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

In the Matter of **Docket Nos. 96-108-ST**
97-19-ST
JON LOUIS SCHOOLS OF BEAUTY,
Consolidated Student Financial Assistance Proceedings
Respondent.

Appearances:

Denise Morelli, Esq., and Russell B. Wolff, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Student Financial Assistance programs.

J. Andrew Usera, Esq., Vienna, Virginia, for Respondent.

Before:

Frank K. Krueger, Jr., Administrative Judge.

DECISION

On August 16, 1996, the Student Financial Assistance Programs (SFAP), U.S. Department of Education, issued a notice to the Jon Louis Schools of Beauty of its intent to terminate its school at Levittown, N.Y., from participation in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended. In addition, SFAP notified Respondent of its intent to fine the school for allegations in the notice. An amended termination and fine notice was issued concerning the Levittown School on February 5, 1997. On February 5, 1997, SFAP also issued a notice of termination and fine for other Jon Louis Schools located at North Babylon, NY (with a branch in the Bronx, NY), Patchogue, NY, and Jamaica, NY. Jon Louis requested a hearing and, at the request of the parties, the cases were consolidated. An evidentiary hearing was held in Washington, D.C., from September 10-16, 1997.

For the reason provided below, the Jon Louis Levittown, North Babylon/Bronx, and Patchogue Schools are terminated and fined $63,000, $117,500, and $39,000, respectively. The Jamaica School is neither terminated nor fined.

FINDINGS OF FACT

Corporate Organization and Structure of Schools:

1. The Jon Louis Levittown and North Babylon/Bronx Schools are owned by the JB Beauty Corp. The Jon Louis Patchogue School is owned by Patchogue Beauty School, Inc. The Jon Louis Jamaica School is owned by the Riverhead Beauty School, Inc.

2. Mr. Jon L. Braider is 100 percent owner and President of all three corporations which own the Jon Louis Schools.

3. The corporate office for all of the Jon Louis Schools is located at North Babylon, NY. The corporate office handles a significant portion of the administration of all of the schools. This includes the draw down and disbursement of Title IV funds, determination, calculation, and payment of Title IV refunds and credit balances, the maintenance and reconciliation of fiscal records, and compliance with reporting requirements of the Department.

4. The Jon Louis Schools participate in the Title IV programs. Mr. Braider signed separate program participation agreements for the Levitttown, North Babylon/Bronx, Patchogue, and Jamaica Schools. By signing these agreements, the schools agreed to comply with all statutory and regulatory requirements relating to the Title IV programs.

5. The approximate enrollment of each school is as follows: Levittown, 100 to 120 students; Patchogue, 60 students; North Babylon, 80 students; Bronx, 180 students; and Jamaica, 50 students.

6. The student drop-out rate for the Jon Louis Schools is between 20 and 27 percent.

HESC and SFAP Reviews:

7. The Higher Education Services Corporation of New York (HESC) is the guarantor of Federal student loans and the administrator of State financial aid in New York. As the guarantee agency in New York, HESC conducts periodic reviews and audits of institutions that participate in the Federal Family Education Loan (FFEL) program. In conducting these reviews, HESC examines compliance with Federal and State laws regarding Title IV administration. In April 1994, HESC conducted a standard program review of the Patchogue School. As a result of problems discovered during the Patchogue review, in September 1994, HESC conducted unannounced reviews of the Levittown and North Babylon Schools. Because of unpaid and late refunds and credit balances discovered by HESC during the Patchogue, Levittown, and North Babylon reviews, in January 1996, HESC conducted a refund review at the corporate office. HESC reviewed approximately 500 ledger cards for students at the Levittown, North Babylon/ Bronx, and Patchogue Schools. The majority of ledger cards concerned students that attended the schools during the 1993-1995 award years.

8. Based on a recommendation from HESC, SFAP also conducted an unannounced program review at the Levittown School in September 1994. The review was conducted simultaneously with the HESC review. The reviewers examined 120 files for the 1992/93, 1993/94, and 1994/95 award years. The review was not completed until June 1995, and a program review report was issued on August 28, 1995. The program review report instructed the school to conduct a full-file review of all refund and credit balances. On September, 29, 1995, Jon Louis was placed on a reimbursement method of payment. In December 1996, SFAP conducted reviews at the North Babylon/Bronx, Patchogue, and Jamaica Schools.

9. The August 16, 1996, notice of termination and fine for the Levittown School was based on both the HESC and SFAP reviews. SFAP accused the Levittown School of unpaid and late refunds, improper retention of student credit balances, improper Pell Grant disbursements, improper determination of satisfactory academic progress, missing financial aid transcripts and failure to determine prior postsecondary academic enrollment, failure to conduct entrance and exit interviews, and failure to submit a compliance audit report. At the beginning of the hearing, SFAP dropped the charge of improper determination of satisfactory academic progress and the failure to submit the compliance audit.See footnote 1[1]

10. On July 21, 1997, SFAP reclassified 24 charges for Levittown and 111 charges for North Babylon, Bronx, and Patchogue from refunds to credit balances. In addition, between July 21, 1997, and the commencement of the hearing on September 10, 1997, SFAP reclassified a number of additional charges from unpaid refunds to late refunds, as Respondent paid the refunds at issue.

11. The February 5, 1997, termination and fine notice for the North Babylon/ Bronx, Patchogue, and Jamaica Schools was also based on both the HESC and SFAP reviews. SFAP accused Jon Louis of late and unpaid refunds, late and unpaid credit balances, inaccurate calculation of refunds, improper disbursements of Title IV funds prior to completion of the requisite clock hours, and excess cash. The notice also alleged that the North Babylon School had a cohort default rate of 41.3 percent for the 1994 fiscal year and that the school should be terminated from the Title IV programs on the

basis of the cohort default rate alone.

