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

In the Matter of **Docket No. 97-141-ST**

ROGIE'S SCHOOL OF BEAUTY CULTURE Student Financial Assistance Proceeding
Respondent.

Appearances:

J. Andrew Usera, Esq., Vienna, Virginia, and Ronald L. Holt, Esq., Kansas City, Missouri, for Rogie's School of Beauty Culture.

Paul G. Freeborne, Esq. and Russell B. Wolfe, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before: Judge Ernest C. Canellos

DECISION

On September 15, 1997, the office of Student Financial Assistance Programs (SFAP), of the U.S. Department of Education (Department), issued a notice to terminate Rogie's School of Beauty College (Rogie's) from participating in the student financial assistance programs which are authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV). The Department may terminate an institution from participation in all the Title IV programs if it has a cohort default rate (CDR) in excess of 40% for any fiscal year. 34 C.F.R. § 668.17(a)(2). SFAP initiated the termination action based on Rogie's alleged Federal Family Education Loan (FFEL) Cohort Default Rate of 44.8% for fiscal year 1994.

The Department notified Rogie's of its 44.8% 1994 CDR on January 6, 1997. Rogie's, in accordance with its regulatory right provided in 34 C.F.R. § 668.17 (c)(1), contested the rate calculation by contending that 9 borrowers who defaulted on their loan were subject to improper servicing, and thus should be removed from the calculation of the 1994 CDR pursuant to the provisions of 34 C.F.R. § 668.17 (h)(3)(3)(viii). On July 30, 1997, the Department determined that there was no basis to revise Rogie's 1994 cohort default rate. On January 16, 1998, Rogie's requested that its appeal be reconsidered, however, on March 3, 1998, the Department again found no evidence of improper loan servicing.

Rogie's raises the same improper servicing issues in this proceeding. Specifically, it contends that 9 students should be removed from the calculation of the CDR since these Spanish- speaking students were only contacted in English, a language which they could not understand.See footnote 1[1] This, in Rogie's opinion, constitutes a case of improper servicing pursuant to 34 C.F.R. § 668.17 (h)(3)(3)(viii). My jurisdiction in this proceeding, however, is extremely limited. SFAP has shown that its calculation of Rogie's final CDR for 1994 is 44.8%. Since SFAP has made this showing, there is but one defense available to the school. To avoid termination, the school must prove by clear and convincing evidence that the CDR in question is not the final rate determined by the Department and that the correct rate is 40% or less. 34 C.F.R. § 668.90 (a)(3)(iv).

Rogie's first argues that the rate is not final since it has filed a formal request with the Secretary to reopen its already concluded internal SFAP appeal. In addition, it argues that "process integrity issues" prevent their 1994 CDR from being considered final -- the school claims that the failure of the Department to follow the controlling law during the process of its determining the CDR prevents finality. Rogie's supports this contention on three grounds. The first is a comment by the Secretary in the September 21, 1995 Notice of Proposed Rule Making, reported in the Federal Register at 60 Fed. Reg. 49179. According to Rogie's, this comment, which was deleted from the text of the final regulation, provides the school with an additional defense to a CDR termination proceeding -- the ability to challenge the calculation of the rate. Second, it argues that for this tribunal to have a substantive role in this appeals process, I must have the authority to determine whether the Secretary followed governing legal standards. Third, Rogie's argues that 34 C.F.R. § 668.89(b), which binds the hearing official to apply all statutes and regulations which are applicable, trumps 34 C.F.R. § 668.90, and thereby forces me to consider the question of whether all regulations have been followed.See footnote 2[2]

None of these considerations have any bearing on the finality of the CDR. In order for a CDR not to be considered final, one of three criteria must be met. Rogie's must establish by clear and convincing evidence that either the time to appeal has not expired, the final rate had not yet been issued, or the final rate has been appealed and the decision has not yet been issued. *See Palm Beach Beauty & Barber School*, U.S. Dep't of Educ., Dkt. No. 97-102-ST (October 23, 1997). Barring the establishment of any of these three circumstances, the rate is final.

Rogie's arguments try to create a additional means to contest the calculation of the CDR within this tribunal. The established appeal right of the school to contest the calculation of the rate is internal to SFAP. *See Alladin Beauty College #32*, Dkt. No. 97-108-ST, U.S. Dep't of Educ., (August 20, 1998). To permit the filing of a request to reopen an appeal to prevent finality would present an untenable consequence. In such a situation, if a school continues to request the reopening of its appeal, and cannot be terminated until it stops doing so, a school might never be terminated for its excessive default rate. I refrain from providing the school with this additional hearing right. Most importantly, the school has not established by clear and convincing evidence that the time to appeal has not expired, the final rate has not been issued, or the final rate has been appealed and the decision has not yet been issued. All other issues raised are outside my jurisdiction. As a consequence, the termination of Rogie's must be upheld.

Rogie's argument regarding improper servicing is irrelevant to my decision in this proceeding -- the calculation of the rate does not fall within the jurisdiction of this tribunal. *See Alladin Beauty College #32, supra*. However, even assuming *arguendo* that I had the authority to provide relief based on a showing of improper servicing, I would refrain from taking such action under the present circumstances. 34 C.F.R. § 668.17(h)(2) instructs the Secretary to exclude from the calculation of the CDR those defaulted loans that because of improper servicing would result in an inaccurate or incomplete rate. Improper servicing, however, is established only if the school can show that the lender failed to perform one of five selected servicing activities.See footnote 3[3] If the school establishes that at least one of these required activities was not performed, then the loan will be removed.

