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

In the Matter of **Docket No. 97-164-ST**

INTERNATIONAL JUNIOR COLLEGE, Student Financial Assistance Proceeding
Respondent.

Appearances:

J. Andrew Usera, Esq., Vienna, Virginia, and Ronald L. Holt, Esq., Kansas City, Missouri, for International Junior College.

Pamela Gault, 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

International Junior College (IJC), with its main campus located in San Juan, Puerto Rico, is a private career school specializing in computer technology, secretarial skills, and cosmetology, among other disciplines. IJC participates in the federal student financial aid programs authorized under Title IV of the Higher Education Act of 1965 (Title IV, HEA), as amended. 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* On October 23, 1997, the office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (Department), issued a notice of intent to terminate IJC's eligibility to participate in further Title IV, HEA programs. This notice was based on the school's Federal Family Education Loan (FFEL) program's cohort default rate (CDR) which was in excess of 40 percent for the 1994 fiscal year.[1] Under 34 C.F.R. § 668.17(a)(2) (1997), "the Secretary may initiate a proceeding under subpart G...to limit, suspend, or terminate the participation of an institution in the Title IV, HEA programs, if the institution has an FFEL Program cohort default rate...that exceeds 40 percent for any fiscal year."

In December 1996, prior to the notice of termination, the Default Management Division (DMD) issued to IJC a letter notifying the school that its FY 1994 CDR was 40.8 percent. In April 1997, IJC filed an appeal pursuant to this rate determination, and asserted that the rate was not the final rate due to the improper loan servicing of 15 student borrowers. Under 34 C.F.R.
§ 668.17(h)(2), the Secretary of Education will exclude any loan from the CDR which, due to improper loan servicing, would result in an inaccurate or incomplete calculation of the CDR. IJC contended that by only extracting two student defaults, the CDR would fall below the 40 percent threshold used to pursue termination proceedings. Improper loan servicing, under 34 C.F.R. § 668.17(h)(3)(viii), is substantiated only if the institution proves that the lender failed to perform one or more of several activities that may be necessary under certain conditions of delinquent loan repayment.

These activities include: sending at least one letter (other than the final demand letter) urging the borrower to make payments on the loan; attempting at least one phone call; submitting a request for preclaims assistance to the guaranty agency; sending a final demand letter to the borrower; and submitting a certification that skip tracing was performed.

On July 11, 1997, DMD issued an official notification denying the appeal and upholding IJC's final FY 1994 CDR of 40.8 percent. The Department twice sent IJC final rate determination letters, the first of which was returned to the Department. IJC stated that it received neither of the two letters, and this, in part, formed the basis of IJC's motion to dismiss this proceeding. IJC argued that proper notice is required before an institution's Title IV eligibility may be terminated, based on an excessive CDR. SFAP countered by stating that no regulatory provision supports this motion. Notification, according to SFAP, is not legally significant in this instance since IJC was already notified once of its CDR in the October 23, 1997, notice to terminate, and the school submitted a timely request for a hearing to challenge the proceedings. Further, SFAP noted that where notice is legally significant, the regulations explicitly state so.See footnote 2[2] Finally, SFAP stated that even if IJC had not received the final rate determination notice, the school was not harmed because it had already exhausted all appellate recourse within the Department.See footnote 3[3] IJC's motion to dismiss was denied on January 16, 1998.

In its challenge of this termination proceeding, the school alleges that the CDR is not final because DMD incorrectly calculated the 1994 CDR by not considering the need for native language servicing of some of the borrowers, and because the school has asked the Secretary to reopen this case which would include a re-examination of the rate calculation. In addition, IJC states that several U.S. District Court cases support its contention that the rate is not final. Finally, IJC believes that its opportunity to appeal the rate has not yet expired.