Refunds:

12. For the period covered by the HESC and SFAP reviews, the Levittown School had a total of 61 late refunds, with 38 of the refunds not paid until after the commencement of the reviews. The refunds were an average of approximately 26 months late. Five of the refunds were over 4 ½ years late; 2 were over 4 years late; 4 were over 3 ½ years late; 4 were over 3 years late; 3 were over 2 ½ years late; 14 were over 2 years late; 7 were over 18 months late; 6 were over 1 year late; 10 were over 6 months late; 4 were over 90 days late; 1 was over 60 days late; and 1 was less than 30 days late. As of the date of the hearing, 7 additional refunds remained unpaid _ 3 over 4 years old; 3 over 3 years old; and 1 over 18 months old. Thirty-six of the late refunds involved checks negotiated or cleared by banks substantially later than when the checks were dated and the dates appearing in the student account ledgers noting the refunds as paid. The checks and ledger entries for these checks are dated late as follows: 2 were over 3 ½ years late; 4 were over 3 years late; 4 were over 2 ½ years late; 5 were over 2 years late; 1 was over 18 months late; 7 were over 1 year late; 5 were over 6 months late; 5 were over 90 days late; 3 were over 30 days late.

13. For the period covered by the HESC and SFAP reviews, the North Babylon School, not including the Bronx branch, had a total of 72 late refunds, with 24 of the refunds not paid until after the commencement of the reviews. The refunds were an average of approximately 14 months late. One refund was over 4 ½ years late; 3 were over 3 ½ years late; 5 were over 3 years late; 5 were over 2 ½ years late; 2 were over 2 years late; 3 were over 18 months late; 8 were over 1 year late; 22 were over 6 months late; 15 were over 90 days late; 7 were over 30 days late; and 1 was less than 30 days late. As of the date of the hearing, 5 additional refunds remained unpaid. One of the unpaid refunds is over 5 years old; 2 are over 2 years old; 1 is over 11 months old; and 1 is over 10 months old. Thirty of the late refunds involved checks that were negotiated or cleared by banks substantially later than when the checks were dated and the dates appearing in the student ledgers noting the refunds as paid. All of the checks and ledger entries for these checks were late as follows: 1 was over 3 years late; 1 was over 2 ½ years late; 3 were over 2 years late; 5 were over 1 year late; 3 were over 6 months late; 3 were over 5 months late; 8 were over 30 days late; and 6 were less than 30 days late.

14. For the period covered by the HESC and SFAP reviews, the Jon Louis School at the Bronx location, which is a branch of the North Babylon School, had a total of 58 late refunds, with 41 not paid until after the commencement of the reviews. The refunds were an average of approximately 8 months late. Two refunds were over 18 months late; 10 were over 1 year late; 37 were over 6 months late; 6 were over 90 days late; and 3 were over 60 days late. As of the date of the hearing, 3 additional refunds remained unpaid, with 2 over two years old, and 1 over 20 months old. Twenty-six of the refunds involved checks that were negotiated or cleared by banks substantially later than the dates appearing on the front of the checks or in the student ledgers. The checks and ledger entries for these checks are dated late as follows; 1 was over 1 year late; 15 were dated over 6 months late; 6 were over 3 months late; 2 were over 2 months late; and 2 were over 30 days late.

15. For the period covered by the reviews, the Patchogue School had a total of 47 late refunds, with 22 refunds not paid until after the commencement of the reviews. The refunds were an average of approximately 21 months late. One refund was over 9 years late; 1 was over 5 ½ years late; 1 was over 4 ½ years late; 2 were over 4 years late; 1 was over 3 ½ years late; 7 were over 3 years late; 2 were over 2 ½ years late; 2 were over 2 years late; 1 was over 18 months late; 8 were over 1 year late; 7 were over 7 months late; 6 were over 90 days late; 7 were over 30 days late; and 1 was less than 30 days late. As of the date of the hearing, 3 additional refunds remained unpaid _ 1 over 3 years old; 1 over 14 months old, and 1 over 13 months old. Fifteen of the late refunds involved checks negotiated or cleared by banks substantially later than when the checks are dated and the dates appearing as paid in the student account ledgers. The checks and ledger entries were dated late for these refunds as follows: 1 was dated over 4 years late; 3 were dated over 2 ½ years late; 1 was dated over 18 months late; 8 were dated over 90 days late; and 2 were over 30 days late.

16. For the period covered by the reviews, the Jamaica School had a total of 3 late refunds_ 1 was over 6 months late; 1 was over 4 months late; and 1 was over 2 months late. As of the commencement of the hearing, 1 additional refund, 10 months late, remained unpaid.

Credit Balances:

17. For the period covered by the reviews, the Levittown School had a total of 52 late credit balances, with 37 not paid until after the commencement of the reviews. The credit balances were paid an average of approximately 15 months late. One of the credit balances was over 5 ½ years late; 1 over 4 years late; 2 over 3 ½ years late; 2 over 2 ½ years late; 6 over 2 years late; 4 over 18 months late; 4 over 1 year late; 9 over 6 months late; 15 over 60 days late; 7 over 30 days late; and 1 less than 30 days late. At the time of the hearing, 3 additional credit balances remained unpaid, all over 3 years old. Twenty-one of the late credit balances involved checks negotiated or cleared by banks substantially later than when the checks are dated or the dates appearing in the student account ledger as paid. The checks and ledger entries for these credit balances are dated late as follows: 1 over 2 ½ years late; 6 over 2 years late; 4 over 18 months late; 1 over 1 year late; 6 over 6 months late; 1 over 90 days late; 1 over 60 days late; one date on time.

