then current

statutes and regulations violated by Little French as determined by HEAF and their corresponding regulations in effect as of January 1, 1985, are as follows:See footnote 3

HEAF Violation	HEAF Regulation	FISLP Regulation
1. High Default Rate	668.15	668.17
2. Track Record Disclosure Forms	668.44	No FISLP regulation
3. Refund Calculation Error	668.22, 682.606	668.21, 682.608,.610
4. Failure to Complete 2 Year Audit Req't.	668.23,.24	668.12, 682.612
5. Written Verification Policies	668.53	No FISLP regulation
6. Refund Distribution Policy	668.44	668.43,.45
7. Exit Counseling	682.604	No FISLP regulation
8. Satisfactory Academic Progress	668.14	668.16(e)
9. Family Contributions	682.610	682.612(b)
10. Leaves of Absence	682.605	682.609
11. Cost of Attendance Errors	682.200	682.200
12. Estimated Aid	682.200	682.200
13. Loan Period Dates	HEA § 427A(g)(2)	HEA § 427A(e)
14. Dependency Status	668.2	682.301(d)
15. EVR Reporting	682.610	682.612
16. Student Refund Notification	682.607	682.610

17. Identification of
Title IV Programs 668.43 668.44

Failure to Respond to HEAF Bulletin
HEAF Notice L/S No. 85 682.706

Ex. E-15 at 1-2.

The regulations at issue in findings numbered 1, 4, 6, and 8-17 are identical or substantially similar in all pertinent,

material aspects to their counterpart regulations in effect as of January 1, 1985.

However, finding number 3 does involve substantive agency requirements contained in 34 C.F.R. § 682.606 (1990), which HEAF applied to LFBA, which are more onerous than those in effect for schools participating in FISLP as of January 1, 1985.

OSFA's counsel stated in Ex. E-15 that 34 C.F.R. §§ 668.21, 682.608 and 682.610 (1985), found at Ex. E-15 at 44 to 45, and 57 to 58, were the FISLP regulations of January 1, 1985 which pertain to this violation while 34 C.F.R. §§ 668.22 and 682.606 (1990) found at Ex. E-15 at 17 to 18, and 32 to 33, were the regulations HEAF enforced against LFBA in this proceeding.

It is clear that 34 C.F.R. § 682.606 (1990) contained an additional requirement which was more onerous than those involved in 34 C.F.R. § 682.608 (1985). This is more particularly set forth in 34 C.F.R. § 682.606 (b) (2) and (c) (1990). The manner of description of the violation by HEAF set forth at Ex. E-1 at 2 to 3 indicates that the requirement being enforced by HEAF was a new and additional requirement as to the method of calculation of refunds. The description by HEAF is, in part, as follows:

REQUIREMENT:

The school's lack of awareness of changes in refund regulations is of great concern because it has not been refunding the correct amount. The school is to perform a file review of all student loan recipients who withdrew or were terminated on or after November 1, 1988 and had not reached their scheduled midpoint of 1,000 hours. Although the payment period calculation was required for refunds effective February 3, 1988, the U.S. Department of Education issued a moratorium on liabilities from February 3, 1988 to October 31, 1988 due to confusion surrounding the regulation. Enclosed is a copy of the "Dear Colleague" letter which outlined the requirements for payment period refunding. This review must be performed by a certified public accountant or an independent financial aid consultant. The CPA or consultant hired by the school must be approved by HEAF. The report showing the findings of the file review should be made in the following format: student name, Social Security number, student's start date, last date of attendance, scheduled hours as of last date of attendance total loan amount disbursed, refund amount paid, if any, and the date refunds were made. This file review is due 60 days from the date of this report.

Specifically for [student name], the school is to confirm that the student attended into the second payment period by providing copies of the student's attendance records. If the student did not attend during the second payment period, the school must repay the net amount of the second disbursement. Please make the check payable to HEAF and send it to the reviewer's attention. Upon receipt of the funds, the school will be billed for excess subsidies.

The school's lack of understanding of program requirements even after receiving instructions on the new required procedures in the 1987 cohort default rate letter is of great concern. Because of the potential of incorrectly calculated and, therefore, underpaid refunds, the school is required to include in its file review a review of the files of those students who received or benefitted from a Guarantee Student Loan program loan made for a period of enrollment that began on or after October 1, 1989 and withdrew or were terminated prior to the half-way point in the student's program of study or six months after commencement of the student's program, whichever is earlier, to the date of the school's notification that its 1988 cohort default rate was less than 30%. A report with the results of the review should be made . . . . This report is due to HEAF within 60 days of the date of this report. Additionally, please send front and back copies of the refund checks and copies of the refund calculations for all students on the report.

