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

In the Matter of **Docket No. 98-14-ST**

BENJAMIN FRANKLIN CAREER & TECHNICAL EDUCATION CENTER, Student Financial Assistance Proceeding
Respondent.

Appearances: Gregory Bailey, of Kanawha County Schools of Charleston, WV, for Benjamin Franklin Career & Technical Education Center.

Alexandra Gil-Montero, 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 January 30, 1998, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED) issued a notice of intent to terminate the eligibility of Benjamin Franklin Career & Technical Education Center (BFC) from participation in Federal student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* SFAP initiated the termination action as a result of the institution's cohort default rate for the 1995 fiscal year, which SFAP asserts was 45.5 percent.

BFC filed a request for a hearing challenging the finding in the notice.See footnote 1[1] On February 19, 1998, I issued an Order Governing Proceedings requiring the parties to file timely submissions. After careful review of the parties submissions, I find that SFAP has satisfied its burden of proving that the eligibility of BFC to participate in Title IV programs must be terminated.

BFC is a public, non-profit, institution located in Dunbar, West Virginia. Many of the institution's students enter BFC after experiencing significant periods of unemployment. The institution is authorized to participate in various student financial assistance programs governed by Title IV, including the Federal Pell Grant program, the Federal Family Education Loan (FFEL) program, and the Federal campus-based aid programs.

Under 34 C.F.R. § 668.17(a)(2), when an institution's cohort default rate exceeds 40 percent, SFAP may seek termination of the institution's eligibility for participation in Title IV programs by issuing a Notice of Termination.See footnote 2[2] To avoid being terminated from Title IV programs on the basis of SFAP's proposed finding, BFC must demonstrate by “clear and convincing evidence” that the cohort default rate is not the final rate, and that the correct rate would result in the institution having a rate of 40 percent or below.

The institution raises many arguments concerning whether the Secretary has exercised his discretionary authority in accordance with 34 C.F.R. § 668.17(a)(2). In BFC's view, the fact that SFAP is attempting to impose the harshest penalty allowed in a Subpart G proceeding against an institution that, in the institution's words, provides a “value to students and the community” in which it is located demonstrates that the Secretary has not exercised his discretion to consider whether a remedy that is more appropriate or, at least, less harsh in its result, should be applied under the circumstances of this case.

There are occasional cases that present facts that seem to depict situations wherein the strict operation of the law may

have a harsh result. This case illustrates that point. BFC insists that despite the clear language of Section 668.17(a)(2), I should accept their request to consider factors they present supporting the imposition of a different remedy. Nonetheless and irrespective of the merits of BFC's arguments concerning the value of the educational program it provides to the residents of Dunbar, West Virginia, I do not, indeed, I cannot, accept BFC's solicitation to alter the remedy required by regulation. Our prior decisions on this and similar matters confirm that the regulations leave me with no discretion to depart from the prescribed remedy once it is shown that the institution's cohort default rate exceeded the regulatory threshold.

The institution also presents a direct and frontal attack on the enforcement of the Secretary's cohort default regulation under any circumstance, not just the factors surrounding this case. This argument clearly presents issues that exceed the limited scope of my review in cases concerning an institution's cohort default rate. Even if I were to consider BFC's regulatory enforcement arguments in the manner they present them, the institution could not prevail before me. It is clear that BFC's ultimate argument, if it succeeded, would require me to nullify, void, or otherwise waive enforcement of the Secretary's duly promulgated cohort default regulation. Although the Secretary ostensibly retains a degree of reviewable discretion in this regard, it is clear that I do not. As long as a regulation has been duly promulgated and is *not* in obvious tension with the controlling statute, it must be enforced by this tribunal as it is written. *See In re Golf Coast Trades Center,* Dkt. No. 89-16-S, U.S. Dep't of Educ. (Decision by the Secretary) (October 19, 1990) (holding that the tribunal has no authority to waive enforcement of a regulation promulgated by the Secretary under the authority of Congress).[See footnote 33] Therefore, BFC's challenge to the legal status of the cohort default regulations is unmistakably not properly before me.