18. For the period covered by the reviews, the North Babylon School, not including the Bronx branch, had a total of 86 late credit balances, with 70 paid after the reviews. The credit balances were an average of approximately 7.9 months late. One late credit balance was over 4 ½ years late; 3 were over 2 ½ years late; 4 were over 2 years late; 2 were over 18 months late; 14 were over 1 year late; 19 were over 6 months late; 20 were over 90 days late; 11 were over 60 days late; 5 were over 30 days late; and 7 were less than 30 days late. At the commencement of the hearing, 5 additional credit balances remained unpaid _ 1 four years old; 3 over 3 years old; and 1 over 2 ½ years old. Thirty-six of the late credit balances involved checks that were negotiated or cleared by banks substantially later than the dates appearing on the front of the checks and in the student ledgers. All of the checks and ledger entries for these checks were late as follows: 1 check was dated over 3 years late; 8 were over 2 years late; 1 was over 18 months late; 8 were over 1 year late; 7 were over 6 months late; 5 were over 90 days late; 4 were over 60 days late; and 2 were over 30 days late.

19. For the period covered by the reviews, the Jon Louis School located in the Bronx, which is a branch of the North Babylon School, had 5 late credit balances, for an average of approximately 8 months late _ 1 over 11 months late; 1 over 10 months late; 1 over 9 months late; 1 over 6 months late; and 1 over 5 months late. One additional credit balance remained unpaid for over 36 months.

20. For the period covered by the reviews, the Patchogue School had a total of 28 late credit balances, with 12 not paid until after the commencement of the reviews. The credit balances were an average of approximately 15.6 months late. One credit balance was paid over 5 years late; 3 were over 3 years late; 7 were over 2 years late; 4 were over 18 months late; 1 was over 1 year late; 4 were over 7 months late; 2 were over 60 days late; 1 was over 30 days late; and 5 were less than 30 days late. No credit balances at the Patchogue School remain unpaid. Eight late credit balances involved checks negotiated or cleared by banks substantially later than when the checks are dated and the dates appearing in the student ledgers. The checks and ledger entries were dated late for these checks as follows: 3 were dated 2 ½ years late; 3 were dated 2 years late; and 2 were dated 18 months late.

21. For the period covered by the reviews, the Jamaica School had one credit balance which was paid late by 12 days.

Absence Policy:

22. The program of study offered at all of the Jon Louis Schools is a 1,000 clock hour cosmetology program.

23. Prior to September 1996, Jon Louis had a policy of permitting 100 hours of absence which a student, for extenuating circumstances, would not have to make up to qualify for graduation. The policy was part of an overall student attendance policy which made it clear that students were expected to attend class on a regular basis, and that students were permitted to make up class hours missed due to absence. In October 1996, Jon Louis adopted a revised policy, retroactive to September 5, 1996, which allowed students to be absent up to 10 percent of the required clock hours during a payment period so long as the student maintained a C average, had completed all written and practical work, and had satisfied all financial obligations.

Excess Funds:

24. For its North Babylon School, between December 14, 1995, and September 4, 1996, Jon Louis maintained a cash balance in excess of its projected three-day needs for 124 days. The excess cash ranged from $74,018.57 to $55.29. For

24 days during this period, Jon Louis had negative balances in its Title IV account for the North Babylon School ranging from $1,386.43 to $55.29.

25. For its Patchogue School, between July 26, 1995, and October 28, 1996, Jon Louis maintained a cash balance in excess of its projected three-day needs for 341 consecutive days. The excess cash ranged from $8,485.00 to $370.69.

26. For its Jamaica School, between August 23, 1995, and October 31, 1996, Jon Louis maintained a cash balance in excess of its projected three-day needs for 320 days. The excess cash ranged from $14,946.97 to $91.00. For 12 days during this period, Jon Louis had negative balances in its Title IV account for the Jamaica School ranging from $556.10 to $75.00.

Cohort Default Rate for North Babylon School:

27. SFAP determined that the final cohort default rate for fiscal year 1994 for the North Babylon School was 41.3 percent.

DISCUSSION

Late and unpaid refunds:

Under Title IV, an institution must have a fair and equitable refund policy under which the institution refunds unearned tuition, fees, room and board, and other charges to students who receive Title IV assistance, if the student withdraws or otherwise fails to complete the period of enrollment for which the assistance is provided. 20 U.S.C.A. § 1091b(a) (Supp. 1997);
34 C.F.R. § 668.22(a)(1) (1997). For Pell Grant funds, the refund must be made to the Pell Grant account within 30 days from the date that the student officially withdraws, is expelled, or the institution determines that the student has officially withdrawn. 34 C.F.R. § 668.22(j)(4) (1997). In the case of FFELs, the institution must pay the refund within 60 days after the student officially withdraws, is expelled, or the institution determines that the student has withdrawn. 34 C.F.R. §§ 682.607(c) (1997).

During the period of the HESC and SFAP reviews, the Levittown, North Babylon/Bronx, and Patchogue Schools consistently failed to pay their refunds on time, with many of the refunds going unpaid for several years. One could fairly conclude that the refunds would never have been paid had HESC and SFAP not conducted their reviews. During the approximate three years covered by the reviews, these schools had 238 refunds which were late, of which 125, or approximately 52 percent, were not paid until after the commencement of the reviews. Many of the refunds that were unpaid at the time of the reviews were several years old. As of the commencement of the hearing, 19 refunds remained unpaid. Respondent argues that each of the schools must be judged individually on the basis of the facts pertinent to each school. Even looking at the schools individually, one must question whether the refunds would have ever been paid. Of the 61 refunds due for Levittown, 38 were not paid until after the commencement of the reviews. Of the 72 late refunds at North Babylon, 24 were not paid until after the commencement of the review. At the Bronx location, there were 58 late refunds, with 41 not paid until after the commencement of the reviews. At the Patchogue School, of a total of 47 late refunds, 22 were not paid until after the commencement of the reviews. At the Levittown School, students would remain on the roll books as absent from school for many months. In some cases the student's name would simply disappear from the roll books without any determination that the student had withdrawn from the school, so no refund calculation was done until after the SFAP review. Testimony of Patricia Edelson, tr. at 199-205.

