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

In the Matter of

Docket No. 98-133-ST

DRAKE SCHOOL OF THE BRONX,

Student Financial Assistance Proceeding

Respondent.

Appearances: Pamela Gault, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Ronald L. Holt, Esq., Watkins, Boulware, Lucas, Miner, Murphy & Taylor, LLP, Kansas City, Missouri, for Drake School of the Bronx.

Before:

Frank K. Krueger, Jr., Administrative Judge.

DECISION

In November 1997, the Student Financial Assistance Programs (SFAP) notified Respondent that its cohort default rate under the Federal Family Education Loan (FFEL) Program for fiscal year (FY)1995 was 54.2 percent. As a result of Respondent's appeal to SFAP under the procedures provided by 34 C.F.R. § 668.17(h) (1997), Respondent's final rate was reduced to 52.9 percent. On September 14, 1998, SFAP notified Respondent of its intent to terminate Respondent's participation in all programs authorized under Title IV of the Higher Education Act of 1965, as amended, based on Respondent's FFEL cohort default rate for FY 1995.See footnote 1[1] Respondent filed a timely request for hearing under 34 C.F.R. Part 668, Subpart G to challenge the proposed termination.

As stated in my Order Governing Proceeding issued on October 13, 1998, under 34 C.F.R. § 668.90(a)(3)(iv) (1997), since Respondent's FY 1995 FFEL cohort default rate is above 40 percent, and it is a "final" rate arrived at by SFAP under 34 C.F.R. § 668.17, I must find that the "remedy" proposed by SFAP _ *i.e.*, termination _ is warranted. *See Aladdin Beauty College # 32*, Docket No. 97-108-ST, U.S. Dept. of Educ. (Order of the Secretary, Aug. 20, 1998). Respondent argues that its FY 1995 FFEL cohort default rate cannot be considered "final" since SFAP failed to apply the correct legal standards and failed to exclude certain data from its calculations. Respondent contends that I have the authority to review SFAP's final rate determination and cites *International Junior College*, Docket No. 97-164-ST, U.S. Dept. of Educ. (July 28, 1998) (on appeal to the Secretary) in support of its position. These arguments were also raised in *Westchester School of Beauty Culture*, Docket No. 98-97-ST, U.S. Dept. of Educ. (Oct. 27, 1998) (on appeal to the Secretary). For the reasons provided in *Westchester*, I find these arguments unpersuasive.

Respondent also contends that the regulatory history of 34 C.F.R. § 668.90(a)(3)(iv) supports its position that the SFAP "final" cohort default rate determination may be challenged in a Subpart G proceeding. Respondent relies on language contained in the preamble to the proposed regulation appearing in the *Federal Register* on September 1, 1995. This argument was also raised in *Hair Design Institute*, Docket No. 97-122-ST, U.S. Dept. of Educ. (Aug. 5, 1998) (on appeal to the Secretary). For the reasons provided in *Hair Design*, I reject this argument. As noted in *Hair Design*, the language relied on by Respondent was interpreting language in the proposed regulation which was eliminated when the regulation was published in final on December 1, 1995.

Respondent also raises a number of other factors which it contends should be taken into consideration before a decision is made on termination. Under section 668.90(a)(3)(iv), I have no authority to consider such factors as mitigation and must order termination.[See footnote 2][2]

FINDINGS

1. SFAP made a final determination under 34 C.F.R. § 668.17 (1997) that Respondent's FFEL program cohort default rate for FY 1995 was 52.9 percent.

2. SFAP 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.

_____

Dated: March 8, 1999

Frank K. Krueger, Jr.

Administrative Judge

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] *Respondent is not currently eligible to participate in the FFEL program because its three most recent cohort default rates exceeded 25 percent. See 34 C.F.R. § 668.17(b)(1) (1997).*

Footnote: 2 [2] *One of the mitigating factors which Respondent argues should be considered is its cohort default rate for FY 1997. By letter dated February 4, 1999, Respondent moved to supplement the record with data from its guarantee agency, the New York Higher Education Corporation, which Respondent argues indicates that its draft FY 1997 cohort default rate is 33.47 percent. By letter dated February 11, 1999, SFAP opposed this motion on the grounds that SFAP uses data from the National Student Loan Data Systems, and that SFAP does not take action based on draft rates. SFAP also contends that, since the hearing official must issue a termination order when SFAP has issued a "final" cohort default rate, it is inappropriate for the proffered data to be in the record. Although the regulations make it clear that the hearing official has no discretion but to issue a termination order under the facts in this case, the regulations do not similarly limit the Secretary when considering a case on appeal. Thus, in the interest of making the record complete for possible appeal, Repondent's motion to supplement the record is granted.*