Rogie's does not dispute that these required five steps were taken by the lender. Instead, Rogie's contends that the steps taken were ineffective for the purpose of the regulations since the communication was not substantively effective. According to Rogie's, a letter in English to a Spanish only speaking student would not constitute a letter under 34 C.F.R. § 668 (h)(3)(viii), and thus would render the servicing invalid. Rogie's argues that due diligence mandated of lenders during the guaranteed student loan collection process by 34 C.F.R. § 682.411, requires that any communications be in the native language of the student to be effective. Additionally, *Advanced Career Training v. Riley*, No. 96-7065, 1997 U.S. Dist. LEXIS 12776 (E.D. Pa. Aug. 18, 1997), should be interpreted to hold that loan servicing must be effective and meaningful under the law to be in compliance.

SFAP, in response, argues that contact in Spanish is not grounds for improper servicing. They provide four reasons for this contention. First, SFAP contends that the lenders had interpretative services available for the borrowers. Second, they argue that the language of the letters essentially is irrelevant; due to the entrance and exit counseling that the borrowers received, they knew, or should have known, of the import of their failure to pay off their loans. Third, SFAP argues that even if the servicing was improper, it should be irrelevant since it was not the sole cause of default. Last, SFAP argues that the 34 C.F.R. § 668.17(h)(3)(vii) focuses on whether an attempt has been made to contact, not

whether contact was successfully made or even understood. By inference, SFAP argues no contact need be made in the native language of the borrower.

Upon analysis of the various arguments, I have concluded that the regulations do not require servicing to be in the native language of the borrower. Regardless of its effectiveness, attempted communication is all that is required by 34 C.F.R. § 668.17(h)(3)(vii). Specifically, if a final demand letter is sent to a borrower but no contact is actually made, this constitutes proper servicing. 34 C.F.R. § 668.17(h)(3)(vii)(a) and (d). In addition, if a phone call is attempted but no contact is made, this is proper servicing. 34 C.F.R. § 668.17(h)(3)(vii)(b). It is abundantly clear that no contact is less effective than foreign language contact and, since such attempts which fail to effectuate contact constitute proper servicing, I am forced to conclude that any contact or attempted contact in English would also constitute proper servicing.

Rogie's does raise an interesting observation. From the late 1980s to 1992, all loan servicing of guaranteed students loans in Puerto Rico was performed by the Puerto Rican guaranty agency with local servicing. During that period of time, the default experience of Puerto Rican schools was amongst the best in the Guaranteed Student Loan Program. However, for the 1995 fiscal year, Puerto Rico has the second highest default rate in the nation. Rogie's attributes this phenomenon to a change in the Guaranty Agency in Puerto Rico, and the resulting change in the language of servicing. This correlation may be worthy of further inquiry, but without any empirical evidence, this assertion becomes pure speculation. Most important, however, is that the Secretary has clearly stated that I do not have authority to review the final rate established by SFAP. *In re Aladdin Beauty College #32*, Docket No. 97-108-ST, U.S. Dep't of Educ. (Order of the Secretary, August 20, 1998).

CONCLUSION

None of the arguments raised by Rogie's prevent its termination from participation in Title IV programs. Furthermore, while Rogie's claim of improper servicing is, at best, highly suspect, I do not have the jurisdiction to consider the claim of improper servicing to prevent termination. Under the current regulations, this is not the appropriate forum for the resolution of Rogie's improper servicing claim. *See Alladin Beauty College #32, supra*, (while the rate may not be challenged in this tribunal, it may certainly be challenged in federal court). Since the 44.8% rate is final, Rogie's must be terminated pursuant to 34 C.F.R. § 668.90 (a)(3)(iv).

ORDER

On the basis of the foregoing findings and conclusion, it is hereby **ORDERED** that the eligibility of Rogie's School of Beauty to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, is terminated.

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Ernest C. Canellos
Chief Judge

Dated: September 24, 1998

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]*I have granted both respondent's and SFAP's motions to supplement the record. All evidence submitted has been considered in this appeal.*

Footnote: 2 [2]*34 C.F.R.§ 668.90 outlines the procedures to be followed in this type of appeal. It requires that I order the termination of the institution from participating in Title IV programs unless the institution presents clear and convincing evidence that the CDR is not final and the correct rate is at or below 40%.*

Footnote: 3 [3]*34 C.F.R. § 668.17(h)(3)(vii) states that:*

> *a default is considered to have been due to improper servicing or collection only if the borrower did not make a payment on the loan and the institution did not perform one or more of the following activities: (a) Send at least one letter (other than the final demand letter) urging the borrower or endorser to make payments on the loan if the lender was required to send such letters; (b) attempt at least one phone call to the borrower or endorser, if such attempts were required; (c) submit a request for preclaims assistance to the guaranty agency, if such attempts are required; (d) send a final demand letter to the borrower, if required; and (e) if required, the lender did not submit a certification (or other evidence) that skip tracing was performed.*