Respondent's primary defense is that during the period when many of the refunds were due it had a cash-flow problem which prevented it from making refunds on time. In the spring of 1993, Mr. Braider reached an agreement with the Wilfred American Education Corporation to take over the Wilfred Academy of Hair and Beauty Culture located in White Plains, NY. Under the terms of the agreement, Patchogue Beauty School, Inc., would teach-out the students attending the Wilfred Academy. All inventory, equipment, and supplies on hand at the Wilfred Academy became the property of the Patchogue Corp. When Mr. Braider's application for this additional location was approved by the Department, however, Jon Louis was not authorized to approve any additional Title IV assistance for the Wilfred

students beyond undisbursed portions of aid already awarded or loans already guaranteed. *See* Exhibit R 759. According to Mr. Braider, this cost him $86,000. Tr. 836-842. Mr. Braider presumably made a business decision to take over the Wilfred Academy, which he still operates. *See* tr. 836-842. In exchange for agreeing to teach-out the Wilfred students, Mr. Braider was able to acquire the equipment and materials necessary to own another school. Mr. Braider's testimony suggests that he was performing a public service to ensure that Wilfred students would have the opportunity to complete their education. However, according to Mr. Clem LaPietra, a Program Analyst for HESC for the past ten years, HESC would make arrangements for a students to be taught at the present location of a school stopping operations or to have the students taught at another school. If a student did not desire to continue his or her education, HESC would forgive the loans or reimburse a student for any cash payments made to the defunct school. Tr. 894-895.

Respondent also blames part of the problem on its own corporate inefficiency. Ms. Wendy Duckham, Jon Louis' Director of Finance, testified that under its old procedure refund checks were written at the corporate headquarters, sent to the schools to be copied, and then sent to the bank with a cover letter from the school. Ms. Duckham testified that the current procedure provides for the check to be sent directly to the bank from the corporate office. Tr. 554, 569. Use of the old procedure may account for several additional days being added to the time necessary to reach the bank, but would not account for egregious delays found by the HESC and SFAP reviewers.

Respondent complains that it never received proper notice concerning SFAP's allegations concerning refunds and credit balances. Respondent notes with dismay the fact that SFAP, without leave from this tribunal, on July 21, 1997, reclassified 135 violations from late refunds to late credit balances and, from time-to-time up to the very morning of the commencement of the hearing, reclassified students from unpaid refunds to late refunds. While I certainly understand counsel's frustration in dealing with such a large number of allegations, I cannot agree with the assertion that Respondent did not receive adequate notice and opportunity to prepare a defense. Many of the allegations in the notices of termination concerning refunds and credit balances were based on the HESC reviews. Unfortunately, HESC and SFAP were not using the same dictionary. HESC referred to credit balances as refunds, while SFAP distinguishes refunds to the Title IV program from refunds (credit balances) to students. In effect, they are both refunds. SFAP made an apparent honest mistake when, in reliance on the HESC classification, it originally classified many of the late “credit balances” as late “refunds.” All of the files upon which the SFAP allegations are based are Respondent's files. All of the student accounts involved in the case were specifically identified by the notices of termination and in the SFAP exhibits which were provided to the Respondent prior to the commencement of the hearing. After SFAP made its reclassification, Respondent was given an additional six weeks in which to prepare for the hearing. Respondent also complains that SFAP kept moving allegations from unpaid refunds to late refunds. During the course of the SFAP and HESC investigations and during the period between the issuances of the notices of termination and the commencement of the hearing, Respondent would periodically pay off the outstanding refunds, until most of the refunds were paid. As SFAP received proof that the refunds were paid (i.e., copies of the front and back of negotiated checks) it would reclassify the violation from an unpaid refund to a late refund. The reclassifications were entirely appropriate; had the reclassifications not been made, the record would be more extensive and complicated than it is.

SFAP also alleges that Respondent paid six refunds to private loan companies rather than to the Title IV program. *See* ED Exhibit 712; testimony of Patricia Edelson, tr. 386-392; testimony of Tom Whiting, tr. 392. Title IV regulations mandate that Title IV lenders be repaid prior to refunds being made to outside sources. *See* 34 C.F.R. § 668.22(h) (1997). Although one of the private loan companies providing loans to Jon Louis students is owned by Mr. Braider, the evidence does not prove that Mr. Braider's company received any of the refunds at issue. Standing alone, the payment of six refunds to private loan companies instead of to the Title IV program is a violation of minor significance and would not warrant termination. In the context of the present case, however, the payments reinforce my decision to terminate the Respondent schools from continued participation in the Title IV programs.

Late and unpaid credit balances:

Under the Title IV program, when a participating school receives funds in excess of a student's cost of attendance, the school must return the excess funds to the student or, with the permission of the student, retain the credit balance to apply to future institutional charges. For the 1994/95 award year, a school had 30 days after the excess balance was created to return the funds to either the student or the parent borrower. For the 1995/96 award year, the period in which to return the excess funds was reduced to 21 days, and for the 1996/97 award year, the period was further reduced to 14

days. *See* 34 C.F.R. § 668.165(b)(2)(ii) (1996).

As with refunds, the Levittown, North Babylon/Bronx, and Patchogue Schools consistently failed to pay student credit balances on time, with many of the credit balances going unpaid for several years. Again, given that many of the credit balances were not paid until after the commencement of the reviews, one must question whether the credit balances would have been paid at all but for the HESC and SFAP reviews. During the approximate three years covered by the reviews, Respondent schools had a total of 171 late credit balances, with 119, or approximately 69 percent, not paid until after the reviews. Again, even when one looks at each school individually, the picture remains bleak. The Levittown School had a total of 52 late credit balances, with 37 not paid until after the commencement of the reviews. At the North Babylon School, there were 86 late credit balances, with 70 paid after the reviews. At the Patchogue School, there were 28 credit balances, with 12 paid after the commencement of the reviews. Other than the cash-flow defense, which, presumably, Mr. Braider would argue applies to credit balances as well, Respondent puts forward virtually no defense.

