UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

IN THE MATTER OF

PAUL'S BEAUTY COLLEGE

Respondent

Docket No. 92-14-ST

Student Financial
Assistance Proceedings

DECISION

This is a Subpart G proceeding under 34 C.F.R. 668, as amended at 57 Fed. Reg. 47,752 (October 19, 1992), arising from the issuance on January 9, 1992 of a notice of intent to terminate the eligibility (ED EX. E-1.) of respondent Paul's Beauty college (Paul's or the college) to participate in student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended.

The Office of Student Financial Assistance (OSFA) 1 of the Department of Education seeks to terminate Paul's because assertedly (1) the college's Federal Student Loan Fiscal year default rate exceeded 60 percent for fiscal year 1989; (2) Paul's disbursed Title IV funds at an ineligible branch campus; and (3) Paul's failed to implement a pro rata refund policy. On March 1, 1993, OSFA amended the January 9, 1992 notice of intent to terminate to include, as an additional basis, Paul's 1990 fiscal year default rate which exceeded 65 percent and was not reduced from 1989. ED EX. 17. The 1990 rate was determined by the Department subsequent to the initial termination notice.

II. PROCEDURAL HISTORY.

A program review was held at Paul's between September 17 and 21, 1991, which review led to findings adverse to Paul's.

On November 18, 1991, the Department of Education forwarded to Paul's a Program Review Report and the Paul's objections are not consolidated for decision herein but references to the Program Review are unavoidable.

On January 9, 1992, this termination proceeding was instituted.

On March 12, 1992, the College received a Notice of Receipt of Request for Hearing and Prehearing Order issued February 24, 1992.

Initial briefs were filed on April 22, 1992. An oral hearing was held on March 19, 1993, at Oklahoma City, OK. Post- hearing initial briefs were filed on May 14, 1993. A post- hearing reply brief was filed by OSFA but not by Paul's.

III. STATEMENT OP FACTS.

Paul's commenced operations in 1957 at Oklahoma city, OK. Tr. 205. 2

A. Background

Paul's is accredited by the National Accrediting Commission of cosmetology Arts and Sciences (hereinafter NACCAS), and is state licensed by the Oklahoma State Board of cosmetology. Tr. 206. In 1986 Paul's was purchased by United Schools of America, Inc., principally owned by Frederick J. Laurino and located in Wichita, KS. Tr. 204-06.

United Schools of America operates the following proprietary schools, which, for FY 1987 through 1989, had the following Cohort Default Rates (Tr. 206):

Year/location	Borrowers Entered Repayment	Borrowers in Default	Default Rate
1987			
W.B.C.	130	36	27.7
Vernon's	186	63	33.9
Fayetteville	25	5	20.0
Paul's	78	52	66.7
	---	---	---
	419	156	Avg. 37.5
1988			
W.B.C.	176	36	20.5
Vernon's	198	78	39.4
Fayetteville	12	4	33.3
Paul's	89	56	62.9
	---	---	---
	475	174	Avg. 36.6
1989			
W.B.C.	170	25	14.7
Vernon's	155	53	34.2
Fayetteville	10	3	30.0
Paul's	89	45	63.4
	---	---	---
	406	126	31.0

Total	1300	456	Avg. 35.0
			Avg. based upon dollar amount
	$934,178	$242,592	25.96

The staff and faculty include the following (Tr. 208-09):

Mr. Laurino: President of the College, has a B.A. and M.A. in Education. In addition, he holds Instructor's Licenses and a Cosmetology Licenses in Oklahoma, Arkansas, and Kansas.

Mr. Kenneth Young: Vice President of the College, has a B.A. from New York State University, holds instructor's and Cosmetology Licenses in New York, Oklahoma, Kansas, and Arkansas.

Ms. Mary Johnson: Manager and Instructor, has a B.S. from Kansas State University, and has an Advanced Cosmetology License, as well as an Instructor's License in Oklahoma.

Ms. Pamela Elaine Johnson-Pergande: Instructor, is a licensed Cosmetologist and Licensed Instructor in Oklahoma.

