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

In the Matter of **Docket No. 98-62-ST**

TRC JAN MAR BEAUTY ACADEMY, Student Financial Assistance Proceeding
Respondent.

Appearances:

Peter S. Leyton, Esq., Ritzert & Leyton, Fairfax, Virginia, for TRC Jan Mar Beauty Academy.

Paul G. Freeborne, 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

On April 3, 1998, the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a notice of intent to terminate the eligibility of TRC Jan Mar Beauty Academy (TRC) to participate in the student financial assistance programs authorized under 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.* This proceeding is representative of a series of cases recently initiated by SFAP against institutions because of excessive cohort default rates by their student borrowers of Federal Family Education Loans (FFEL).See footnote 1[1] TRC filed a request for review, and both parties submitted briefs.See footnote 2[2]

SFAP contends that TRC is no longer eligible to participate in the Title IV programs because TRC's 1995 final cohort default rate exceeded 40 percent. In response, TRC argues that termination is an extreme remedy and requests that this tribunal deny the proposed termination of the school, or, at a minimum, recommend to the Secretary of Education (Secretary) that TRC not be terminated.

I

As was explained to the institution in its November 5, 1997, cohort default rate notification, the Secretary has the authority to terminate an institution's eligibility to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act if the institution has a cohort default rate in excess of the regulatory threshold of 40 percent for any year. 34 C.F.R. § 668.90(a)(3)(iv). As this has been exhaustively addressed in previous decisions regarding excessive cohort default rate cases, SFAP's burden is met when it presents evidence that an

institution's final cohort default rate for any year exceeds 40 percent.See footnote 3 SFAP has done that here when it presented documentation showing that TRC's final cohort default rate for fiscal year 1995 was 44.7 percent. A respondent may raise as a defense to this proceeding only clear and convincing evidence that the default rate in question is not the final rate as determined by the Department, and that the correct rate is 40 percent or below. 34 C.F.R. § 668.90(a)(3)(iv). In the absence of such a presentation, SFAP has satisfied its burden of proving that the eligibility of the institution to further participate in the HEA programs should be terminated.

In response, TRC raises several arguments. TRC contends that SFAP's proposed action violates the school's due process rights, that SFAP's proposed action is without legal authority, that SFAP's proposed termination is arbitrary and capricious and an abuse of discretion, and that overwhelming mitigating circumstances dictate that SFAP's proposed termination should be denied.

TRC's initial contention is that SFAP's proposed action violates the school's due process rights because "[e]ligibility to continue to participate in Title IV is a constitutionally protected property interest and loss of eligibility threatens a liberty interest as well," citing *Continental Training Services v. Cavazos*, 893 F.2d 877 (7th Cir. 1990). SFAP points out, however, that other decisions, including a more recent decision by the 9th Circuit, have rejected this claim, specifically holding that an institution that participates in the Title IV programs has no property or liberty interest in its continued participation in the Title IV programs. In *Dumas v. Kipp*, 90 F.3d 386, 392 (9th Cir. 1996), the court held that the HEA was not intended to benefit institutions that participate in the Title IV programs, so any harm resulting to such institutions from their administration of Title IV programs is "indirect," and procedural due process protections do not extend to those who suffer indirect harm from government action. Other federal courts have also confirmed that the Title IV programs were designed to benefit students, not institutions such as TRC.

Moreover, even if TRC did have a constitutionally protected property interest in its continued participation in the Title IV programs, TRC's due process rights were not violated here because TRC was given the opportunity to challenge its cohort default rate in a separate proceeding, which it did. Following a review of the evidence submitted by TRC in that proceeding, the Department found on February 24, 1998, that TRC failed to raise its erroneous data allegations in a timely matter and upheld the fiscal year 1995 cohort default rate for TRC of 44.7 percent.

TRC also argues that SFAP's proposed action is without legal authority because neither the authorizing statutes for the HEA nor the legislative history specifically authorize the Secretary to terminate the eligibility of institutions with high cohort default rates. This argument is without merit. Pursuant to 20 U.S.C. § 1094(c)(1)(F) authorizes the Secretary to prescribe regulations for the termination of any institution where the Secretary has determined that such institution has failed to properly administer Title IV funds. Pursuant to this statutory authority, the Secretary promulgated 34 C.F.R. § 668.17(a)(2), which allows for the termination of any institution that has a cohort default rate for any fiscal year that exceeds 40 percent. In addition, the legislative history that I outlined above clearly supports the Secretary's authority to promulgate such regulations.

TRC's next argument is that SFAP's proposed termination is arbitrary and capricious and an abuse of discretion because the Secretary has stated that no institution would be terminated where that institution has less than five students borrowing under the FFEL and Direct Loan programs, yet TRC had no students that borrowed funds under the FFEL program in fiscal year 1995. As SFAP notes, the regulations governing cohort default rates focus on the number of students entering repayment, not on the number of students borrowing in any given fiscal year.