Ex. E-1-5 [emphasis added].

Under the finding as to the refund calculation errors HEAF also stated as follows: "Additionally, during the period of required prorata refunds, the school was not aware of nor utilizing the prorata method of calculation. The school was required to make this type of refund based on its 1987 cohort default rate of 40.3%." Ex.E-1-4.

These clearly are more demanding refund procedures than existed previously. This then constitutes a situation where HEAF took action on the basis of substantive agency requirements regarding the continuing eligibility of LFBA which were more onerous than those in effect for schools participating in FISLIP as of January 1, 1985.

The question next arises as to whether this issue as to the refund calculations was merely de minimus or whether it is of such import that it substantially affects the foundation upon which HEAF took its action and that consequently HEAF's termination action, minus this issue, is inadequate to serve as the foundation for Education to disqualify LFBA nationwide from further participation in the Stafford Loan Program, the Supplemental Loans to Students Program, or the PLUS Program.

The record indicates that the issue relating to refund's was

the primary basis for HEAF's termination action and therefore the removal of the refund issue results in elimination of the HEAF termination action as a foundation for Education to disqualify LFBA nationwide from further participation in the above mentioned programs.

The fact that the refund issue was the primary basis for HEAF's termination action is shown in several different documents in evidence. First reference should be made to the statement in the

Declaration of Wendie J. Doyle, General Counsel for HEAF, (Ex. E-17) at paragraphs 13 and 14, as follows:

13. A specific violation of federal regulations noted in the July 3, 1991 letter was LFBA's failure to calculate and pay tuition refunds in accordance with federal regulations (Finding Number III).

14. An institution's failure to calculate and pay tuition refunds is one of the most serious and common violations which lead to HEAF's compliance actions. I have been informed and on that basis believe that this finding is also one that is very serious for the Department of Education. Additionally, every HEAF termination that I am aware of has led to national disqualification by the Department of Education. In all of these actions, the institution's failure to calculate and/or pay tuition refunds was a primary basis for HEAF's termination action.

Ex.E-17-4 [emphasis added].

Further evidence that the refund issue was the primary basis of HEAF's termination action is shown in HEAF's Notice of Intent to Terminate of July 3, 1991. Paragraphs two and three state, in part, as follows:

This action results from a number of ongoing and serious problems at the school. HEAF conducted a program review of the school on July 24 and 25, 1990, the results of which were issued in HEAF's program review report dated October 9, 1990. The review found, among other violations of Federal regulations, that the institution has failed to calculate and pay tuition refunds in accordance with Federal regulations. The school was to have hired a certified public accountant (CPA) or independent financial aid consultant to conduct a file review in order determine the total amount of the unpaid refunds. The results of this file review were to be provided to HEAF by December 8, 1990. In a letter dated January 28, 1991, the deadline for the completion of the file review and payment of the liabilities was extended to February 8, 1991. In the

school's response dated February 27, 1991, it indicated it was conducting the required review and would be providing the results of the review within 60 days, or by April 28, 1991. Finally, in the school's June 25, 1991, correspondence to HEAF, the institution indicated that it has just recently engaged a CPA to conduct the file review.

As of the date of this letter, the school has not provided the file review results or payment of the liabilities. Furthermore, the school has not provided any meaningful response to any of the other issues raised during HEAF's program review.

Ex. E-9 at 1 to 2 [emphasis added].

It can be seen that the only violation discussed by HEAF in that notice related to the refunds. One sentence was devoted to all of the remaining 16 violations. That sentence did not even describe any of them.

Also OSFA placed the same primary emphasis upon the refund issue in its August 1, 1991 notice as to the review of the HEAF termination action as follows;

On July 3, 1991, HEAF sent you a notice of its intent to terminate the Academy from further eligibility to participate in the loan programs that it administers. As you know, HEAF's action was based on a program review that it conducted at the Academy on July 24 and 25, 1990. This review indicated, among other violations of Federal regulations, that the Academy failed to calculate and pay tuition refunds in accordance with Federal regulations. The Academy was to have hired a certified public accountant or independent financial aid consultant to conduct a file review in order to determine the total amount of unpaid refunds. As of the date of the termination notice, the Academy had not provided the file review or paid the refunds. Also, the Academy had not provided a meaningful response to the other issues raised during HEAF's program review.