Mr. Laurino has been a licensed cosmetologist since 1965, and also taught high school speech and English for six years. His parents were also involved in hair styling and school ownership. He attended his father's cosmetology school, Kay- Laure School in Huntington, New York. He purchased Vernon's Kansas School of cosmetology in 1976. In addition to cosmetology schools, Mr. Laurino also owns and operates the Wichita Business College, and F.J. Cosmetics and Beauty Supply, a wholesaler of beauty products. Tr. 204-05.

Mr. Laurino is or has been president of the Kansas Association of Private Career Schools and a member of the Board of Directors; Secretary of the Region 7 Proprietary Council; and Vice-President of the Association of Accredited Cosmetology Schools.

B. Paul's Change of Location.

In March 1990 the College closed its location at 3024 Paseo in Oklahoma city, and moved to two new locations: the main location at 309 S.W. 59th Street, and the branch campus at 5912 N.W. 38th Street. Contemporaneous with the move, the College notified the Department. Tr. 224-25, and also see Laurino Letter to Lois Moore dated March 1, 1990, attached hereto as an appendix.

By letter dated March 23, 1990, Ex. R-2, Mr. Laurino again notified the Department of the two new locations, including the 5912 N.W. 38th street location, and stating, "The paperwork for the change of address and branch have recently been submitted to the appropriate parties in Washington. 11 Ex. R-12.

Documents initially sent to Education contemporaneously with the change were lost by Education and re-sent by fax approximately three months following the original submittal. Ex. R-13 (Letter from Mr. Larry Prather to the Department dated March 10, 1992; and Ex. R-14 (Letter from Rick Laurino to the Department dated November 20, 1990.

At least by May 10, 1990, the Department Education was dealing directly with the branch. Ex. R-15 (Letter dated May 10, 1990, from the Department to Paul's at the 5912 N.W. 38th street location). Also, by at least the time of the September 14, 1990 program review, the Department obviously had actual knowledge, and hence notice, of the N.W. 38th street location.

On December 1, 1991, the college closed its main location on S.W. 59th Street and, on December 6, 1991, applied for a new Determination of Eligibility based upon a change of address to what was formerly its branch location on N.W. 38th Street. On March 10, 1992, the Department's Division of Eligibility and Certification (DEC) issued the College an Institutional Eligibility Notice for the 38th Street location, and made the Notice effective as of February 11, 1992.

The College's Program Participation agreement was signed on December 5, 1991, and again on March 9, 1992.

The 1989 Cohort Default Rate, on which this termination proceeding is premised, arises out of those students entering repayment who attended classes at the Paseo campus. Tr. 226. One of the principal measures the College has undertaken to reduce its default rate is to change its location from the inner city Paseo campus to the suburban 38th Street campus. 3 The new owners did, however, reduce the number and amount of student loans while the College was still located at the Paseo location, thereby reducing risk to the Federal taxpayer.

C. Voluntary Withdrawal from GSL program.

Beginning April 1991, the college voluntarily stopped certifying GSL loan applications based upon the Department's finding that the College's Cohort Default Rate for fiscal year 1989 exceeded 60 percent. Tr. 245-46.

As of September 17, 1991, the date of the Program Review, the College had implemented a Default Management Plan pursuant to Appendix D of 34 C.F.R. Part 668, including the implementation of a pro rata refund policy. Tr. 209, 216.

D. The Department's Objective Expressions of Its Interpretation of the Pro Rata Refund Policy Requirement.

The Department's objective expression of its interpretation of the pro rata refund policy requirement is found in the following exhibits: R-16, R-17, and R-18, which are the Department's publications or handouts distributed to explain how to calculate pro rata refunds. Exhibits R-16 and R-17, excerpts from The 1990-91 and 1991-92 Federal Student Financial Aid Handbooks, instruct institutions upon the manner of determining whether a refund is required.

In calculating the percentage of the period of enrollment that the student completed in a clock hour program, "Excused absences under the school's written policy may be included in the hours the student completed. "Institutions are instructed to use calendar time to determine the halfway point for semester hour programs and further that in clock-hour programs, the institution is to calculate the percentage of the enrollment period the student completed by determining "the

hours the student completed during the period of enrollment for which the student was charged." Ex. R-18 at page TG 13-23.