IJC alleges that its CDR is not final due to improper loan servicing which resulted in the guaranty agencies' “failure to perform all required tasks.” Among the 15 student borrowers that are the subject of IJC's appeal, the students allegedly informed the servicer that they could not speak English. IJC states that little or no attempt was made, however, to communicate with the students in Spanish by either telephone or letter. As a result, IJC requested that these 15 students be excluded from the CDR calculation. IJC alleges that the Department, during its review of IJC's CDR appeal, did not conduct a thorough review of the servicing history of these 15 students because there was no mention of the negative effects, caused by a language barrier, on the students' repayment status, and hence the school's default rate. In this vein, IJC cautions against the appeal process' arbitrary or capricious nature when it ignores the negative impact of English-only servicing. At the same time, IJC asserts that loan servicers have a responsibility to communicate to the borrowers in an effective and meaningful manner, following a common- sense application of the purpose of the loan servicer regulations.

IJC supports a great deal of its argument with the district court case of *Advanced Career Training v. Riley*, No. 96-7065, 1997 U.S. Dist. LEXIS 12776 (E.D. Pa. Aug. 18, 1997) (hereinafter *ACT*). The main import of this decision, as interpreted by IJC, is that loan servicing, based on an analogy with pre-claims assistance, must be effective and meaningful under the law, otherwise ineffective form over substance will dictate administrative regulations. The regulation's (34 C.F.R. § 668.17(h)(3)(viii)) language, purpose, and manner in which it was carried out was a focal point of this decision. IJC questions whether servicing conducted in English is a meaningful way to communicate with borrowers whose first and, in many cases, only language is Spanish. IJC extends its analysis when it states that although a service is technically performed, it is considered ineffective and as if it were never completed if the service is done in a manner that does not achieve its intended goal. In the present case, IJC concludes that phone calls and letters made or sent by the servicer were not performed because they were conducted in English instead of Spanish, and therefore did not achieve the intended goal of effectively urging the borrower to avoid defaulting on her loan.

Particularly subject to opposing interpretations by SFAP and IJC is a letter, issued by the Secretary, in response to a letter from the Hispanic Association of Colleges and Universities concerning possible discrimination in loan servicing to Hispanic borrowers. SFAP points out that after the Secretary reviewed general CDR data, he concluded that institutions serving Hispanic populations have not historically experienced high default rates. The Secretary further stated that two student loan servicers, Sallie Mae (a servicer for the Puerto Rican region during the FY 1994 loan defaults at issue in this case) and Citibank, employ multilingual representatives. IJC counters by stating that while general data may not reveal discrimination, the Secretary did not assess IJC's individual borrowers to determine whether native language servicing was required and appropriate. More specifically, IJC does not believe this letter implies that loan servicers

operating in a region where Spanish is the official language need not provide communication in that language. Rather, IJC believes the letter is silent on whether the loan servicing was adequate in this particular case.

ANALYSIS

In reviewing the foregoing evidence it appears that termination of IJC from participation in further Title IV, HEA programs is appropriate under 34 C.F.R. § 668.90(a)(3)(iv), which establishes that termination is warranted if an institution's CDR exceeds 40 percent. In addition, 34 C.F.R. § 668.90(a)(3)(iv) limits the authority of the hearing official if the requirements for termination are met and such recourse is sought by the Department.See footnote 4[4] IJC has not established by clear and convincing evidence that the FY 1994 CDR is not final, or that the correct rate is beneath the threshold that makes it subject to termination. Thus the school has not proven the only available defense to Title IV program termination.

The case at hand presents a unique dilemma for loan servicers who conduct business in a United States commonwealth where English is not the predominant or official language. Indeed, this case speaks substantively to both the jurisdictional limitations of this tribunal, as addressed in previous decisions, and the loan servicing process administered to borrowers who attend institutions where the instruction is not in English. Disturbingly, Puerto Rico represents a discrete region that participates in Title IV programs, yet nowhere in the regulations is attention devoted to the responsibility of servicers operating in this region. This omission is a contributing factor in the present litigation. As a result, the parties involved have resorted to interpretation of intent, purpose, and at times mere speculation of the meaning of those regulations that govern the loan servicing of Title IV programs.

