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

In the Matter of **Docket No. 97-172-ST**

MICHIGAN BARBER SCHOOL,

Student Financial Assistance Proceeding

Respondent.

Appearance:

Leslie H. Wiesenfelder, Esq., and Jonathon C. Glass, Esq., Dow, Lohnes & Albertson, Washington, D.C., for Respondent.

Paul G. Freeborne, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the Student Financial Assistance Programs.

Before: Frank K. Krueger, Jr., Administrative Judge.

DECISION

On November 4, 1997, the Student Financial Assistance programs (SFAP), U. S. Department of Education, issued a notice of intent to terminate Respondent's participation in all student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended. The proposed termination was based on Respondent's cohort default rate under the Federal Family Education Loan (FFEL) program for fiscal year 1994. Respondent appealed the proposed termination and seeks to remain in the Pell Grant program.See footnote 1[1]

Since SFAP has made a final determination that Respondent's cohort default rate for fiscal year 1994 exceeded 40 percent, under the regulations implementing Title IV, I have no discretion but to order termination from all of the Title IV programs, including the Pell Grant program. *See* 34 C.F.R. § 668.90(a)(3)(iv) (1997); *Palm Beach Beauty & Barber* School, Docket No. 97-102-ST, U.S. Dept. of Educ. (Oct. 23, 1997); *Aladdin Beauty College*,See footnote 2[2] Docket No. 97- 108-ST, U.S. Dept. of Educ. (Dec. 15, 1997) (on appeal to Secretary of Education); *Academy for Career Education*, U.S. Dept. of Educ. (Feb. 2, 1998) (on appeal to Secretary of Education); *Jon Louis Schools of Beauty*, Docket Nos. 96-108-ST & 97-19-ST, U.S. Dept. of Educ. (April 3, 1998), p. 15-16; *Trend Beauty College*, Docket No. 97-173-ST, U.S. Dept. of Educ. (April 28, 1998).

In 1995, when it strengthened its regulations concerning schools with high FFEL cohort default rates, the Department suggested that such action was necessary to protect students and Federal taxpayers from "unscrupulous institutions that participate heavily in the loan programs but do not provide quality educational services to those students," 60 *Fed. Reg.* 49,181 (Sept. 21, 1995), and that "use promises of job training and placement to entice students to enroll and then . . . fail to provide worthwhile services," 60 *Fed. Reg.* 61,762 (Dec. 1, 1995). Respondent has proffered a number of persuasive exhibits, however, which indicate that it is not the type of institution that was intended to be targeted by the regulations. Consequently, if my termination order is appealed, I recommend that the Secretary remand the case for a full evidentiary hearing to consider the evidence proffered by Respondent and to subject the evidence to cross-

examination and rebuttal.See footnote 3[3] I also recommend that, at the conclusion of the hearing, I be charged with the responsibility of preparing findings of fact and a recommended decision on what, if any, action should be taken by the Secretary concerning Respondent's high cohort default rates.

For fiscal year 1994, Respondent's cohort default rate was 56.4 percent, with 23 students in repayment and 10 in default. The actual default rate was 43.5 percent, but since Respondent had less than 30 students in repayment, SFAP calculated its final determination using a three- year average. For fiscal year 1993, the three-year average rate was 61.4 percent; the actual rate was 76.2 percent, with 21 students in repayment and 16 in default. For fiscal year 1992, Respondent's three-year average rate was 51.3 percent; the actual rate was 45.5 percent, with 11 students in repayment and 5 students in default. Exhibit ED-2.

Respondent states that it has not certified any FFELs since July 1996. Declaration of Darryl L. Green, Exhibit R-2, p. 3, ¶ 8. Under the Title IV statute, a school's participation in the FFEL program ends after notification by the Department that its cohort default rate for each of the three most recent fiscal years is 25 percent or greater. 20 U.S.C.A. § 1085(a)(2) (Supp. 1998). By letter dated September 16, 1996, Respondent lost its eligibility to participate in the FFEL program pursuant to this statutory provision. *Id.* at 8, # 23; Declaration of Tara A. Porter, Exhibit ED-3, p. 4, ¶ 11.

