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

In the Matter of **Docket No. 95-73-ST**

DEAN'S WESTSIDE BEAUTY COLLEGE, Student Financial Assistance Proceeding
Respondent.

Appearances: Glen Bogart, Higher Education Compliance Consulting, Birmingham, Alabama, for Dean's Westside Beauty College.

Denise Morelli, Esq. and Russell B. Wolff, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before: Judge Richard F. O'Hair

DECISION

At the time these proceedings were initiated, Dean's Westside Beauty School (Dean's or respondent) was a one year proprietary school in San Jose, California, which offered programs in cosmetology. On March 17, 1995, the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (ED or Department) issued a notice of intent to terminate the eligibility of Dean's to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq*. In addition, SFAP proposed the imposition of a fine of $195,500. Dean's filed a request for a hearing before this tribunal on April 5, 1995, and the requested hearing was conducted on September 18-20, 1995.

SFAP initiated this termination proceeding against Dean's following an unannounced program review of Dean's administration of Title IV programs for award years 1991-92, 1992-93, and 1993-94, which was conducted January 25-28, 1994. At that time, review specialists from the Institutional Review Branch of ED's San Francisco Regional Office interviewed key personnel and examined Dean's student files, institutional records, forms, policies and procedures. The findings in the May 11, 1994, program review report which serve as the basis for this proceeding include the following program violations: improperly maintaining excess cash; making untimely

refunds or failure to make refunds; failing to ensure students demonstrate the ability to benefit; failing to document independent status determinations; and disbursing federal funds to ineligible non-citizens.

At the inception of the hearing, Dean's acknowledged it ceased operation as of April 28, 1995, and, therefore, conceded that a termination of its eligibility was appropriate. However, it emphasized that its primary goal in this proceeding was to contest the proposed fines recommended by SFAP. On this topic, Dean's argued that fines were not appropriate in this instance because of the absence of any evidence of fraud on its part, and referred to *In re Fischer Technical Institute*, Dkt. No. 92-141-ST, U.S. Dep't of Educ. (March 16, 1995) for authority for its position. In *Fischer,* ED initiated proceedings to terminate and fine the institution because of a large number of refunds owed to students and lenders. The tribunal found that Fischer should be terminated, but explained that because of the severe nature of a termination, a fine was not appropriate in that case since the amount of the proposed fines, $91,000, was only $1,500 more than the total amount of the late-paid refunds. Additionally, at the time of the decision, Fischer had repaid all funds due the students and lenders. Based upon these facts, the tribunal found a fine was clearly unwarranted. In my view *Fischer* imposes no limits on any tribunal in reaching a decision as to whether a fine is appropriate in a given proceeding. It does serve to emphasize that a decision regarding the appropriateness of a fine is unique to each proceeding and such a decision will be made on the merits of each individual case.

On January 25, 1994, program reviewers examined a sample of 32 student files for the three relevant award years. The program reviewers were sufficiently concerned about the number and seriousness of the program violations they discovered that they immediately recommended Dean's be transferred to the reimbursement system of payment. This recommendation was adopted on February 22, 1994. Dean's submitted a request for reimbursement on December 5, 1994, but because the ED personnel who processed the request found what they believed to be alterations and inconsistencies in the documentation Dean's submitted, the request was denied. This situation, combined with the serious, unrebutted findings of the program review, indicated to ED there were continued weaknesses in Dean's administration of the Title IV programs which were sufficient to warrant the initiation of these termination proceedings.

Institutions which participate in Title IV programs must abide by certain statutory and regulatory standards of administrative capability which are found in 34 C.F.R. § 668.16. These institutions are also bound by certain fiduciary responsibilities which subject them to the highest standard of care and diligence in administering the program and accounting for Title IV funds they receive. 34 C.F.R. §§ 668.82(a), (b). If an institution fails to meet either of these standards, ED has the authority to terminate it from further participation in the Title IV programs. 34 C.F.R. §§ 668. 82(c), 668.86(a). In addition to termination, an institution may be fined up to $25,000 as punishment for each of its violations of the Title IV program requirements. 34 C.F.R. § 668.84. The several factors which must be considered in the process of determining the appropriate amount of the fine
include the gravity of the violation, whether these violations represent repeat findings, and the size

of the institution. 34 C.F.R. § 668.92(a).

MAINTENANCE OF EXCESS CASH

One element of an institution's fiduciary responsibilities is that it must not misuse federal

funds by maintaining excess federal cash in its bank accounts. Institutions have independent authority to request a cash advance from ED's Financial Management Service accounts for the purpose of making Pell Grant disbursements to student accounts but these funds must not be retained in the school accounts in excess of three days. 34 C.F.R. §§ 668.82, 668.14(b)(2). *See also In re Allied Schools of Puerto Rico*, Dkt. No. 94-121-ST, U.S. Dep't of Educ. (March 23, 1995).