Ex. E-12-1 [emphasis added].

The primary emphasis as to the refund issue is further shown in the briefs of OSFA's counsel. The only issue counsel actually discussed in its initial brief was the one relating to refunds.

Counsel stated, in part: "All that this Tribunal must decide is whether the failure to make proper refunds is a sufficient grounds [sic] for disqualifying an institution from national participation in the student loan insurance programs.

OSFA submits, this finding alone requires this Tribunal to disqualify Little French from participating nationally." OSFA Initial Brief at 11-12. Also in OSFA's supplemental initial brief we find the same emphasis. Almost the same language as quoted above is found at pages 10-11 of that brief. Then counsel stated further: "While OSFA submits that Little French's failure to appeal the refund finding is sufficient basis for the Department to disqualify Little French nationally, the additional findings provide further evidence of 'a number of ongoing and serious problems at the school.'" OSFA Supplemental Initial Brief at 11.

Thus, although the refund issue is discussed, not one of the other 16 issues is actually described by counsel.

It is therefore clear from HEAF's official notice as to termination of eligibility, the statement of HEAF's vice-president and general counsel, OSFA's official notice as the review of the HEAF termination action, and arguments of OSFA's counsel that the primary basis for HEAF's termination action was the refund issue. This issue was based entirely upon new and more demanding requirements that were not contained in the FISLP regulations of 1985. The fact that HEAF found that the application by LFBA of the old requirements had resulted in a payment by LFBA of less than was due for these refunds shows that the new requirements are more onerous than the requirements of 1985.

Therefore the removal of the primary basis for HEAF's termination action results in the elimination of the HEAF action as the foundation for OSFA to disqualify LFBA nationwide from further participation in the loan programs.

There are three other HEAF's findings which can not be considered as the basis for OSFA's action in the present case. The regulations at issue in finding 2, 5, and 7 have a substantive foundation based upon regulations that were not in effect as of January 1, 1985. In view of the determination as to the refund issue these three findings have little effect upon the ultimate determination in this case.

Also in view of the determination as to the refund issue the issue as to the procedural regulations may not seem to be important in this case. However it is considered that, for the record, this matter should be considered.

The judge in Aristotle in discussing the procedural rules, stated as follows:

HEAF's procedural rules governing the termination of a participant's eligibility to participate in its guaranteed student financial assistance program are set

forth in its Bulletin L/S No. 61. Since [the institution] did not request a hearing before HEAF, the only relevant aspect of the HEAF hearing process in this proceeding is limited to HEAF's termination notice rule. In this regard, HEAF's notice requirement . . . is similar in all respects to the Department's notice requirement in effect as of January 1, 1985, which is set forth in 34 C.F.R. § 668.77(b) (1984). That is, a notice must be sent by certified mail, with return receipt requested; it must cite the particulars and consequences of the intended action and identify the alleged violations; the termination shall not be effective not less than 20 days from the date of the mailing of the letter of intent; [sic] and if an institution requests a hearing within 15 days of the mailing date of the notice, the termination date will be automatically delayed until after a final determination is made through the process. Therefore, the second criteria necessary for disqualification is satisfied.

Aristotle (Decision on remand) at 4. As in Aristotle, the institution here did not request a hearing before HEAF, and therefore, the only relevant aspect of the HEAF hearing process in this proceeding is limited to HEAF's termination notice rule. HEAF's Bulletin L/S No. 61 has since been superseded by Bulletin L/S No. 85, which is essentially similar in all material respects. See Ex. E-17-2 (paragraph 4), Ex. E-17 at 8 to 10, and Ex. E-18 at 7 to 9. Therefore, the judge's conclusion is controlling here, and the second criteria necessary for disqualification is satisfied.

The judge in Aristotle further determined, although unnecessary to his decision, that the remaining procedures within HEAF's termination process are also substantially the same as the Department's procedures.

Regarding the third criteria, the judge stated:

The third criteria in the disqualification action, according to the Secretary's decision in Aristotle, is whether the factual findings of the guaranty agency are insupportable as a matter of law. In this case, the institution did not contest the termination action before the guaranty agency. Hence, the factual findings of HEAF were not disputed and, therefore, there is nothing to review regarding this matter in this proceeding.