In the alternative, TRC suggests that the number of its students entering repayment in fiscal year 1995, totaling 38 students, is insignificant. In *In re Cannella Schools of Hair Design*, Dkt. No. 95-141-ST, U.S. Dep't of Educ. (Decision of the Secretary) (March 20, 1997), the Secretary held that he will not seek termination in situations where there are fewer than five borrowers in repayment. By TRC's own count, there are more than five students in repayment, so termination is consistent with the Department's announced policies and is not an abuse of discretion.

Finally, citing *In re Cannella Schools of Hair Design*, Dkt. No. 95-141-ST, U.S. Dep't of Educ. (Decision of the Secretary) (Sept. 5, 1997), TRC argues that overwhelming mitigating circumstances dictate that SFAP's proposed termination should be denied. Specifically, the school points to its predominantly minority and economically disadvantaged student population, its success in obtaining jobs for its graduates, and its implementation of extensive

default reduction measures under Appendix D.

In *In re Aladdin Beauty College #26 and Aladdin Beauty College #21,* Dkt. Nos. 97-109- ST and 97-157-ST (July 1, 1998), the school raised arguments regarding mitigating circumstances similar to those being raised here by TRC. In *Aladdin,* this tribunal stated as follows:

> Mitigating factors have no bearing on the hearing official's decision of whether an institution's eligibility should be terminated when its cohort default rate exceeds the 40 percent threshold. As noted above, an institution in this setting has only two defenses, either that the default rate is not the final rate, or that the final rate is 40 percent or below. Neither of these are present here. Therefore, I must find that the termination of Respondent's Title IV eligibility is warranted. 34 C.F.R. § 668.90(a)(3)(iv).

Id. at 4. That language is equally appropriate here. Moreover, despite TRC's reliance on the *Cannella* case, it is important to note that the tribunal terminated the school in that case despite the presence of mitigating factors. This tribunal held that once it had determined that the school's final cohort default rate exceeded 40 percent, the tribunal was compelled to find that termination was warranted, and that only the Secretary had the discretion to find otherwise. In that case, the Secretary followed this tribunal's recommendation that he exercise his discretion to impose a lesser sanction than termination, but he in no way altered the legal requirement of this tribunal to find that termination is warranted in such cases once the threshold requirements of 34 C.F.R. § 668.90(a)(3)(iv) have been met.

FINDINGS

I find that TRC Jan Mar Beauty Academy's fiscal year 1995 final cohort default rate is 44.7 per cent; that this rate exceeds the regulatory threshold under 34 C.F.R. § 668.17(a)(2); that SFAP seeks the termination of TRC Jan Mar Beauty Academy's to participate in the student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended; and that termination of this eligibility is warranted under 34 C.F.R. § 668.90(a)(3)(iv).

ORDER

On the basis of the foregoing, it is hereby ordered that the eligibility of TRC Jan Mar Beauty Academy to participate in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended, be terminated.

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Judge Richard F. O'Hair

Dated: October 1, 1998

SERVICE

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

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Footnote: 1 [1] *See Aladdin Beauty College #26 and Aladdin Beauty College #21, Dkt Nos. 97-109-ST and 97-157-ST, U.S. Dep't of Educ. (July 1, 1998), Interactive Learning Systems, Dkt. No. 97- 169-ST, U.S. Dep't. of Educ. (May 21, 1998), Avanti Hair Tech, Dkt. No. 97-179-ST, U.S. Dep't of Educ. (May 21, 1998), Michigan Barber School, Dkt. No. 97-172-ST, U.S. Dep't of Educ. (May 5, 1998), Trend Beauty College, Dkt. No. 97-173-ST, U.S. Dep't of Educ. (Apr. 28, 1998), Delaware County Institute of Training, Dkt. No. 97-175-ST, U.S. Dep't of Educ. (March 13, 1998), Academy for Career Education, Dkt. No. 97-124-ST, U.S. Dep't of Educ. (Feb. 20, 1998); Alladdin Beauty College #32, Dkt. No. 97-108-ST, U.S. Dep't of Educ. (Dec. 15, 1997); Palm Beach Beauty & Barber School, Dkt. No. 97-102-ST, U.S. Dep't of Educ. (Oct. 23, 1997).*

Footnote: 2 [2] *TRC also requested an evidentiary hearing before this tribunal to challenge the accuracy of its final cohort default rate for the 1995 fiscal year, which the school claims is inaccurate. The tribunal rejected this request in an order dated September 11, 1998, based upon the Secretary's recent decision in In re Aladdin Beauty College #32, Dkt. No. 97-108-ST, U.S. Dep't of Educ. (Decision of the Secretary) (August 20, 1998).*

Footnote: 3 [3] *See supra note one.*