E. The college's Pro Rata Refund Policy, Closed-End Contract, and Attendance Policies.

The College's student brochure, contains the following pro rata refund policy (Respondent's Exh. A):

REFUND POLICY-ALL PROGRAMS

1. An applicant rejected by the school shall be entitled to a refund of all monies paid.
2. If a student (or in case of a student under legal age, his/her parent or guardian) cancels his/her enrollment and demands his/her money back in writing, within three business days of signing of enrollment agreement or contract, all monies collected by the school shall be refunded. The cancellation date will be determined by the postmark on written notification, or the date said information is delivered to the school administrator/owner in person. This policy applies regardless of whether or not the student has actually started training.
3. Refunds to Veterans will be in compliance with Veterans Administration regulations.
4. If a student cancels his enrollment after three business days after signing but prior to entering classes, he shall be entitled to a refund of all monies paid to the school less a registration or enrollment fee of $50 for all programs.
5. Equipment, books, and supplies are non-returnable and costs are non-refundable, except as item (2) applies.
6. Students who enroll in and begin classes, the following schedule of tuition adjustment is authorized.

Percentage of Enrollment Time To Total Time of Course	Amount of Total Tuition Owed That the School Shall Receive or Retain
00.01 to 10.00%	10% Retained or Received
10.01 to 20.00%	20% Retained or Received
20.01 to 30.00%	30% Retained or Received
30.01 to 40.00%	40% Retained or Received
40.01 to 50.00%	50% Retained or Received
50.01 to 100.00%	100% Retained or Received

7. Enrollment time is defined as time elapsed between the actual starting date and the date on which the student formally terminates enrollment. Any monies due the applicant or student shall be refunded within 45 days of formal cancellation by the student as defined in item 2, or formal termination by the school which shall occur no more than 30 days from the last day of formal attendance; or in the case of a leave of absence, the documented date of return.
8. If a school is permanently closed and no longer offering instruction after a student has enrolled, the student shall be entitled to a pro-rata refund of tuition.
9. If a course is cancelled subsequent to a student's enrollment, the school shall at its option:
1. Provide a full refund of all monies paid; or
2. Provide completion of the course.

A transcript of the student's record will be issued to the student provided all money has been paid in accordance with the above policy. Upon satisfactory completion of the prescribed course, the school will grant a completion certificate to the student.

The student's contract with the College is a closed-end contract, with both a beginning and ending date stated in the contract. The College's pro rata refund policy is therefore based upon the ratio of the enrollment time to the total time of the course.

E.g., student Tonya London, whose contract was provided in the College's Response to the Department's Program Review Report, signed her contract on September 12, 1989, and was given a start date of October 3, 1989, and an end date of November 22, 1990. Based upon the above pro rata refund policy, the College can easily calculate the hours of instruction during the time of the enrollment, and divide that number by the total course hours to arrive at the percentage of completion of the program.

The college's Program Attendance Policies provide that a student is allowed only 20% of a student's elapsed time in absent hours at any point in the course. A student exceeding 20% of his elapsed time in absent hours will be subject to dismissal at the discretion of the director after a period of time for counseling is provided. An extension of training beyond a student's completion date will result in an additional fee of ($3.00) per hour for each hour required to complete the state minimum requirements after a grace period of 80 hours is exceeded. The fee for make-up time is to be paid when the end of the grace period is reached.

IV. DISCUSSION AND CONCLUSIONS

I

Under the Student Assistance General Provisions applicable to all of the Title IV programs, the continued participation of Paul's is conditioned upon demonstrating administrative capability:

To begin and to continue participation in any Title IV, HEA program, an institution shall demonstrate to the Secretary that it is capable of adequately administering that program under the standards established in this section. Except as provided in § 668.15, the Secretary considers an institution to have that administrative capability if it [satisfies the enumerated administrative requirements].

34 C.F.R. § 668.14 (emphasis added). The standards enumerated in § 668.14 include, among others, maintaining proper records, utilizing qualified personnel, and having adequate internal controls. Id.