During the program review, Dean's monthly bank statements were examined and the reviewers concentrated on the dates of receipt of Title IV funds and the dates those funds were disbursed to student accounts. The program review report found that, through the process of requesting and depositing more Title IV funds than were disbursed during the three days following its deposit, Dean's had maintained excess cash during every month of the three award years examined. The program review report concludes Dean's maintained an excess of an average of $19,000 per month for the award years in question. This amount was the product of a formula used by ED at the time of the program review to quantify excess cash, but use of that formula has since been abandoned.See footnote 1 *1* Regardless of the formula utilized, I have examined the bank records, and I find that Dean's maintained excess federal cash during the three award years reviewed, a practice in violation of ED regulations, policy and case law.

UNTIMELY REFUNDS

An institution participating in Title IV programs is required to calculate a student's eligibility for a refund of any Title IV funds disbursed to a student who withdraws, drops out, or is expelled on or after the first class day. 34 C.F.R. § 668.22(a). To be timely, the refund, if one is due, must be made within 30 days of the institutional determination the student withdrew or dropped out. 34 C.F.R. § 668.22(g)(2)(iv). The program reviewers found Dean's breached its fiduciary duties by failing to make timely refunds to seven students in the sample (students 1, 3, 7, 9, 10, 12, and 27). Dean's challenged this finding with the argument that it is often difficult to determine when a student has withdrawn from an institution because it is ordinarily not documented by the student. The school explained that some students "simply discontinue attending school without advising the school that they are withdrawing." Additionally, there is evidence Dean's made an improper Pell Grant disbursement to student 21 after the student had withdrawn from the institution and there is no evidence this amount was refunded to the program

account. I find that Dean's was not adequately diligent in its monitoring of these students who withdrew from the program and, therefore, did not comply with its fiduciary responsibilities to make appropriate, timely refunds to seven students and to make any refund to student 21.

ABILITY TO BENEFIT REQUIREMENTS

An institution may admit students who have neither a high school diploma nor its equivalency only if the students show they have the ability to benefit from the training offered by the institution. 34 C.F.R. § 668.7. This showing is accomplished if the student, before admission, earns a passing score on an independently administered ability to benefit test which has been approved by the Secretary of Education. 20 U.S.C. § 1091(d).

The program review report identified two students, 2 and 11, who were admitted to Dean's without evidence of their eligibility regarding their satisfactorily passing ability to benefit tests or proof of receipt of high school diplomas. At the hearing, the parties stipulated to the fact that student 2 was administered an ability to benefit test, but the student did not earn a passing score on the test. They also stipulated that student 11 was admitted without having a high school diploma, its equivalency or being administered an ability to benefit test. SFAP also presented testimony and exhibits which proved student 31 had no high school diploma, received no equivalency, and there was no evidence she had been administered an ability to benefit test.

While examining Dean's December 1994 request for reimbursement, the reviewers discovered nine more student files (students 3R, 5R, 6R, 9R, 21R, 22R, and 33R) containing evidence of a combination of inconsistent statements regarding student eligibility, copies of documents which appeared as though they had been altered, and purported affidavits which were, on their face, not worthy of belief. The letter of notification for this termination and fine proceeding included the irregularities in these nine additional files as further evidence of misconduct. They are summarized as follows.

Student 3R - the enrollment questionnaire indicates the student is a high school graduate, but there is also a mark on the form suggesting the passing of the GED. The institution's certificate of acceptance concludes the student has a high school diploma and attached to this is an unsworn statement from the student which explains that the diploma was issued by a school in a foreign country and the student is unable to obtain a copy of the diploma. There is a notary stamp and signature at the bottom of this unsworn statement, but there is none of the usual language explaining that the signer appeared before the notary to sign the document. An SFAP witness explained that this unsworn student statement was first submitted to ED without the notary's stamp and signature, but returned to Dean's as being unacceptable. Dean's later returned the same statement, but with the addition of the notary stamp and signature.

Student 5R - the file documents show this student was admitted as a high school

graduate. There is a copy of a foreign diploma in the file, but this is followed by a statement from the student explaining her diploma was issued in a foreign country and she cannot obtain a copy of it. Prior to the hearing, an ED employee showed this student a copy of the purported high school diploma from her student file at Dean's; however, she did not recognize it as being her diploma because it contained neither the name nor street address of her school.