Misrepresentation:

Because many of Respondent's refund and credit balance checks are dated substantially before the checks were negotiated or cleared by the banks, both HESC and SFAP have accused Jon Louis of representing that the refunds had been paid and then holding the checks until sometime later. Most of the checks in question were many months late in being negotiated, and many were several years late. Jon Louis vociferously denies this charge and blames the problem on its banks. Ms. Duckham and Mr. Braider testified that Respondent experienced many problems with lenders and servicers. Respondent introduced several letters wherein a couple of banks and loan servicers acknowledged delays in negotiating five refund checks. *See* Exhibits R 743. Ms. Duckham stated that this was representative of the problems Jon Louis was having with either lenders or servicers. There were instances where the banks have lost checks, and where checks have been returned because the bank erroneously thought the student was in default. Tr. 572-676. Exhibit R 742 is a spreadsheet created by Jon Louis which Ms. Duckham testified demonstrated the problem with banks not clearing checks in a timely manner. Tr. 576-577. However, the exhibit does not state or prove who was holding the checks after they were written by Jon Louis.

Mr. Braider testified concerning Exhibit R 695-2, which is a copy of a certified check dated March 9, 1998. The check was not negotiated until April 19, 1998. Mr. Braider testified that it took the bank over forty days to cash the check. Tr. 852. The evidence does not prove, as Mr. Braider implies, that the bank caused the delay in cashing the check. The bank may have in fact caused the delay; but, the delay may have been caused by Jon Louis not taking the check to the bank. The exhibit proves nothing other than the obvious fact that there was delay in negotiating the check.

Sally Ann Kramer, Vice President, Technical Review, FAME, Jon Louis' present Title IV servicer, testified that, in her experience in dealing with Title IV loans, she has seen extreme delays because of loans being sold, or the lender or guarantee agency does not know where the student is located. Sometimes a bank will return a check with instructions that it be reissued. However, the checks do not just float around; there will be a notation somewhere, although not necessarily on a ledger. Moreover, if a check is reissued, it definitely will not have the same check number as the original check. Tr. 543-549. Most, if not all, of the late refund and credit balance checks in dispute in this case had the same check number as the original check.

Clem LaPietra of HESC testified that on November 30, 1994, he contacted Katrina Williams at First Federal to confirm whether it had received several checks represented as having been paid by Jon Louis for Patchogue. Ms. Williams, according to Mr. LaPietra, stated that the checks in question were never received. Tr. 31-32. As part of its rebuttal case, SFAP introduced unsworn letters from one of Respondent's banks and from one of the servicers for one of the banks. ED Exhibits 719 and 725. Both letters state that the institutions in question immediately post the checks to the accounts of the students in question. Similarly, ED Exhibits 718 and 728 are sworn statements from servicers of student loans made by banks used by Respondent. Both statements state essentially that all checks are posted immediately.

Respondent objected to the admission of these exhibits on the basis that they are self- serving statements, not subjected to cross-examination. I agree that the statements are self-serving in the sense that banks and other financial

institutions are not likely to voluntarily admit that they have been responsible for regular delay in the clearing of refund and credit balance checks sent to them by Jon Louis. The credibility of the statements would certainly be enhanced had SFAP produced the witnesses for cross-examination. On the other hand, given the nature of Respondent's defense, it should have been obvious to Respondent that it would be necessary to produce a witness from at least one of the financial institutions involved to verify its charges of extensive delay by the institutions. Respondent was provided with an additional two weeks to proffer sur rebuttal to the SFAP statements. *See* tr. 993-994. Respondent's counsel ultimately declined to produce any additional evidence, based on his belief that the financial institutions in question would not cooperate, without any indication that he, or anyone else acting on behalf of the Respondent, had actually spoken to anyone from the financial institutions. Further, Respondent's own evidence contradicts counsel's statements that he does not believe that the financial institutions would testify concerning delays in clearing checks. The record contains several statements made by officials from the financial institutions tracing checks at the request of the Respondent and admitting to some delays in the processing of checks. *See* Exhibits R 743,
R 767-2; R 231-A2-1; R 471-a2-2; R 471-A2-4; R 684-114; R 687-14. While I am sympathetic to Respondent's position that hearsay statements not subjected to cross-examination should be given little weight, on balance I cannot accept Respondent's contention that the financial institutions were responsible for most of the delays in negotiating the refund checks.

Even assuming that the financial institutions were responsible for the delays between the time the checks were dated and negotiated, many of the checks at issue were still several years old. As a fiduciary in handling Title IV funds, Respondent was primarily responsible to the Department of Education. Respondent clearly breached that duty when it issued refund checks to cover student loans guaranteed by the Federal government and then, if Respondent is to be believed, sat by willy nilly after receiving bank statements indicating that the checks had not cleared.[See footnote 2](#)[2] For example, the refund for student # 191 was due 4 ½ years ago. The check to cover this refund was issued by the Respondent 3 ½ years ago. If Respondent is to be believed, the check was sent promptly to the bank, which held the check for 3 ½ years. Even assuming that the bank held the check as claimed, Respondent breached its fiduciary duty to the Federal government by not attempting to find out after a reasonable time why the check was not being cleared by the bank. The record is full of other examples of where the Respondent failed to reconcile its accounts.

Respondent also complains that it never received proper notice of the misreprentation charge. There is little validity to this complaint. The revised notice of termination for the Levittown School, dated February 5, 1997, at page 2, states as follows:

During the course of the HESC investigation, Jon Louis repeatedly misrepresented the status of the Title IV refunds. When reviewers would request that the cancelled checks be produced to establish that the refunds noted on student ledgers had actually been made, Jon Louis would in many cases submit only the front of the requested checks. Reviewers would then request that the back of the cancelled checks be produced. When the cancelled checks were finally produced, the HESC reviewers discovered the dates the refunds had actually been made were substantially later than the dates noted on the student ledgers. These misrepresentations are in direct conflict with your fiduciary duties to the Department.