Under § 668.15, the Secretary established regulatory indicators of the lack of administrative capability. Under this section, a default rate in excess of 20 percent indicates impaired capability. 34 C.F.R. § 668.15 (a) (l). The section further provides for termination in case of excessive default rates:

On or after January 1, 1991, initiate a proceeding under Subpart G of this part to limit, suspend, or terminate the eligibility of the institution to participate in the Title IV, HEA programs, if--
(i) The institution's GSL and SLs cohort default rate exceeds 40 percent for any fiscal year after 1989 and has not been reduced by an increment of at least 5 percent from its rate for the previous fiscal year (e.g., a 50 percent rate was not reduced to 45 percent or below); or
(ii) The institution's GSL and SLS cohort default rate exceeds--
(A) 60 percent for fiscal year 1989;
(B) 55 percent for fiscal year 1990;
(C) 50 percent for fiscal year 1991;
(D) 45 percent for fiscal year 1992; or
(E) 40 percent for any fiscal year after fiscal year 1992. 34 C.F.R. § 668.15 (b) (1).

Under the regulations governing this proceeding, once the hearing official finds that the institution's fiscal year default rate exceeds the level specified in 34 C.F.R. § 666.15(b)(l):

. . . the hearing official shall find that the sanction sought [in this case, termination] by the designated Department official is warranted, except that the hearing official shall find that no sanction is warranted if the institution demonstrates that it has acted diligently to implement the default reduction measures described in Appendix D to this part.

34 C.F.R. § 668.90(a)(3)(iii), as amended 57 Fed. Reg. 47,752 (October 19, 1992)(emphasis added).

Paul's cohort default rates for fiscal year 1989 and 1990 exceed the thresholds of § 668.15 (b) (l). The 1989 rate was 62.9. ED Ex. 18; Tr. at 46, 54-56. Paul's was notified of its 1989 rate by letter dated July 15, 1991. 4 ED Ex. 4; Tr. at 58-59. Paul's submitted a notice of intent to appeal the 1989 rate, but did not follow through with an actual appeal. Tr. 58-61; ED Ex. 7.

Paul's rate increased substantially in fiscal year 1990. The 1990 rate was 68.1. ED Ex. 18; Tr. at 46, 53-55. Paul's was notified of this rate by letter dated September 18, 1992. ED Ex. 20; Tr. at 56. The letter informed Paul's of its opportunity to challenge or appeal the calculation of the 1990 rate; Paul's did not appeal the 1990 rate. Tr. at 56-58; ED Ex. 19.

Paul's provided no specific evidence to dispute the rates as calculated by the Department. It did offer some very general testimony regarding alleged servicing errors, but provided no specifics as to any actual effect on the rates as established by the Department. Tr. 212-216. Paul's admitted that it did not bring any alleged servicing error to the Department's attention and did not request a recalculation. Tr. 268-269.

Therefore, since the record demonstrates that the 1989 rate exceeded 60 percent (34 C.F.R. § 668.15(b)(l)(ii)(A)), the 1990 rate exceeds 55 percent (34 C.F.R. § 668.15 (b) (l) (ii) (B)), and exceeds 40 percent and not at least a 5 percent reduction from 1989 (34 C.F.R. § 668.15(b)(1)(i)), Paul's must be terminated for lack of administrative capability. 34 C.F.R. § 668.90 (a) (3) (iii). Paul's can avoid termination only if it "demonstrates that it has acted diligently to implement the default reduction measures described in Appendix D." Id.

With respect to the 1989 rate, Paul's was subject to termination upon publication of that rate in July 1991. The Department conducted a program review at Paul's from September 17-21, 1991, and as a result stipulated that Paul's had, as of September 17, 1991, implemented all of the Appendix D requirements, except for the pro rata refund policy required by 34 C.F.R. § 682.606(c). Stip. of Fact No. 13; ED Ex. 3, at 1 & 5. Therefore, Paul's need only demonstrate diligent application of the pro rata refund requirement to avoid termination based on the 1989 rate.

The 1990 default was published by the Department in the summer of 1992, thereby subjecting Paul's to termination based on that rate. The Department has made no determination that Paul's was implementing Appendix D after publication of the 1990 rate. Therefore, Paul's must demonstrate diligent implementation of all of the measures in Appendix D to avoid termination as a result of the 1990 rate.

Thus, as can be seen, Paul's has the burden of demonstrating that it diligently implemented the pro rata refund requirements of 34 C.F.R. § 682.606(b) in order to avoid termination due to its excessive cohort default rates. A review of Paul's argument reveals that Paul's failed to satisfy its burden. Moreover, OSFA provided contrary evidence at the hearing that Paul's failed to make pro rata refunds as required by regulation. E.g. Tr. 125- 136.