Student 6R - the certificate of admission indicates the student is a high school graduate, but she was also administered an ability to benefit test. If she were a high school graduate, it would have been unnecessary to administer her this test. On the enrollment questionnaire, she indicated she completed the 12th grade, but did not mark the form to show she was a high school graduate. There are also marks on the form which suggest that at one time a lower grade level had been annotated as the highest level completed and then erased and changed to reflect completion of the 12th grade. When completing the front page of the ability to benefit test front page, she indicated she had completed only 9 years of education.

Student 9R - on the enrollment questionnaire, the student indicated she had completed the 12th grade, but then marked the box indicating she had neither a high school diploma nor a GED. On her certificate of admission she indicated she was a high school graduate. The same notary who signed many other student files signed an unsworn statement from this student which explained that her diploma was located in a foreign country and she could not obtain a copy of it. There is no evidence the student was administered an ability to benefit test.

Student 21R - the certificate of admission is dated October 5, 1993 and it indicates the student is a high school graduate; however, there is a mark on the form suggesting the student was administered an ability to benefit exam. There is an unsworn statement from the student explaining that he cannot obtain a copy of his foreign high school diploma. Later in the file there is a copy and a translation of his diploma which was prepared more than two years later, on January 5, 1995. Interestingly, the translation is notarized by the same person who "notarized" the other unsworn student statements. On this occasion, however, the traditional language regarding the fact the signer (translator) personally appeared before the notary is included at the bottom of this translation.

Student 22R - the student noted on the enrollment questionnaire she completed the 12th grade, but she did not check the block on the form to show she is a high school graduate. The certificate of admission reports she is a graduate. There are two accompanying preprinted statements from the student on which she explains that her diploma is located in a foreign country and cannot be obtained. One of these is signed by the same notary as the others; the second is not "notarized." Additionally, one of these forms shows her graduation date as "10-9-92" and the

other shows "9/1991."

Student 33R - The student indicated on the enrollment application that he completed the 12th grade and is a high school graduate, and the certificate of admission agrees with that. The enrollment application appears to have been altered in that information has been deleted, or "whited out", in the section designated to contain information regarding the administration of an ability to benefit test. The student signed an unsworn statement explaining his diploma is located in a foreign country and he is unable to obtain a copy of it. This statement was "notarized" by the same notary as the others.

None of these students testified at the hearing to help eliminate the ambiguities uncovered in their files. The conclusion which I have reached for each of these student files (students 31, 3R, 5R, 6R, 9R, 21R, 22R, and 33R) is that Dean's has not satisfied its obligation of coming forward with credible evidence that the students in question were eligible for Federal student financial aid. Each file contains at least one item of conflicting data which should have been resolved before Dean's awarded these students student aid. There is no authority for requiring an institution to obtain properly notarized statements from a student which explain why the student cannot obtain a copy of his or her high school diploma. Nevertheless, such a sworn statement would have been persuasive to me in light of the existing conflicts in each of the student files. It is possible these were eligible students, but one cannot ascertain this with any certainty by examining the documentation in the files. For this reason, I find that none of the students listed above had sufficient, unambiguous information in their files to support a finding that these

students had a high school diploma, its equivalent, or had earned passing scores on an ability to benefit test. These eight students, plus students 2 and 11 who were the subject of a stipulation between the parties, were ineligible for Federal student financial aid, and it was an error for Dean's to have disbursed such funds to them.

INDEPENDENT STATUS DETERMINATION

Applicants for Federal student financial aid who satisfy the requirements which entitle them to independent student status are awarded more student aid than those students who are found to be dependent on other persons for some or all of their financial support. A student can claim independent status if the individual meets one of seven statutory criteria:

(1) is 24 years of age or older by December 31 of the award year;

(2) is an orphan or ward of the court or was a ward of the court until the individual reached the age of 18;

(3) is a veteran of the Armed Forces of the United States [as defined elsewhere];

(4) is a graduate or professional student;

(5) is a married individual;

(6) has legal dependents other than a spouse; or

(7) is a student for whom a financial aid administrator makes a documented determination of independence by reason of other unusual circumstances.

20 U.S.C. §1087vv(d).

If a student does not meet any of the first six criteria listed above, then a student can qualify as independent only if that person can provide the institution with other evidence which supports a conclusion of independence. This process is called a "Dependency Override" and the verification materials submitted by the student must be documented in the student's file to such a degree that any reviewer can examine this information and easily determine the facts the institution relied on in this evaluation process. For students 6 and 23, Dean's approved a Dependency Override which awarded the students an independent status. However, there are no unambiguous statements or documents from sources outside the students' families which support a finding of an independent status. I find that Dean's failed to secure evidence which adequately and convincingly supports Dean's Dependency Override for these two students and, therefore, it was an error for Dean's to have awarded an independent status to these students for student aid purposes.