The termination notice for the North Babylon/Bronx, Patchogue, and Jamaica Schools, states as follows:

In a blatant breach of [its] fiduciary duty, Jon Louis repeatedly misrepresented the status of Title IV refunds. When a student withdraws from his/her program of study, Jon Louis performs a refund calculation and enters a drop adjustment figure on the student ledger cards. If the drop adjustment results in a refund owed, the institution writes a refund check and notes the date the check was written on the student ledger card. A copy of the front of the check is then placed in the student's file. By placing the refund date on the account card, Jon Louis is representing to someone reviewing or auditing those ledgers that the refund was processed on that date. Jon Louis, however, routinely held those refund checks for several months before sending the checks to the appropriate payee. Consequently, the representations made on the student's file documentation regarding the date refunds were made are intentionally misleading.

Misrepresentations regarding the status of refund and credit balance payments are ongoing. During the course of the review in December, Department reviewers obtained ledger cards from representatives of Jon Louis for students whose files they were reviewing. Reviewers requested cancelled checks for withdrawal students whose ledger cards noted a

refund paid. Jon Louis, however, failed to provide all of the required checks. As outlined below, despite representations in student files indicating payment of the refunds and credit balances, these payments were never made. These continual misrepresentations regarding the status of Title IV refunds underscores your callous disregard for your fiduciary responsibilities to the Department.

This notice, although very specific, was not, apparently, specific enough for Respondent to figure out what was being alleged. Respondent, apparently, believes it was entitled to a list of specific student accounts where the alleged misrepresentations occurred and that it did not have enough notice to adequately prepare its defense. *See* testimony of Jon Braider, tr. at 812-814, 821-822. The documents upon which the allegations were based are Respondent's documents. All of the ledger cards and checks, negotiated and otherwise, are in Respondent's possession. Respondent need not look very hard to find examples of the alleged misrepresentation, as almost one-half of the refunds and credit balances at issue in this case, all of which were listed for the Respondent prior to the commencement of the hearing, involved substantial discrepancies between the dates the checks were dated and posted on the account ledgers and the dates that the checks actually were negotiated. Thus, Respondent's argument of a lack of notice must be rejected.

Excused Absence Policy:

When Jon Louis calculated refunds and second disbursements of Title IV assistance, it included absent hours in the calculation. This practice, according to SFAP, inflated the amount of the money Jan Louis could retain when calculating refunds, and accelerated the dates it could take draw downs from its Federal account to cover disbursements for students. According to SFAP, this is not proper if a school does not have an excused absence policy. According to SFAP, a valid excused absence policy is one which allows students to graduate without completing all of the hours required of a program. *See* testimony of Patricia Edelson, Senior Review Specialist, Region II, NY, tr. 166-167, 274. Respondent contends that it does have an excused absence policy. Exhibit 676-10, which is a page from the January 1995, Jon Louis catalogue for the North Babylon School, provides as follows:

Jon Louis permits 100* hours of absence which do not have to be made up to qualify for a graduation certificate.

* For extenuating circumstances.

Mr. Braider testified that this statement constituted the Jon Louis policy on excused absences for all of the Jon Louis Schools and had been in place for a number of years. Tr. 802-803; *see also* letter dated March 29, 1996, from Mr. Braider to Patricia Edelson, p. 4, ED Exhibit 161-303. In October 1996, the school revised its policy as follows:

All students at Jon Louis School of Beauty qualify for a graduation certificate if they meet the following criteria:

1. Students may have excused absences (those that do not have to be made up) not to exceed 10% of the clock hours in a payment period. Example: In a 450 hour payment period 45 is the maximum number of excused hours permitted.

2. Achievement of a minimum C (20.) average.

3. All written and practical work must be completed.

4. All financial obligations must be satisfied.

Although SFAP contends that it is a Title IV violation for a clock hour school to include absent hours in calculating refunds and periods for Title IV payments in the absence of an excused absence policy, nowhere in their briefs or other documents or testimony is it stated where this requirement is codified. In fact, there appears to be no such requirement. In addition, Jon Louis had an excused absence policy, even prior to October of 1996 _ it allowed up to 100 hours of excused absence under extenuating circumstances.

Maintenance of Excess Cash:

Under the Pell Grant program, participating schools may make withdrawals, or draw downs, of Federal funds directly from the U.S. Treasury Department at such times as are needed to disburse to eligible students. When a school

determines how much it wants to draw down, it uses a designated telephone code to indicate how much money it needs. As long as the amount does not exceed the school's total authorization, the money is transferred electronically from the Treasury Department into a bank account held by the school. Testimony of Christopher Curry, Institutional Review Specialist, SFAP, Region II, N.Y., tr. 401-402. An institution may not, however, draw down more funds than are needed to disburse to students for three business days. 34 C.F.R. § 668.166 (1997). Given the limited control that the Federal government exercises over Title IV cash disbursements, one can readily appreciate the importance of schools complying with the rule against the draw down of more funds than are needed for any three days.

Jon Louis maintained cash balances in excess of its three-day needs at its North Babylon, Jamaica, and Patchogue Schools from December 1995 through October 1996. The balances ranged from as high as $74,000 to a low of $55. Jon Louis does not deny the maintenance of the excess cash, but blames the problem on its servicer during this period, Earle Grovatt & Associates. Earle Grovatt, which is no longer in business, had an apparent problem with maintaining excess cash at many schools under its control. *See* testimony of Sally Ann Kramer, tr. at 517-523. In addition, during the fall and winter of 1995/96, when the Federal government shut down as a result of a budget dispute between the Executive Branch and the Congress, Earle Grovatt instructed its clients to draw down funds in excess of their three-day needs in order to cover tuition costs during the projected shutdown. Jon Louis does not claim that the Earle Grovatt instructions were authorized. There is no evidence or contention that either Jon Louis or Earle Grovatt held the excess cash in any interest-bearing accounts or otherwise made money on the excess cash. Testimony of Christopher Curry, tr. 416.