As mentioned earlier in this decision, there are five requirements of a loan servicer which include sending a final demand letter and attempting a phone call. IJC has not proven, nor does it even contend, that *no* communication was attempted by the loan servicer to the student borrowers. Rather, the school relies on its interpretation of *ACT*, including the belief that communication in English served no functional purpose and therefore constituted a failure to perform the required tasks. The court in *ACT* , however, also determined that, “[u]nder the statute, the school is entitled to a reduction in its CDR only if that loan servicing [error] was so serious as to have caused the loan to default.” *ACT*, at 34 (interpreting the meaning of 20 U.S.C. § 1085(m)(1)(B)). While there is no way to determine whether a final letter or phone call in Spanish would have prevented the students from defaulting, there is evidence that IJC students were already presented with information detailing their obligations of repayment as borrowers. The students signed promissory notes in English; IJC's personnel, however, worked with the students in Spanish to ensure that they understood their loan obligations. In addition, IJC administered entrance and exit interviews conducted in Spanish, as were all business and academically related transactions, and the school's Office of Financial Assistance sent several letters in Spanish to the students explaining their responsibilities. In the present case, there were simply too many attempts at communicating with the student borrowers in Spanish to establish causation between the loan servicing and the excessive default rates.See footnote 5[5]

Further, assuming arguendo that the loan servicing was the cause, there appears to be no precedent or regulatory authority which states that loan servicing must be conducted in the native language of the borrower. In fact, many borrowers do not even receive phone calls in any language since the requirements only obligate an *attempt* on the part of the loan servicer. IJC does not establish that no letters or phone calls were made to the borrower. To the contrary, much of the evidence establishes that students received final correspondence, albeit in English. *ACT*, as much as it discusses a standard of regulatory review that incorporates purpose and meaning, also affords the Secretary a great deal of discretion in interpreting the regulations unless the interpretations are “clearly erroneous” or “inconsistent with the regulation.” *ACT* at 24. The wording of 34 C.F.R. § 668.17(h)(3)(viii), which governs loan servicing requirements, states nothing about language requirements. Therefore, I find that SFAP's interpretation is not erroneous and does not negate the purpose or intent of this regulation. Finally, the erroneous nature of the timing of the final demand letters and the preclaims assistance issues, which were addressed in the *ACT* decision,See footnote 6[6] are not analogous to the loan servicing issue in the present case.

IJC also utilizes several other District Court cases in its argument. The issues raised in these cases, however, are couched within the context of utilizing *relevant* loan servicing and collection records to prove that one of the five basic loan servicing steps was not performed. *See generally, Calise Beauty School, Inc., d/b/a Hair Design Institute-*

Livingston, et al. v. Riley, No. 96-6501, 1997 U.S. Dist. LEXIS 15706 (S.D. N.Y. Oct. 8, 1997). Again, the issue in the present case is not whether the services were performed, but rather whether the language in which they were carried out is sufficient to constitute performance. For the reasons stated above, the Secretary's conclusion that these services were performed is not "arbitrary or capricious" since the regulations are silent on native language servicing. In some instances, phone calls in Spanish to IJC students were attempted, thereby further satisfying the requirements. Indeed, the *Calise* case, as well as *Mildred Elley Business School v. Riley*, 975 F. Supp. 434 (N.D. N.Y. 1997), dealt mainly with the adequacy of loan servicing *records* provided by the guaranty agency. This is not analogous to the present case where IJC alleges that the Secretary did not address all of the facts before ruling on the 15 defaults. Here, even if records reveal that servicing was not done in Spanish, the outcome would not change because the five regulatory loan servicing requirements do not include a requirement of native language servicing.

CONCLUSION

IJC has subjected itself to this termination proceeding because of its high CDR for FY 1994. Of some notice is the sharp increase between the FY 1993 CDR of 19.6% and the FY 1994 CDR of 40.8% which corresponds to a change from a local servicer to one based outside of Puerto Rico.See footnote 7[7] By the time SFAP issued a notice of termination, IJC already had a Default Management Plan in place. Although this plan does not mention lingual concerns, this is not dispositive. It is a viable interpretation that any default plan implemented by IJC would be conducted in Spanish; indeed any communication issued by the school to students is presupposed to be in Spanish. In addition, IJC's FY 1995 CDR was 33.8%, which evidences an improvement on the school's part. Diligent measures to reduce CDR's, however, cannot serve as the basis for defending a termination action. Nonetheless, IJC's CDR surpassed an explicitly defined threshold, above which termination is mandated. While the regulations governing loan servicing may at times be nebulous, they most certainly do not contain a reference to native language servicing. Congress has spoken on its desire to promote a preciosity of excessively high cohort default rates. Until such time as the regulations are changed to incorporate a definitive stance on native language servicing in the Commonwealth of Puerto Rico, I am not convinced that an interpretation of the loan servicing regulations which omits this as a requirement is erroneous.