Respondent is owned and operated by a nonprofit corporation which has been licensed and in good standing by the State of Michigan since at least 1974. Respondent's Executive Officer and President of the Board of Trustees states that the school has existed as a nonprofit corporation and has been run by his family since 1947. The records maintained by the State of Michigan do not go back that far. Declaration of Forrest F. Green, Jr, Exhibit R-1, p. 1, ¶ 3 and Attachment B. Respondent has an enrollment of approximately 200 students, 99 percent of whom are African Americans and approximately 25 percent are women. Exhibit R-1, p. 2, ¶ 5. There are only four licensed barber schools in the State of Michigan; Respondent is the only licensed barber school in the City of Detroit. Exhibit R-1, p. 2, ¶ 7 and Attachment B. According to Respondent's Financial Aid Director since 1987, he has never advertised the availability of Federal student loans, and discourages students from seeking loans since most of Respondent's students can manage their tuition and living expenses through Pell Grants and part- time employment. Respondent did not approve any FFELs unless the student "strongly insisted on his or her need for the funds." Exhibit R-2, p. 4, ¶ 12.

Nevertheless, the students themselves were well aware that federal loans were available, so that some students would insist on receiving the [FFEL] for which they were eligible. There were many, many cases in which I told students they should not apply for a . . . loan but they came back a second, third or fourth time to demand such a loan. There were times when I approved loans because the student had an emergency need for the funds for living expenses that had nothing to do with paying their tuition at Michigan Barber. I can recall a handful of students who needed the loans to pay their rent to avoid eviction or respond to other similar emergencies.

Id., ¶ 13.

Again according to the Financial Aid Director, Respondent does not recruit students and it only advertises in the Yellow Pages. Respondent claims a graduation rate in excess of 70 percent and a placement rate in excess of 90 percent. Over the past twelve years, 145 out of a total of 1,502 students enrolled during this period received Federal student loans, which is less than 10 percent of the student body. Of the 145 loan recipients, 112 graduated and 94 were placed in barbering jobs. Of Respondent's remaining students, the great majority are dependent on the Pell Grant program, with most of its students from poor and disadvantaged backgrounds from the inner city of Detroit. Exhibit R-2, pp. 1-5.See footnote 4[4] Respondent claims that if it is terminated from participation in the Pell Grant program it will be forced to close. Exhibit R-1, p. 3, ¶ 9 and Exhibit R-2, pp. 2-3, ¶ 7. Respondent claims that it has a very strong record of compliance with Title IV regulations and that, other than its high default rates, SFAP has not asserted any other claims against the school. Exhibit R-2, p. 8, ¶ 14.

SFAP has not specifically disputed these assertions. Nevertheless, SFAP argues that Respondent must be terminated from all Title IV programs, including the Pell Grant program, based on Respondent's high cohort default rate. SFAP argues that "[t]his type of action, which is lauded by Congress, is necessary to protect unwitting students, as well as safeguard the taxpayers, from further needless expenditure of tax dollars at an institution which continues to act irresponsibly in its administration of the federal student loan programs." SFAP assumes that high default rates are

synonymous with a bad educational program. Much of Respondent's proffered evidence indicates, however, that it is not acting irresponsibly in its administration of the FFEL program and is providing an outstanding trade-school education. Respondent has a very high graduation and placement rate. It does not advertise for students and it discourages its students from seeking FFELs. Respondent submitted a sworn declaration from one of its graduates who states that he is gainfully employed as a barber and that he received high quality training from the Respondent. The declaration also states that he was discouraged from taking out an FFEL by the school, but was given the loan at his insistence. The student also states that he was counseled extensively concerning his obligations to repay the loan, but that he is in default through no fault of the school.See footnote 5[5] Declaration of Donald A. Allen, Exhibit R-7. Respondent submitted a number of additional declarations from its graduates testifying to the fine training provided by the Respondent, that graduates generally have jobs offered prior to or shortly after graduation, and that the jobs secured have enabled them to move off public assistance. Exhibits R-3 - R-6. Respondent argues that the reason for the large number of defaulting FFEL borrowers, in the face of high postgraduate employment of its students, is because the borrowing students tended to be the neediest of its students. Respondent's Pre- Hearing Brief, p. 14.

SFAP correctly notes that I lack any discretion but to order termination. The Secretary of Education, however, has the discretion to decide not to terminate the Respondent. Under 34 C.F.R. § 668.90(a)(3)(iv) (1997), the hearing official must order termination if that is the sanction sought by SFAP and SFAP has made a final determination that the Respondent's cohort default rate for any given fiscal year exceeds 40 percent. That regulation states nothing concerning the Secretary's authority. Under 34 C.F.R. § 668.17(a)(2) (1997), the Secretary “may” initiate proceedings to terminate, suspend, or limit an institution's participation in all of the Title IV programs because of a cohort default rate in excess of 40 percent. The use of the word “may” denotes discretion. Obviously, if the Secretary can exercise discretion on whether to initiate a Subpart G proceeding, and whether to seek termination, suspention, or limitation, the Secretary may also exercise discretion when reviewing a decision before him on appeal from a hearing official's mandatory termination order. Under 34 C.F.R. § 668.120 (1997), the Secretary may modify, remand, or overturn the initial decision of the hearing official.