1. Paul's Did Not Calculate Refunds On Basis of Clock Hours "Remaining to be completed" As Required by 34 C.F.R. § 682.606(c) (3).

Paul's argues that it need only provide a refund that proportional to the period of enrollment that "remains" under its enrollment agreement with students. Respondent's Initial Brief Following Hearing, at 16-18. As defined in § 682.606(c)(1), a pro rata refund requires:

. . . a refund by the school of not less than that portion of the tuition, fees, room and board, and other charges assessed the student by the school equal to the portion of the period of enrollment for which the student has been charged that remains on the last day of attendance[.]

Paul's maintains that the pro rata refund is limited to those clock hours still available to a student under his or her contract with Paul's.

Paul's argument and discussion ignores 34 C.F.R. § 682.606 (c) (3) . That provision provides that for schools like Paul's that measure their programs in clock hours, "the portion of the period of enrollment for which the student has been charged that remains" is determined by:

. . . dividing the total clock hours comprising the period of enrollment <u>by the hours remaining to be completed</u> by the student in that period as of the last recorded date of attendance by the student.

34 C.F.R. § 682.606(c)(3)(emphasis added). The concept of remaining available time applies only to programs measured in credit hours. 34 C.F.R. § 682.606(c)(2) (refunds in credit hour programs determined by dividing by the "number of weeks remaining") .

Thus for clock hour programs, the refund must be proportional to the clock hours yet to be completed by the student. In this case, a student must complete every hour of the 1500 hour Basic Cosmetology program in order to graduate and sit for the licensing exam in Oklahoma. Tr. 132, 255, 261. 5 Paul's admitted that a student does not graduate unless the hours are actually completed. Tr. 261. A proper pro rata refund must take into account all hours "remaining to be completed."

Paul's also argued that absent hours could be counted toward completed hours if such absences were in accord with its attendance policy. Respondent's Initial Brief Following Hearing, at 16. Paul's attendance policy allows a student to miss 20 percent of the available hour at any point in the course. R. Ex. A, "Program Attendance Policies" ("The school will allow only 20% of a student's elapsed time in absent hours at any point in the course.").

However, a student cannot be absent 20 percent of the time, and still graduate and sit for the exam. Tr. at 261. 6 Since all 1500 hours must be actually completed to complete the program, absences--excused or otherwise--cannot be counted toward completion of the program. Tr. 185-186.

Paul's argument that its policy on absences represents diligent implementation of the pro rata refund requirement is belied by the record in any event. In calculating pro rata refunds, Paul's did not distinguished "excused" or "allowable" absences. Paul's included all absences, excused or not, in calculating the portion of a program completed to determine how much it could retain. See Paul's tuition refund worksheets in ED Ex. 16 (Line 4 "Present Hours" + Line 5 "Absent Hours" = Line 7 "Total Hours Enrolled"). Tr. 130-131; OSFA's Pre-Hearing Reply Brief, at 4-6.

Of the seven tuition refund worksheets in the record, only one student showed absences of less than 20 percent. ED EX. 16, at 3 (75 Absent Hours/ 424.5 Total Hours Enrolled = 18 percent) All the others were absent from 30 to 43 percent of the time. E.g., ED Ex. 16, at 2 (28 Absent Hours/64.5 Total Enrolled Hours - 43 percent).

2. Paul's Failed to Properly Treat Equipment Charges.

Paul's argues that it properly implemented the pro rata refund requirements with respect to its charge to students for instruction kits (referred to as "Kit/Book/Manikin" on the tuition refund worksheets, ED EX. 16). Paul's argues that those charges were unpaid by the students, and thus it could charge for the kits under 34 C.F.R. § 682.606 (c) (l). Respondent's Initial Brief Following Hearing, at 18. Paul's, however, cited no evidence that students did not pay for the instruction kit. In fact, the evidence in the record shows that such charges were paid.

