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

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In the Matter of **Docket No. 97-124-ST**

**ACADEMY FOR CAREER EDUCATION**, Student Financial Assistance Proceeding

Respondent.

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Appearances:

Dr. Chana Schachner and Jay Schachner, Ridgewood, New York, for Academy for Career Education.

Renee Brooker, 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

The Academy for Career Education (ACE) is a not-for-profit business school which operates in Ridgewood, New York. On July 25, 1997, the office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a notice of intent to terminate ACE's eligibility 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*. SFAP initiated this termination proceeding because ACE's Federal Family Education Loan (FFEL) Program's cohort default rate for fiscal year 1994 exceeds 40 percent and, pursuant to 34 C.F.R. § 668.17(a)(2), this authorizes SFAP to initiate a proceeding under Subpart G to terminate ACE's participation in Title IV, HEA programs. ACE appealed this determination and requested a hearing.

SFAP underscores the importance of preventing post-secondary schools which have a large percentage of their students defaulting on their federally subsidized student loans, such as ACE, from continuing to participate in federal student financial assistance programs. SFAP also reports that the Secretary considers an institution's cohort default rate to be a factor which directly reflects an institution's ability to properly administer Title IV, HEA programs. 34 C.F.R. § 668.16(m)(1). Its concern, and one which is shared by Congress, is that schools with high cohort default rates often victimize students by leaving them with huge debts, minimal education, and often in a worse position than when they started school.See footnote 1[1] Taking into consideration both the concern for fiscal control over the excessive loss of federal dollars to subsidize defaulted student loans and the concern for the welfare of uneducated students with defaulted loans, the Department elected to combat this problem by implementing regulations which permit the Secretary to initiate a proceeding under Subpart G to fine, limit, suspend, or terminate the eligibility of an institution which has a cohort default rate that exceeds 40 percent for any fiscal year. 34 C.F.R. § 668.17(a)(2). In such a proceeding, SFAP

must show that it has calculated a final cohort default rate for the institution and that the rate exceeds 40 percent. If the institution requests a hearing, the hearing official must find that the sanction sought by SFAP is warranted unless the institution can show, by clear and convincing evidence, that the cohort default rate is not the final rate determined by the Department and that the correct rate is 40 percent or less. 34 C.F.R. § 668.90(a)(3)(iv). *See Aladdin Beauty College #32*, U.S. Dept. of Education, Dkt. No. 97-108-ST (Dec. 15, 1997)*; Palm Beach Beauty & Barber School*, U.S. Dept. of Education, Dkt. No. 97-102-ST (Oct. 23, 1997).

The Department notified ACE on January 6, 1997, that its 1994 cohort default rate was 50 percent. It also provided ACE with instructions on the means by which it could contest this calculation. ACE submitted no appeal within ten working days of this notice and thus the 50 percent cohort default rate became final as of January 6, 1997. 34 C.F.R. §§ 668.17(a)(1), (h).

In response to this termination proceeding, ACE alleges that the Department has acted arbitrarily, capriciously, and contrary to law, and that the facts of the case do not necessitate a termination. ACE administrators point out that in January 1992 it recognized that its cohort default rate had reached an unreasonable level and it voluntarily resigned from participation in the federally subsidized loan program at that time. SFAP advises that it never received notice of this withdrawal, and it presented a document showing that ACE continued to certify FFEL Program loans until August 1993, shortly before SFAP terminated ACE's FFEL Program eligibility.

Following their decision to voluntarily withdraw from the FFEL Program, ACE administrators said they had discussions with Departmental personnel who told them they were no longer responsible for further reports regarding that program. For this reason, they felt they were justified to ignore the Department's October 1, 1993, letter which informed them it had terminated ACE's eligibility to participate in the loan program. ACE uses the same rationale for not appealing the 1994 cohort default rate when it was presented to it in January 1997. ACE believed it was out of the loan program business and an assignment of a cohort default rate for 1994 was a meaningless event.