The fact that Jon Louis was following the instructions of its Title IV servicer in maintaining the excess cash is no excuse for the practice. Jon Louis, not Earle Grovatt, was the participating institution in the Title IV programs. Jon Louis, as the fiduciary for the Federal government, was responsible for insuring that the funds were properly spent and maintained. Jon Louis cannot assign its fiduciary duties to a third party and expect to escape liability.

Cohort Default Rate for North Babylon School:

One of the grounds cited by SFAP for termination of the North Babylon School is that it had a cohort default rate for the FFEL program in excess of the 40 percent threshold rate established for participation in the Title IV programs. Under the regulations, if SFAP makes a “final determination” that a school's FFEL cohort default rate exceeds 40 percent for **any** given fiscal year, the hearing official has no discretion but to order termination if that is the “remedy” sought by SFAP. *See* 34 C.F.R. §§ 668.17(a)(2) and 668.90(a)(3)(iv) (1997); *Alladdin Beauty College # 32,* Docket No. 97-108-ST, U.S. Dept. of Educ.(Dec.12, 1997) (case on appeal to Secretary of Education); *Academy for Career Education*, Docket No.97-124-ST (Feb. 20, 1998) (case on appeal to the Secretary of Education). In the present case, SFAP has made a “final determination” that the North Babylon School had a final cohort default rate of 41.3 percent for fiscal year 1994. Ed Exhibit 717. Under the regulations, I have no discretion but to order termination.[See footnote 3](#)[3]

During pre-trial preparation in this case, it became clear that Respondent intended to challenge the “final” rate arrived at by SFAP. After the issue of whether I had the authority to consider such a challenge was fully briefed by the parties, I granted SFAP's motion *in limine* precluding the introduction of any evidence challenging SFAP's “final” rate determination. Although the hearing official may have limited authority to consider evidence which challenges the SFAP “final” determination and make a recommendation that the Secretary of Education exercise his discretionary authority to not terminate the institution's participation because of extenuating circumstances,[See footnote 4](#)[4] or that the Secretary remand the case for a full evidentiary hearing on the cause of the high cohort default rate,[See footnote 5](#)[5] there is no reason to consider these options in this case since more than adequate grounds exist which warrant termination for a number of other violations.

Remedy:

SFAP has requested that Respondent schools be terminated from the Title IV programs and that a fine be levied for each of the violations. Termination and fines are alternative and complementary sanctions. As noted by SFAP in its brief, termination serves the non-punitive purpose of protecting students and the government from harm, while fines are punishment for past conduct and to deter future misconduct by both the school being fined and other schools. Thus, termination may be used separate from a fine, in conjunction with a fine, or a fine may be used by itself. *Electronic College and Computer Programming,* Docket No. 91-7-ST, U.S. Dept. of Educ. (Decision of the Secretary, July 10,

1992). Termination is a very serious remedy to be used when an institution has consistently violated the Title IV regulations and attempts at voluntary resolution have failed, or where the violations are "sufficiently" egregious. *Yorktowne Business Institute*, 85 Ed. Law Rep. 1265 (U.S. Dept. of Educ., 1993). In deciding whether to levy a fine and in deciding the amount of the fine, the hearing official must consider the gravity of the offense and the size of the institution. 34 C.F.R. § 668.92(a) (1997). A fine may be levied up to $25,000 per violation. 20 U.S.C.A. § 1094(c)(3)(B)(i) (Supp. 1997); 34 C.F.R. § 668.84(a); *see also Bnai Arugath Habosen*, 92-131-ST, U.S. Dept. of Educ. (Decision of Secretary, Aug. 24, 1993).

Using these criteria, the Levittown, North Babylon/Bronx, and Patchogue Schools must be terminated from the Title IV programs. (Of course, I must order termination of the North Babylon School because SFAP has determined that its cohort default rate for one year exceeded 40 percent.) The violations proved by SFAP with respect to the Levittown, North Babylon/Bronx, and Patchogue Schools are egregious. The Levittown School had 61 late refunds and 52 late credit balances; 7 additional refunds and 3 additional credit balances remained unpaid. The North Babylon School, with its branch in the Bronx, had 130 late refunds (72 at the North Babylon location and 58 at the Bronx location) and 91 late credit balances (86 at the North Babylon location and 5 at the Bronx location); an additional 6 credit balances remained unpaid. The Patchogue School had 47 late refunds and 28 late credit balances; an additional 3 refunds remained unpaid. Given that checks for many of the refunds were not even written until after the HESC and SFAP program reviews were commenced, and that all three schools either intentionally withheld the checks from being submitted to the banks for payment or willy nilly ignored the obvious problem of the checks not clearing within a reasonable amount of time, it is clear that the Levittown, North Babylon/Bronx, and Patchogue Schools must be terminated from the Title IV programs as soon as possible to prevent additional abuse of Federal resources.