Since SFAP has determined that BFC's final cohort default rate for fiscal year 1995 was 45.5 percent, which clearly exceeds the 40 percent threshold, I am compelled to find that SFAP's proposed termination is warranted. *See* 34 C.F.R. §§ 668.17(a)(2) and 668.90(a)(3)(iv)(1997); *see also Palm Beach Beauty & Barber School*, Dkt. No. 97-102-ST, U.S. Dept. of Educ. (Oct. 23, 1997); *Aladdin Beauty College #32*, Dkt. No. 97-108-ST, U.S. Dept. of Educ.(Dec. 15, 1997) (on appeal to the Secretary); *Academy for Career Education*, Dkt. No. 97- 124-ST, U.S. Dept. Of Educ. (Feb. 20, 1998) (on appeal to the Secretary); *Delaware County Institute of Training*, Dkt. No. 97-175-ST, U.S. Dept. of Educ. (March 13, 1998); *Jon Louis Schools of Beauty*, Dkt. Nos. 96-108-ST and 97-19-ST, U.S. Dept. of Educ. (April 3, 1998)(on appeal to the Secretary); *Trend Beauty College*, Dkt. No. 97-173-ST, U.S. Dept. of Educ. (April 28, 1998);

Michigan Barber School, Dkt. No. 97-172-ST, U.S. Dept. of Educ. (May 5, 1998); *Avanti Hair Tech*, Dkt. No. 97-179-ST, U.S. Dept. of Educ. (May 21, 1998); and *Interactive Learning Systems*, Dkt. No. 97-169-ST, U.S. Dept. of Educ. (May 21, 1998).

Under Section 668.90(a)(3)(iv), BFC can prevail only if it demonstrates by “clear and convincing evidence” that the cohort default rate is not the final rate, and that the correct rate would result in the institution having a rate of 40 percent or below. BFC offers no argument addressing whether SFAP's rate is correct or that the correct rate is below the regulatory threshold. Accordingly, I find that SFAP has determined persuasively that BFC's final cohort default rate for fiscal year 1995 was 45.5 percent.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Benjamin Franklin Career & Technical Education Center's eligibility to participate in programs authorized under Title IV of the Higher Education Act of 1965, as amended, is terminated.

Ernest C. Canellos
Chief Judge
Dated: August 5, 1998
Washington, D.C.

Footnote: 1[1]*In its request for a hearing, BFC did not dispute the accuracy of SFAP's calculation of the institution's*

cohort default rate. Instead, BFC contended that it should be able to retain its eligibility to participate in the Title IV Pell Grant Program because the institution, by voluntarily withdrawing from Title IV loan programs since the 1993-94 academic year and contacting students about their defaulted loans, had done all it could do to reduce the institution's cohort default rates for all fiscal years subsequent to 1994.

Footnote: 2[2] The language of Section 668.17(a)(2) ostensibly authorizes SFAP to initiate a subpart G action against an institution whose Title IV loan program cohort default rate or weighted average cohort default rate exceeds 40 percent for any fiscal year. Although Section 668.17(a)(2) provides SFAP with discretion to determine whether a subpart G action should be brought against an institution as well as the discretion as to what remedy it deems is appropriate under the circumstances, once SFAP has determined that an institution should be terminated under Section 668.17(a)(2), the Hearing Official is restricted to determining whether SFAP has met its ultimate burden of proof. 34 C.F.R. § 668.90(a)(3)(iv). In this regard, I am plainly precluded from going beyond the dictates of Section 668.90(a)(3)(iv) to consider whether a sanction other than termination is more appropriate under the circumstances.

Footnote: 3[3] It is axiomatic that the tribunal, as a Federal administrative adjudicative body, retains the authority to give content to the words of a regulation within the confines of the principles of statutory and regulatory interpretation. This, I do not decline to do. Instead, I reject considering BFC's arguments that pose a frontal attack on the Secretary's lawful promulgation of the regulation.