INELIGIBLE NON-CITIZENS

To be eligible to receive assistance under any of the Title IV programs, the student must be a United States citizen or national, or provide evidence from the Immigration and Naturalization

Service (INS) that the student is a permanent resident of the United States or is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident. 34 C.F.R. § 668.7(a)(4). The program reviewers found four student files which contained inadequate citizenship documentation to prove their eligibility for Title IV funds.

Student 2 - the alien registration card from the INS which documented that the student was lawfully in the United States expired a month before her enrollment.

Student 8 - the alien registration card from the INS contains a birth date which is different than that on the student's drivers license and other enrollment forms in her student file. There is no explanation for this inconsistency elsewhere in the file.

Student 15 - the electronic student aid report indicates the student is a United States citizen, whereas the enrollment questionnaire indicates she is a permanent resident. There is no explanation for this inconsistency.

Student 22 - the electronic student aid report indicates the student is an "eligible non-citizen" and lists the student's alien registration number; however, there is no INS document in the file to corroborate this conclusion.

Dean's defended itself on this issue by presenting documentary evidence which it asserts confirms that all four students were eligible non-citizens. To obtain these confirmations, Dean's submitted separate Document Verification Requests to the INS for three of the students in 1994 and a verification request for the fourth one in 1995. In each case, the INS responded within several weeks by verifying the residency status of the four students. Unfortunately, this documentation was several years too late in each instance because the students enrolled in classes and received Title IV funds between two and three years before these INS verifications were received. These documents speak only to the residency status of each student at the time the Document Verification Request was submitted to INS, not to the time the Title IV funds were disbursed. Accordingly, I find these students were not eligible to receive Title IV funds upon their enrollment because of the absence of proper, timely INS verification of their alien status.

DEAN'S REBUTTAL

Dean's is owned by Mrs. Hong Gardner. At the conclusion of SFAP's case, Dean's called Mr. John Gardner, the owner's husband, as a witness. Mr. Gardner testified that his wife's work experience has been primarily as a teacher and that this background, in conjunction with the fact she is Vietnamese, explains her unfamiliarity with the many requirements of complying with Title IV regulations. For this reason, he said she relied almost exclusively on a succession of different student financial aid servicing operations which she employed to ensure that all ED requirements were satisfied. He admitted there may have been some delay in notifying her servicer of the need for a refund when a student dropped out, but this was caused by her practice of attempting to contact the student to encourage re-attendance. With regard to maintaining excess cash in her accounts, he once again said she relied on her servicer to draw down only the amounts of federal funds necessary to make approved payments. One of Dean's servicers was

responsible for assembling the reimbursement request packages and he maintained that any inconsistencies or errors found in those packages submitted to ED should be attributed solely to the servicer. To explain the fact there were alterations to a number of the original student documents, specifically why the dates on which ability to benefit tests had been administered were "whited out" by typewriter correction paint or tape, Mr. Gardner informed the tribunal that his wife had seen employees of one of her servicers make changes to some of the documents. He said she did not know what documents were being altered and had not authorized any improper acts. He concluded by stressing that he knew his wife would not deliberately falsify any of the student documents.

Following Mr. Gardner's testimony, SFAP presented copies of approximately 17 ability to benefit tests it obtained at the time of the program review. SFAP alleged that either these documents were not copies of the original tests or that someone had made alterations to the dates of the tests, the scores, and/or the signatures of the test administrator. Respondent then offered the originals of these tests into evidence. Of those 17 tests, it was obvious to me that the dates

placed on 11 of these test score sheets which supposedly reflect the date on which they were administered, had been changed. Respondent's Exhibits 16, 17, 18, 19, 22, 23, 25, 26, 27, 28, and 29. I found most of the changes involved the erasure of the originally entered date and the insertion of the change; however, on two of them, typewriter correction tape was used to cover the original date and a substitute date was entered atop the correction tape. I suspect the persons who made the changes did not believe the original tests would be seen by ED personnel, but expected that only copies of them would be examined, because the copies do not readily reflect the changes which were made. One possible reason for changing these dates was to conceal the fact the tests were being administered after the students had been admitted and begun classes. Of the 11 tests with obvious date alterations, eight of them (Respondent's Exhibits 16, 17, 19, 22, 23, 26, 27, and 29), were definitely administered anywhere from three or four days to three months after the student was enrolled in classes. It is less clear to me why the test dates for the remaining three were changed. Nevertheless, these 11 students were not eligible beneficiaries of the federal student financial aid they received.