In calculating refunds, Paul's determined the amount the school claimed it could retain, and refunded the difference between what it claimed it could retain and the amount actually received from students. ED Ex. 16 (Total Amount Paid to School Total Amount Due School = Due/Refund). On all of the worksheets in the record, the amount paid Paul's always exceeded or equaled the amount due. Id. In no instance, is a balance showed as owing. Therefore, Paul's argument has no factual basis. 7

3. Paul's Did Not Prorate All Charges.

Paul's also fails to address its failure to prorate all charges, including the kit fee and a registration fee, as required. Tr. 133-134. Paul's prorated only the tuition charges. Thus, contrary to Paul's assertion, the $50 registration fee is in issue. While that amount is allowable as administrative fee under 34 C.F.R. § 682.606(c)(1)(i), Paul's failed to prorate the original registration fee of $50 (R. Ex. B). Paul's has thus filed to demonstrate that it prorated all charges as required under § 682.606(c) (1).

4. Paul's Did Not Take Sufficient Corrective Action In 1990.

With respect to termination based on the 1990 default rate of 68.1 percent (ED Ex. 14), Paul's made a proffer at the hearing as to its purported implementation of Appendix D after publication of that rate during the summer of 1992. 8 Tr. 305-310. I hereby accept the proffer as evidence. I also find that sufficient notice was given by OSFA on March 1, 1993 that the hearing in this matter would embrace Paul's 1990 default rate. Paul's maintains that this proffer is sufficient by itself to demonstrate diligent implementation of Appendix D, and avoid termination.

I accept that the statements contained in the proffer are true, but find that they are insufficient to demonstrate diligent implementation. The proffer (evidence) did not cover all of the required provisions of Appendix D. For example, there was no evidence directed to item 1.1 (revise admission policies), 1.2 (improve availability of counseling to decrease withdrawal rates), 1.5 (compensation of sales representatives), 11.3 (establish liaison with U.S. Employment Service), or IV.l (conduct annual comprehensive self-evaluation of administration of Title IV programs).

Prior to a lengthy discussion (beginning at Tr. 271) with respect to the 1990 rate and the showing required to avoid termination based on that rate, Paul's admitted that it was doing nothing different with respect to Appendix D in the fall of 1992 than it was doing in the fall of 1991 at the time of the program review. Tr. 270-270. Appendix D requires affirmative changes in current practices. Nevertheless, Paul's did nothing different despite the fact that its rate increased to 68.1 percent for FY 1990, and the threshold for termination decreased to 55 percent. When asked if it undertook additional measures in 1992, Paul's did not answer yes or no, but rather stated "We don't do loans", thereby implying it felt it had no further obligation with respect to Appendix D. Tr. at 271.

Paul's has failed to demonstrate diligent implementation of Appendix D following publication in 1992 of the 1990 rate.

5. Validity Of The Default Rates.

In its post-hearing brief, Paul's also argues that the default rates as calculated by the Department are inherently unreliable due to alleged servicing errors, and therefore cannot be relied on to terminate Paul's. Paul's Post-Hearing Brief, at 21. The argument is rejected. Contrary to Paul's its assertion in the brief, the Department has not admitted that improperly serviced loans were included in Paul's default rates.

Paul's cites Concord Career Colleges v. Alexander. However, in the instant proceeding, although Ms. Muirhead testified that OSFA does not individually review servicing of each loan in calculating the default rate (Tr. 92-93), The Department, nonetheless, requires the guaranty agencies to report only properly serviced loans. Tr. 93-94, 105-107, 109-112. Therefore, the rates are not inherently unreliable because only properly serviced loans are to be included in the rates.

Paul's provided no rebuttal evidence that any loan was improperly included in the calculation of its default rates, or that any error materially affected the rates so as to push the rates over the termination thresholds. Paul's did not appeal the calculation of its rates, not did it bring any alleged servicing error to the Department's attention. Tr. 268-269. Paul's argument with respect to the accuracy of the rates is rejected.

II

Before an institution may participate in the student financial assistance programs available under the Higher Education Act of 1965, as amended, it must among other requirements, apply for a determination of eligibility by the Secretary. 34 C.F.R. § 600.20(a); see generally 34 C.F.R. Part 600. It must also be certified as administratively capable and financially responsible. 34 C.F.R. Part 668, Subpart B. The secretary then reviews the application, and determines the extent of eligibility. Eligibility is extended only to locations identified in the application:

(1) Extent of eligibility. If the Secretary determines that the entire applicant institution, including all its locations and all its educational programs, satisfies the applicable requirements of this subpart, the Secretary extends eligibility to all educational programs and locations identified on the institution's application for eligibility.