Aristotle (Decision on remand) at 5. The situation here is virtually identical to that described by the judge in Aristotle. Little French did not contest the termination action before the

guaranty agency either, so the factual findings of HEAF were not disputed, and therefore, there is nothing to review regarding that matter in this proceeding. Aside from this, it does not appear that any of the factual findings of HEAF were clearly erroneous since there was an evidentiary basis for these factual determinations. Hence those factual findings are not insupportable as a matter of law.See footnote 4

However despite the fact that the determinations here as to the second and third issues in this case present no barrier to the nationwide disqualification of LFBA, the determination as to the first issue clearly results in the elimination of the refund issue from consideration in this case. Since this was the primary basis for the HEAF termination action, the HEAF action cannot provide a foundation upon which to disqualify Little French nationwide from its eligibility to participate in the guaranteed student loan programs. If OSFA considers that the alleged violations involved in this case, including the refund issue, are the basis for a proceeding to terminate or limit the eligibility of the institution to participate in Title IV, HEAF programs, its designated department officials may commence a proceeding for that purpose no matter what the result is in the instant proceeding. 34 C.F.R. § 668.86.

V. CONCLUSIONS OF LAW

A. HEAF took action on the basis of substantive agency requirements regarding eligibility that were more onerous than those in effect for schools participating in the Federal Insured Student Loan Program as of January 1, 1985.

B. HEAF took that action in accordance with procedures that were substantially the same as those that govern the limitation, suspension, or termination of a school's eligibility under the Federal Insured Student Loan Program.

C. The factual findings of HEAF are supportable as a matter of law, however since the action of HEAF was primarily based upon a violation of substantive agency requirements regarding eligibility that were more onerous than those in effect for schools participating in the Federal Insured Student Loan Program as of January 1, 1985, the HEAF termination action cannot be considered as the foundation for OSFA to disqualify LFBA nationwide from its eligibility to participate in guaranteed student loan programs.

VI. DETERMINATIONS AS TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The briefs of LFBA and OSFA, insofar as they can be considered to have contained proposed findings and conclusions have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on

the grounds that they are in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VII. ORDER

Based upon the foregoing findings and conclusions, since the HEAF termination action cannot constitute a foundation upon which to disqualify Little French Beauty Academy nationwide from its eligibility to participate in the guaranteed student loan programs, it is hereby ORDERED, That this proceeding be DISMISSED.

John F. Cook
Chief Administrative Law Judge

Issued: December 22, 1992
Washington, D.C.

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A copy of the attached document was sent by **CERTIFIED MAIL RETURN RECEIPT REQUESTED** to the following:

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Footnote: 1 These findings of fact are based upon stipulations contained in the joint statement filed by the parties. The exhibits listed are from OSFA's Initial Brief and therefore continue to be listed as Education exhibits (hereafter, E-#). The parties do not dispute the authenticity of any of the documents offered herein.

Footnote: 2 It appears, based on the termination notice which referenced a program review report (Ex. E-1), that HEAF adopted the Education's regulations as its substantive rules governing its guaranteed student loan programs.

This conclusion is also based upon statements appearing in Ex. E-18 at 4 and 5. Ex. E-18 at 3 through 10 is a copy of HEAF Bulletin L/S No. 85 which contains HEAF's procedural rules governing the termination of a participant's eligibility to participate in its guaranteed student financial assistance program. At Ex. E-18-5, in Section 3 the following appears:

A participant is subject to a limitation, suspension or termination action on the basis of: violation of any provision of the Act; violation of any rule, regulation, policy or procedure of HEAF; violation of any special arrangement, agreement or limitation prescribed under the Act or HEAF's rules, regulations, policies or procedures; or, failure to respond or adequately respond to a program review report issued by HEAF. [emphasis added].

The term "Act" is defined at Ex. E-18-4 as follows: "Act" means the Higher Education Act of 1965, as amended, and the regulations promulgated thereunder. [emphasis added].

Footnote: 3This is based upon the statement by counsel for OSFA which appears in Ex. E-15.

Footnote: 4Salve Regina College v. Russell, 111 S. Ct. 1217, 1221 (1991) (citing Fed. R. Civ. P. 52(a)).