ORDER

On the basis of the foregoing findings and conclusions, it is hereby ORDERED that International Junior College's eligibility 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: July 28, 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]*This termination action is governed by 34 C.F.R. § 668.90(a)(3).*

Footnote: 2 [2]*See, e.g., 34 C.F.R. § 668.17(b)(1), (2), and (3).*

Footnote: 3 [3]*IJC also questions proper notice because the initial October 23, 1997, notice to terminate was based on the FY 1994 CDR. According to SFAP, this CDR was at that time the most recent CDR because the FY 1995 CDR was not released until November 5, 1997, several weeks after the notice to terminate was sent. Further, SFAP correctly states that a termination may be brought on any year's CDR. 34 C.F.R. § 668.17(a)(2).*

Footnote: 4 [4]*This tribunal has spoken, in various decisions, on Title IV termination based on CDR's that exceed 40 percent. In re Academy for Career Services, Dkt. No. 97-124-ST, U.S. Dept. of Educ. (Feb. 20, 1998); In re Trend Beauty College, Dkt. No. 97-173-ST, U.S. Dept. of Educ. (April 28, 1998) (stating that despite compelling explanations for an excessive cohort default rate the institution must be terminated if the final CDR is above 40 percent); In re Alladdin Beauty College # 32, Dkt. No. 97-108-ST, U.S. Dept. of Educ. (Dec. 15, 1997) (noting that the only appeal option for a "final" CDR is internal to SFAP, and review is not conducted by a disinterested third party, such as a hearing official, within the Department); In re Palm Beach Beauty & Barber School, Dkt. No. 97-102-ST, U.S. Dept. of Educ. (Oct. 23, 1997) (reiterating the unforgiving CDR which requires termination, and the hearing officials lack of authority to review mitigating circumstances); In re Cannella Schools of Hair Design, Dkt. No. 95-141-ST, U.S. Dept. of Educ. (March 20, 1997).*

Footnote: 5 [5]*IJC also argues that governmental authority, from sources outside of the Department of Education, provides that individuals must be given notice of their legal rights in their native language. As already discussed in this decision, there has not been a violation of notice in this case. Analogously, Department of Defense and Immigration and Naturalization Service regulations govern early communication which may in some instances be the first communication between the individual and the governmental body. In the present case, the borrower had already been advised in Spanish by the school's financial aid office and had participated in entrance and exit interviews conducted by Spanish speaking personnel.*

Footnote: 6 [6]*The issue in the ACT case focused on whether preclaims assistance is considered "performed" if it is done at a time when although technically performed, the student could not have been prevented, at that late time, from defaulting on the loan or from being included in the school's CDR. From this set of facts, IJC broadly applies the standard of purpose and function of loan servicing to include native language issues. The school's point is that like preclaims assistance, when servicing is not done in the native language, the purpose of its function is unrealized and therefore ineffective. In the realm of preclaims assistance, the ACT court ruled that the Secretary, based on the facts before it, cannot consider the element of preclaims assistance to have been performed. The court did not speak on the applicability of this standard to native language servicing.*

Footnote: 7 [7]*On June 26, 1998, IJC submitted a motion of leave to supplement the record with CDR information on Puerto Rican institutions for FY 1988 through FY 1995. The motion is granted. After reviewing this material, however, more questions were raised than answered, and the final outcome of this decision was not altered. IJC notes that there has been a steady increase in Puerto Rico's CDR's since FY 1991. But this information seems to indicate that some Puerto Rican schools experienced this CDR increase prior to the loan servicing change from local agencies to those*

based in the mainland U.S. This causes one to question the relation between loan servicers and the high default rates.