(2) If the Secretary determines that only certain educational programs or certain locations of an applicant institution satisfy the applicable requirements of this subpart, the Secretary extends eligibility only to those educational programs and locations which meet those requirements and identifies the eligible educational programs and locations in the eligibility notice sent in accordance with § 600.21.

34 C.F.R. § 600.10(b)(1) & (2) (emphasis added)

If an institution establishes a new location it must separately apply for eligibility on the forms designated by the Secretary:

(3) Eligibility does not extend to any location that the institution establishes after it receives the eligibility designation. If an eligible institution seeks to establish eligibility for a new location, the institution shall apply under § 600.20.

34 C.F.R. § 600.10 (b) (3).

In the present case, Paul's operated a ineligible branch at its 38th street location for nearly two years. In March of 1990, Paul's moved its former main campus from its location at 3024 Paseo in Oklahoma City to a new main campus at 309 S.W. 59th Street and opened a branch at 5912 NW

38th. Stip. of Fact No. 5. Paul's has stipulated that the 38th Street location was not recognized as eligible by the Department prior to February 11, 1992. Stip. of Fact No. 17. That location became eligible by virtue of an application submitted in December 1991 for a determination of eligibility based on an address change moving the 59th street main campus to 38th Street. Stip. of Fact No. 16.

In March of 1990, Paul's submitted to the Division of Eligibility and Certification of the Department, an Application for Institutional Eligibility and Certification which sought a designation of eligibility for its new main campus at 59th Street. Paul's EX. D, fifth and sixth sheets. On that application, Paul's checked "change of address" as the "Reason for submitting request". Id.; Tr. at 248-249. Paul's did not check the box for "new or different location". Id. The 38th Street location was nowhere reflected in that application. Tr. 250. Paul's did not submit a separate application for eligibility for the 38th Street location. Tr. at 249.

Paul's therefore violated the specific procedures required under 34 C.F.R. §§ 600.10 and 600.20 governing the eligibility of new locations. A new location requires a separate application for eligibility. Letters are not sufficient. § 600.10 (b) (3). 9 No such application was filed by Paul's. The location was therefore ineligible, and Paul's was not entitled to receive federal funds for students at that location. 10

The Department previously cited Paul's in 1990 and 1986 for failure to have its eligibility documents in order. Tr. at 116; ED EX. 14, at 4-6. A September 14, 1990 program review report cited Paul's for same ineligible 38th Street location. Id. In the follow up final program review report, OSFA warned Paul's that repeat findings in the future could lead to administrative action. ED Ex. 15, at 3. Paul's paid a $15,000 informal fine for the lack of eligibility documentation. Tr. at 118-119. Despite the 1990 program review, Paul's never obtained eligibility for the 38th Street as a separate location. By the time of the September 1991 program review, Paul's had still not obtained an eligibility designation. ED EX. 3, at 2-5. That location became eligible only after Paul's closed its main campus in December of 1991 and transferred its eligibility to 38th Street through the change of address application.

Termination is warranted as Paul's consistently failed to comply with eligibility requirements. Under 34 C.F.R. 668.86, the Secretary may terminate the eligibility of an institution if it "violates any provision of Title IV of HEA or any regulation or agreement implementing that Title." In its participation agreements with the Department, Paul's expressly agreed to comply with all program statutes and regulations. ED Ex. 11, 12 & 13, at 1 (Article II.1).

Paul's serves as a fiduciary in administering the Title IV programs, and is therefore held to the highest standard of care and diligence. 34 C.F.R. § 668.82(a) & (c).

In summary, institutional eligibility does not extend to locations not specifically recognized as eligible by the Secretary. 34 C.F.R. § 609.l0(b)(l) & (2). Nonetheless, Paul's argues that it notified the Department of the new location as required by 34 C.F.R. § 600.30 and the Department did not object. Paul's argument is without merit because eligibility for new locations is not established under § 600.30.

The provisions of § 600.10 explicitly provide that a school must separately apply to establish eligibility for a new location. 34 C.F.R. § 600.10 (b) (2). Paul's allegations and argument with respect to whether the Department had actual knowledge of the location are irrelevant. 11

Paul's admitted that it did not include the new location in the change of address application submitted in March of 1990, nor did it submit a separate application for eligibility of the 38th Street location. Tr. 248-249. Paul's stipulated that the 38th Street was not recognized as eligible by the Department prior to February 11, 1992. Stip. of Fact No. 17.

