

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

In the Matter of **Docket No. 98-57-ST**
WESTECH COLLEGE, Student Financial
 Assistance Proceeding
Respondent.

Appearances: Thomas Hylden, Esq., and Joel M. Rudnick, Esq., of Powers, Pyles, Sutter & Verville, P.C., Washington, D.C., for Westech College.

Paul Freeborne, 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 April 9, 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 Westech College (Westech) 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 46.0 percent.

Westech filed a request for a hearing challenging the finding in the notice. On May 6, 1998, I issued an Order Governing Proceedings^{[See footnote 11](#)} 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 Westech to participate in Title IV programs must be terminated.^{[See footnote 2](#)}

Westech is a postsecondary institution located in Pomona, California. According to Westech, many of the institution's students are economically disadvantaged and the institution provides educational programs for a needy community in California. 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 3](#)} To avoid being terminated from Title IV programs on the basis of SFAP's proposed finding, Westech 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 presenting 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. Specifically, Westech raises a number of legal arguments challenging the Secretary's statutory authority to terminate the institution's eligibility for participation in Title IV programs simply on the basis of a single year's cohort default rate. These arguments present issues that exceed the limited scope of my review in cases concerning an institution's cohort default rate. Even if I were to consider Westech's regulatory enforcement arguments in the manner presented, the institution could not prevail before me. It is clear that Westech'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 retains 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 properly promulgated by the Secretary under the authority of Congress). [See footnote 4](#) Therefore, Westech's challenge to the legal status of the cohort default regulations clearly is not properly before me.

Since SFAP has determined that Westech's final cohort default rate for fiscal year 1995 was 46.0 percent, which clearly exceeds the 40 percent threshold, I am compelled to find that SFAP's proposed termination is warranted. [See footnote 5](#) *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. (Decision of the Hearing Official) (Dec. 15, 1997) and (Decision of the Secretary) (August 20, 1998); *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), Westech 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. Westech offers no argument directly disputing whether SFAP's rate, in accordance with the cohort default procedural regulations, actually is final or that the final rate, which is below the regulatory threshold, is *correctly* attributed to Westech College. In this regard, there is no relevant issue in dispute. Accordingly, I find that SFAP has determined persuasively that Westech's final cohort default rate for fiscal year 1995 was 46.0 percent.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Westech College'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: September 15, 1998
Washington, D.C.

SERVICE

A copy of the attached document was sent to the following:

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Footnote: 1¹ In my Order Governing Proceedings, I determined that consistent with the governing regulation this matter should be adjudicated on the basis of the submission of written briefs and documentary evidence. In its brief, Westech requests that I reconsider my initial determination. Specifically, the institution seeks an opportunity for a full-evidentiary hearing or, in the alternative, the opportunity to present oral argument. Westech submitted a 22 page brief and 39 exhibits contained in two separately bound volumes. After review of the extensive record in this case and given the narrow scope of my jurisdiction, I see no reason to alter my initial determination precluding further proceedings in this case. More to the point, the Secretary's decision, in *In re Aladdin Beauty College #32*, Docket No. 97-108-ST, U.S. Dep't of Educ. (Decision of the Secretary) (August 20, 1998), confirms that the regulations leave me with no discretion to provide the institution with the opportunity to further challenge the final rate in a full-evidentiary proceeding before this tribunal.

Footnote: 2 Westech requested leave to file a 22 page brief, which exceeded the page limitation for the submission of briefs by 7 pages. Westech's submission has been reviewed in its entirety and leave to file the submission has thereby been granted.

Footnote: 3 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: 4 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 Westech's arguments that pose a frontal attack on the Secretary's lawful promulgation of the regulation.

Footnote: 5 SFAP presented a copy of a letter addressed to the Chief Financial Officer of Westech, Ms. Mary Zad, dated March 17, 1998, issued by Jeanne Van Vlandren, the Director of Institutional Participation and Oversight Service for SFAP, in which Westech is officially notified that its fiscal cohort default rate for 1995 is 46.5 percent. Notably, on the same date SFAP sent Westech an additional official notification that the information provided by the institution had resulted in a revised calculation of Westech's cohort default rate, which was adjusted downward to 46.0 percent.