ACE now argues that, in light of several recent federal court decisions, it would have been fruitless for it to have appealed its 1994 cohort default rate because these decisions have shown that the agencies guaranteeing loans for ACE's students are unable to provide the necessary documentation to be used by the Department in a meaningful review of an appeal. For this argument ACE relies on two recent federal district court cases in New York which upheld challenges by plaintiff institutions to the completeness and accuracy of the guaranty agency records upon which the cohort default rates for the plaintiffs were calculated. *Calise Beauty School v. Riley*, 1997 WL 630115 (S.D. N.Y.) (decided October 8, 1997); *Mildred Elley Business School v. Riley*, 975 F. Supp. 434 (N.D. N.Y. 1997). The courts remanded both of these cases to the Department for reconsideration of the schools' loan servicing and collection appeals. Although not required to do so by the courts, the Department decided to perform a similar reconsideration of the cohort default rates of schools not a party to these lawsuits if two conditions were met. First, the school had to show that it had timely appealed the calculation of one of its rates and, second, the school had to have complained in the appeal about the inadequacy of the loan servicing records provided by the guaranty agency. Since ACE was not a party to either of these lawsuits and it did not previously submit an appeal of its cohort default rate to the Department, it is not entitled to any relief by virtue of these two cases or by the Department's offer to reconsider cohort default rates.

ACE also seeks relief based upon a third case, *Advanced Career Training v. Riley*, 1997 WL 476275 (E.D. Pa.) (decided August 18, 1997), which it contends is similar in nature to the two cases cited above. While the court found that certain loan servicing procedures for the plaintiff school were improperly performed by lenders and loan servicers, it did not remand the case to the Department for reconsideration because it found the error was harmless. Even if the improperly serviced loans were excluded from the computation of the school's cohort default rate, the plaintiff would not be entitled to the relief requested because its cohort default rate would still exceed the minimum level.

In rebuttal to SFAP's basic premise that an excessive cohort default rate is indicative of an institution's inability to properly administer the Title IV, HEA programs, ACE reports that in all the years since 1984 its audit reports have resulted in only one deficiency and this required a reimbursement to the Department of $813. It also boasts that the best evidence of the outstanding service it provides to its community is that its graduate placement rates are well above average. ACE continues by explaining that it serves a very disadvantaged class of students, many of whom apparently do not appreciate the need to be financially responsible for their student loans. In the long run, however, ACE views

itself as making a worthwhile investment in a group of potential students who, if no one tries to educate them, will cost the federal government far more in welfare payments than the amounts expended to account for defaulted loans. For all these reasons, ACE argues that it and its students should not be penalized because of the irresponsibility on the part of some of its former students who have defaulted on their student loans.

ACE also makes an isolated allegation that the Department erred in its review of evidence it submitted to the Department on February 24, 1997, but it did not state the nature of this evidence, and SFAP has been unable to locate the existence of any such submission. Whatever it was, such a submission would have been too late to be considered as a valid appeal of the institution's 1994 cohort default rate; however, without more information this allegation has no merit.

Despite these valiant efforts to preserve the *status quo*, ACE is unable to overcome the drastic treatment the Department has determined to apply to institutions which participate in the FFEL Program and whose cohort default rate for any fiscal year exceeds 40 percent. It is unfortunate that ACE did not give more attention to the January 6, 1997, letter which announced its FY 1994 cohort default rate and did not challenge that rate determination by exercising its appeal rights. Even a cursory examination of that one and one-half page letter should have placed the institution on notice that the Department intended to use that default rate as a basis for the current termination proceeding. ACE ignored the warning at its peril. ACE has a final cohort default rate of 50 percent for FY 1994, and this exceeds the regulatory threshold established by 34 C.F.R. §§ 668.17(a)(2)and (3). As a result of this lone finding, I am compelled to hold that ACE's eligibility to participate in the Title IV, HEA programs should be terminated.

ORDER

On the basis of the foregoing, it is hereby ORDERED that the eligibility of the Academy for Career Education to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965 be terminated.

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Judge Richard F. O'Hair

Dated: February 20, 1998

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SERVICE

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] *Abuses in Federal Student Aid Programs, ("Senate Report"). S.Rep. No. 58, 102d Cong., 1st Sess. (May*

*17, 1991) at 10.*