Mr. Gardner acknowledged that his wife recently informed him she had seen several of the employees of one of the student aid servicers use a "white-out" correction paint on some of her student files while that group was assembling a reimbursement package for Dean's. According to her husband, Mrs. Gardner did not ask these employees to mask or alter any documents and did not inquire to find out precisely what was being done to them.

DISCUSSION

SFAP's witnesses and documentary evidence have convinced me by a preponderance of the evidence that Dean's has violated requirements in the areas of maintenance of excess cash, making timely refunds, complying with ability to benefit requirements, making independent student status determinations, and admitting ineligible non-citizens. All of these are serious statutory and regulatory violations of the operating requirements of institutions participating in the Title IV programs. As was documented by the 1994 program review, all of these are repeat violations. This situation is somewhat mitigated because the former violations occurred prior to

January 2, 1992, the effective date of Mrs. Gardner's Program Participation Agreement with ED. Dean's blames its servicer for instances of maintaining excess cash and untimely refunds. This may be the case; however, the institution has the ultimate responsibility for program compliance in all aspects and must suffer the repercussions for any violations. For the remaining violations -- ability to benefit violations, unsupported independent status determinations, and ineligible non-citizens -- the culpability rests fully on Dean's owner and administrative staff. Not only were there violations of the regulations, but steps were taken after the fact to disguise these violations. As a consequence, I find that Dean's should be terminated and an appropriate fine imposed.

FINE

At the conclusion of the hearing, SFAP increased the amount it originally requested for a fine from $195,500 to $272,000. This recomputation was made so the amount of the fine would

conform to the evidence elicited during the hearing; SFAP also increased the recommended amount of the fine per violation for the ability to benefit violations contained in the letter of notification. There was no increase in the fine which was specifically premised on evidence of ability to benefit test misconduct which was submitted during SFAP's rebuttal of Dean's defense. SFAP computed the revised fine as follows:

Excess cash	$25,000
Refund violations	
8 instances @ $3,500	28,000
Independent status	
2 instances @ $2,000	4,000
Citizenship	
5 instances @ $3,000	15,000
Ability to benefit tests	
8See footnote 2 *2* instances @ $25,000See footnote 3 *3*	200,000
Total Requested Fine	$272,000

I believe a fine is an appropriate accompaniment to the termination of Dean's eligibility, but I do not share SFAP's views as to what they believe is an appropriate amount. In arriving at this opinion, I have concluded Dean's was exceedingly naive and complacent about adherence to the relevant statutes and regulations. Furthermore, Dean's was placed on notice of similar deficiencies which transpired during the previous owner's watch and for which Dean's management should have been particularly cautious in its administration of these federal programs to preclude against repeat violations. With regard to Dean's alterations to the dates on 11 ability to benefit tests, I have concluded they were deliberate attempts to disguise the improper admission of its students prior to testing. This evidence, however, was presented only to rebut Dean's denial of engaging in any fraudulent acts, and only goes to my opinion of Dean's overall administration of the Title IV program. I have not assessed a specific fine for any of those 11 violations. In addition to that SFAP rebuttal evidence, I have also taken into consideration the size of the institution.

Accordingly, in addition to being terminated, I find that a fine in the amount of $42,200 is appropriate. This amount adequately punishes Dean's for its misconduct and will serve as an

effective deterrent for similar misconduct by other institutions. Using the categories set out above, my computation is as follows:

Excess cash	$ 2,500
Refund violations	
8 instances @ $350	2,800
Independent status	
2 instances @ $200	400
Citizenship	
5 instances @ $300	1,500
Ability to benefit exams	
10 instances @ $3,500	35,000
Total Fine	$42,200

ORDER

. On the basis of the foregoing, it is hereby ORDERED that the eligibility of the Dean's Westside Beauty College to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965 be terminated and that it be fined $42,200.

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Judge Richard F. O'Hair

Dated: November 8, 1995

SERVICE

On November 8, 1995, a copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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Footnote: 1 *1 Using this formula, excess cash was computed by deducting an amount determined by ED as being an estimate of the institution's three day need of cash from the institution's end of month bank cash balance.*

Footnote: 2 *2 This figure should have been 10 rather than 8. When explaining the source of the 8 instances, SFAP counsel recited Students 31, 3R, 5R, 6R, 9R, 21R, 22R, and 33R, but omitted Students 2 and 17, which both parties stipulated were not eligible students. Had these two students been included, SFAP's proposed fine would have been $322,000.*

Footnote: 3 *3 The letter of notification informed Dean's that SFAP proposed to fine Dean's $3,500 per violation. All of the other "per instance" amounts remain unchanged.*