FINDING

SFAP has made a final determination that Respondent's FFEL cohort default rate for fiscal year 1994 was 56.4 percent and seeks an order terminating Respondent's eligibility to participate in all programs authorized under Title IV of the Higher education Act of 1965, as amended.

ORDER

Respondent is terminated from participation in all programs authorized under Title IV of the Higher education Act of 1965, as amended. If this decision is appealed, however, I recommend that the Secretary of Education vacate this order and remand the case for a full evidentiary hearing to consider evidence suggesting that the Secretary should exercise discretion and take action against the Respondent other than termination, or take no action at all, and issue a recommended decision.

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Frank K. Krueger, Jr.
Administrative Judge

Dated: May 5, 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] *On March 23, 1998, Respondent filed motions to dismiss and to stay this proceeding. The motion to dismiss was based on Respondent's contention that SFAP has adopted a policy of automatically seeking termination for any school whose cohort default rate exceeds 40 percent for any given fiscal year, and that the failure of SFAP to exercise any discretion on a case-by-case basis is arbitrary and capricious and a denial of due process. Assuming that SFAP has in fact adopted such a policy as Respondent alleges, I do not agree that the failure of SFAP to consider such cases on an individual basis is arbitrary and capricious or a denial of due process since a school would still have the opportunity on appeal to convince the Secretary of Education to exercise discretion and not terminate the school from the Title IV programs. Cf. Cannella Schools of Hair Design, Docket No. 95-141-ST (Decision of the Secretary, Sept. 5, 1997). Accordingly, Respondent's motion to dismiss is denied.*

Respondent's motion to stay is based on an appeal it has pending with SFAP concerning its continued ineligibility to participate in the FFEL program based on having three consecutive years with cohort default rates in excess of 25 percent. Under 34 C.F.R. § 668.17(c) (1997), a trade school may avoid ineligibility under "exceptional mitigating circumstances" by demonstrating to SFAP that it has a placement rate of 50 percent or higher and that it serves a population with a poverty rate of 70 percent or higher. Under 34 C.F.R. § 668.17(a)(5) (1997), if a school is able to demonstrate such "exceptional mitigating circumstances," the "Secretary ceases any limitation, suspention, or termination action against [the] institution." Respondent argues that, if its appeal for fiscal year 1995 is sustained, the Department must terminate this proceeding even though it is based on Respondent's cohort default rate for fiscal year 1994. I disagree with Respondent's interpretation. Section 668.17(a)(5) appears to be directed toward a limitation, suspention, or termination proceeding initiated by SFAP concerning a fiscal year covered by the "exceptional mitigating circumstances" appeal. Accordingly, Respondent's motion to stay is denied.

Footnote: 2 [2] *In the Initial Decision Aladdin's name is misspelled as "Alladdin."*

Footnote: 3 [3] *Given the limited nature of my authority in this proceeding, an evidentiary hearing was not conducted; the parties where restricted to the submission of briefs and written exhibits.*

Footnote: 4 [4] *Under the Title IV regulations, an institution may appeal within SFAP a loss of FFEL eligibility based on a 25 percent cohort default rate for three consecutive years by demonstrating exceptional mitigating circumstances. See note 1 supra. Respondent's poverty rate as determined in its mitigation appeal for fiscal year 1994 was 68.7 percent. The Department's denial, according to the Respondent, was based on a technical problem in documenting the poverty rate for its students within the exact 12-month period covered by the appeal. Exhibit R- 2, p. 7, ¶ 22. SFAP's standards for approval of mitigating circumstances has, apparently, been revised and, under the revised standards, Respondent's appeal would now be approved. See Respondent's Pre-Hearing Brief, pp. 10-11, footnote 8.*

Footnote: 5 [5] *A recent study indicates that the primary reasons students default on student loans have to do with factors beyond the control of a school, such as the family income of student borrowers, the number of dependent*

children of student borrowers, and whether or not they complete their programs of study. The study indicates that African Americans and Hispanic defaulters are significantly more likely to have these factors present than white and Asian students. The study indicates that men are more likely to default than women. The study found only modest evidence that the type of institution attended has an impact on student loan borrowers, and that default rates for proprietary schools is not much greater than it is for accredited two-year colleges. J. Fredericks Volkwein, Bruce P. Szelest, Alberto F. Cabrera, and Michele R. Napierski-Prancl, Factors Associated with Student Loan Default Among Different Racial and Ethnic Groups, The Journal of Higher Education, Vol. 69, No. 2 (March/April 1998).