The evidence which requires termination also requires that fines be levied. Although Respondent schools, considered individually, are small schools, the violations with respect to the Levittown, North Babylon/Bronx, and Patchogue Schools are grave. SFAP proposes a fine of $500 for each of the late and unpaid refunds and credit balances. SFAP's proposal is reasonable. A $500 fine may be considered modest, since many of the late and unpaid refunds and credit balances were several years old and probably would have never been paid but for the HESC and SFAP reviews; when combined with termination from the Title IV programs, however, the proposed fine is fair. Thus, the Respondent schools should be fined as follows:

Levittown:

$34,000 (61 late refunds + 7 unpaid refunds x $500)

29,000 (52 late credit balances + 3 unpaid credit balances x$500)

$63,000

North Babylon/Bronx: $69,000 (130 late refunds + 8 unpaid refunds x $500)
48,500 (91 credit balances + 6 unpaid credit balances x $500)
$117,500

Patchogue:

$25,000 (47 late refunds + 3 unpaid refunds x $500)

14,000 (28 late credit balances x $500)

$39,000

A separate issue presents itself concerning the Jamaica School. Jamaica had only three late refunds, one unpaid refund, and one late credit balance. Since the Jamaica School is owned by Mr. Jon Braider, who also owns the other Respondent schools, and the Jamaica School is basically run out of the same corporate office which runs the other Jon Louis schools, one can certainly argue that the Jamaica School should also be terminated. However, given the limited number of violations at the Jamaica School, I must conclude that the violations are not sufficiently egregious to warrant termination. Similarly, given the few violations found at the Jamaica School, I do not believe that a fine is warranted.

SFAP also seeks a fine for the excess cash maintained at the North Babylon, Patchogue, and Jamaica Schools. There is no evidence that the schools benefitted from the maintenance of the excess cash. The evidence suggests that the problem was with Respondent's servicer, which has since gone out of business. Standing alone, the excess cash violation would not, in my view, support termination. Standing alone, the appropriate penalty for the excess cash violation would be a modest fine. Combined with the terminations from the Title IV programs, and the fines being levied for the late and unpaid refunds and credit balances, I see no justice served by levying an additional fine for this relatively less serious violation.

CONCLUSIONS OF LAW

1. The consistent and widespread failure of the Jon Louis Schools located at Levittown, North Babylon/Bronx, and Patchogue to make refunds within the thirty days required by the regulations (34 C.F.R. §§ 668.22(j)(4) and 682.607(c) (1997)), or otherwise within a reasonable time, was either an intentional act on the part of the schools to delay or avoid the return of Title IV funds or was in wanton disregard for the requirements of the regulations and its fiduciary duty under 34 C.F.R. § 668.82 (1997).

2. The consistent and widespread failure of the Jon Louis Schools located at Levittown, North Babylon/Bronx, and Patchogue to pay credit balances owed students within the time period required by the Title IV regulations (34 C.F.R. § 668.164 (b)(2) (1996)), or otherwise within a reasonable time, was either an intentional act on the part of the schools to withhold or to delay the payment of money due to their students or was in wanton disregard for the requirements of the regulations.

3. The consistent and widespread failure of the Jon Louis Schools located at Levittown, North Babylon/Bronx, and Patchogue to ensure that checks written to cover refunds owed to the Title IV program were negotiated within a reasonable time was either an intentional act of deception on the part of the schools to delay or avoid paying refunds or was in wanton disregard of its fiduciary duty under 34 C.F.R. § 668.82 (1997).

4. Jon Louis Schools located at North Babylon, Patchogue and Jamaica maintained excess cash between approximately July 1995 and October 1996, in violation of 34 C.F.R.
§ 668.166 (1997).

5. The fiscal year 1994 FFEL cohort default rate for the North Babylon School, with a branch in the Bronx, meets the condition specified in 34 C.F.R. § 668.17(a)(2) (1997); consequently, the termination action proposed by SFAP is warranted under 34 C.F.R.
§ 668.90(a)(3)(iv) (1997).

ORDER

ORDERED, that the Jon Louis Schools located at Levittown, NY, North Babylon/Bronx, NY, and Patchogue, NY, are hereby terminated from participation in the programs authorized under Title IV of the Higher education Act of 1965, as amended, 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.*

__FURTHER ORDERED, that the Jon Louis School located at Levittown, NY, pay a fine of $63,000; that the Jon Louis School located at North Babylon/Bronx, NY, pay a fine of $177,500; and that the Jon Louis School located at Patchogue, NY, pay a fine of $39,000.

_____

Frank K. Krueger, Jr.
Administrative Judge

Dated: April 3, 1998

SERVICE

A copy of the attached order was sent by FAX and regular mail to the following:

Denise Morelli, Esq.
Office of the General Counsel
U.S. Department of Education
600 Independence Ave., S.W.
Washington, D.C. 20202

J. Andrew Usera, Esq.
8310-B Old Courthouse Road
Vienna, Virginia 22182

Footnote: 1 [1] *In its brief, SFAP reduced to a footnote the charges concerning missing financial aid transcripts, failure to determine prior postsecondary academic enrollment, and the failure to conduct entrance and exit interviews. SFAP brief, p. 23, note 8. Given the relative insignificance of these charges in the context of the other charges, and the cavalier treatment they receive by the SFAP brief, this decision makes no findings or conclusions concerning them.*

Footnote: 2 [2] *Respondent now has a procedure in place to ensure that checks are negotiated promptly. See Exhibit R 698-2.*

Footnote: 3 [3] *It is not clear from the record whether the 41.3 percent cohort default rate includes North Babylon's Bronx location. However, even if the 41.3 percent does not apply to the Bronx location, the Bronx location would still be terminated as it only participates in the Title IV programs as a branch of the North Babylon School.*

Footnote: 4 [4] *See Cannella Schools of Hair Design, Docket No. 95-141-ST, U.S. Dept. of Educ. (Decision of the Secretary, Sept. 5, 1997). (Hearing official, bound by regulation requiring termination for failure of school to have mandatory audits conducted, recommended that Secretary exercise his "plenary" authority and not order termination in light of extenuating circumstances. The Secretary, on appeal, accepted the hearing official's recommendation.)*

Footnote: 5 [5] *See Alladdin Beauty College # 32, supra. (Hearing official recommended that, if case is appealed, in light of small number of loans involved and the fact that the school's most recent cohort rate was below 40 percent, the Secretary remand the case to the hearing official to conduct a full evidentiary hearing into the cause of the high cohort default rate and present a recommendation to the Secretary on whether the school should be terminated.)*