Paul's operated an ineligible branch for nearly two years. Because the location was not eligible, Title IV assistance could not lawfully be disbursed. Therefore, the Department, contrary to Paul's suggestion, was harmed. The Department expects that funds will be disbursed only at recognized locations. As its fiduciary, the Department relies on Paul's to disburse aid only within the scope of its eligibility and to comply with applicable statutes and regulations.

V. FINDINGS AND ORDER

It is found that Respondent Paul's Beauty College unlawfully disbursed Title IV funds at an ineligible branch campus; that Paul's failed to sufficiently implement a pro rata refund policy during fiscal years 1989 and 1990 as required because of Paul's student loan default rate; and that Paul's failed to take sufficient action as required in 1990 to reduce its excessive student loan default rate. Because of these violations, Respondent is terminated from participation in Federal student financial assistance programs under Title IV of the Higher Education Act of 1965, as amended.

In the absence of a timely appeal, this decision should become effective in 30 days.

Dated this 13th day of July, 1993.

Paul S. Cross
Administration Law Judge
Office of Higher Education Appeals
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-3644

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1 OSFA is now known as Student Financial Assistance Programs or SFAP.

2 Transcript references (Tr. _____) refer to the record of the oral hearing held on March 19, 1993 at Oklahoma City.

3 One of the problems arising from Cohort Default Rates is that the Department assumes a low default rate indicates financial ability to administer student loans, whereas a high default rate indicates lack of financial ability to administer student loans. This can be a false indicator because default rates also are indicators of other factors such as geographic location.

4 The original rate for 1989 was 63.4; that rate was subsequently revised to 62.9. Tr. at 55-56; ED Ex. 18.

5 Paul's catalog expressly provides that the purpose of the program is to allow the student to sit for the exam. The section entitled "Courses Available At Each Campus" described Basic Cosmetology as "designed to qualify the graduate to take and pass the Oklahoma State Board of Cosmetology examination for a Basic Operator license." R. Ex. A.

6 Only 1580 scheduled hours are available during the period of enrollment (1500 hours, plus 80 hours for make up time). Tr. 267-268.

7 The only other bases to justify a separate charge for equipment are under §§ 682.606(c)(l)(ii) & 682.606 (c) (5). Those provisions apply only to returnable equipment which a student fails to return. The equipment here was not returnable. R. Ex. B.

8 Although Paul's stopped certifying guaranteed loans in 1991, that fact did not end the requirement to comply with Appendix D. A review of Appendix D reveals that it contains a detailed listing of measures for improvement of an institution's overall management of all its programs, and is not limited to measures related elusively to the guaranteed study loan program. Moreover, Appendix D requirements with respect to existing loans continue, even if no new loans are certified.

9 Paul's states that it provided actual notice within 10 days of establishing the new location to the Department pursuant to 34 C.F.R. § 600.30 (a) (3). Paul's argues that the location must be deemed eligible under § 600.30(c) as the Department did not inform Paul's in writing that the location was not eligible. This argument is without merit. Section 600.30(c) applies to changes reported under § 600.30(a) that affect existing eligibility. That provision is not an alternative method of establishing eligibility. Simple notice does not confer eligibility. Tr. at 123-124.

Sections 600.10 and 600.20 specify how eligibility must be established. Paul's did not comply with those requirements.

10 OSFA is seeking to recover the funds unlawfully expended at the ineligible branch as part of the Subpart H proceeding in Docket No. 92-58-SP.

11 Although OSFA admits that the Regional Office of the Department was aware of the location, there is no evidence that the Division of Eligibility and Certification had actual knowledge of new location within ten days of its opening.

In this regard, OSFA objects to Paul's request to add to its Ex. D a letter to Lois Moore attached to its post-hearing brief. This letter attached hereto as an appendix was not previously marked as an exhibit and its authenticity is not established. There also is no evidence that it was actually sent or received. Although I accept that the letter was sent.

Eligibility cannot be established by operation of estoppel. In the matter of Academia LaDanza Artes Del Hogar, Decision, Dkt. No. 90-31-SP (March 19, 1992)(OSFA not estopped from recovering funds disbursed due to erroneous designation of eligibility by the Department).