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

In the Matter of

Docket No. 04-24-SP

AVALON BEAUTY COLLEGE,

Federal Student Aid Proceeding

Respondent.

Appearances: David A. Rivette, of Santa Barbara, California, Avalon Beauty College.

Russell B. Wolff, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

Avalon Beauty College (Avalon) of Santa Barbara, California, operates as a vocational institution that offers postsecondary programs in cosmetology, and participated in federal student financial assistance programs, which are 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*.

On March 8, 2004, the Federal Student Aid (FSA) office of the U.S. Department of Education (Department), issued a Final Program Review Determination (FPRD) that contained findings of various alleged violations of Title IV by Avalon.[1] Although the FPRD contains several findings, there is only one matter at issue in this proceeding.[2] Under Finding #2, FSA

[1] During the period at issue, Title IV, HEA student financial assistance programs included, the Federal Pell Grant, the Federal Family Education Loan, the William D. Ford Federal Direct Loan, the Federal Perkins Loan, the Federal Work-Study, the Federal Supplemental Educational Opportunity Grant, and State Student Incentive Grant Programs.

[2] Finding #2 is the only finding Avalon directly challenges in this proceeding. In the FPRD, FSA accepted the institution's responses, asserted during the program review period, with regard to Findings #6 and #7, but imposed a payment liability for the findings in the FPRD totaling $424.00 in imputed interest for the improper retention of Federal funds. This amount is calculated in accordance with a formula set out in the FPRD and by use of the "Current Value of

alleges that Avalon improperly disbursed Title IV funds to three students who were not eligible to receive those funds. On this basis, FSA determined that Avalon must return $12,133 in Title IV funds disbursed to ineligible students.

This proceeding is governed by regulations promulgated under Subpart H of the general provisions setting forth the rules for participating in various aspects of student financial assistance programs authorized by Title IV. It is well established that in Subpart H -- audit and program review -- proceedings, the institution carries the burden of proof. To sustain its burden, the institution must establish, by a preponderance of the evidence, that the (1) "expenditures questioned or disallowed were proper" and that the institution (2) "complied with program requirements."[3] For reasons fully developed, *infra*, the tribunal finds that Avalon met their burden of proof showing that during the period at issue the institution's students maintained the ability to benefit from their program of instruction, and that disgorging the institution of the Federal funds supporting their instruction is unwarranted.

To be eligible to receive Title IV student financial assistance, a student attending an eligible postsecondary institution must have a high school diploma, its equivalent, or a demonstrated "ability to benefit" from a program of study offered by the institution.[4] To qualify for eligibility by proof of a demonstrated ability to benefit, a student must be administered a standardized or industry developed test measuring the prospective student's aptitude to complete successfully the program of study to which the student has applied.[5]

In the case at bar, during the 2001-2002 and 2002-2003 award years, applicants seeking admission to Avalon by proof of a demonstrated ability to benefit were administered the Wonderlic Scholastic Level Exam (Wonderlic). According to FSA, three students identified under Finding #2 of the FPRD did not pass an ability to benefit exam *prior* to receiving Federal student financial assistance funds. In FSA's view, successful completion of an ability to benefit exam is a condition precedent to eligibility to receive Federal financial assistance. More to the point, FSA argues that conduct occurring *subsequent* to a student's receipt of Federal financial assistance neither eliminates nor fulfills a regulatory requirement that constitutes a condition precedent to eligibility. As such, the question of liability in this case, according to FSA, turns on "*when* must the ATB test be administered?" That question, according to FSA, is answered by the "categorically clear" principle, which affirms that an institution cannot retroactively obtain eligibility for a student, if the student was ineligible at the time of the Title IV disbursement.

Funds Rate Published in the Treasury Financial Manual." Avalon does not challenge the recovery of imputed interest, generally, but urges that the interest liability of $282.16, which covers finding #2, be rejected, if the institution prevails in this proceeding.

[3] 34 C.F.R. § 668.116(d); Subpart H, Part 668, of 34 C.F.R.

[4] 20 U.S.C. § 1091(d). Under section 484(d) of the HEA, a student who does not have a high school diploma or its recognized equivalent is eligible to receive funds under the Title IV, HEA programs only if that student takes an independently administered examination and achieves a score on that test specified by the Secretary demonstrating that the student has the ability to benefit from the education or training being offered.

[5] 20 U.S.C. §§ 1088(b) & 1091(d).

Opposing FSA's position, Avalon argues that of the three students identified in Finding #2, one student, in fact, passed the exam prior to receiving Federal funds and the remaining two students passed the Wonderlic when it was administered on April 19, 2004. In response to Avalon's presentation, FSA accepted the evidence submitted on behalf of the student who passed the Wonderlic prior to receiving Federal funds and, accordingly, reduced the liability sought in this proceeding from $12, 133 to $8,856.16.[6]

With regard to the two students remaining at issue, FSA rejected Avalon's arguments. Avalon argued that despite the institution's lack of proof that an ability to benefit exam was properly administered prior to the disbursement of Federal funds, the institution should not be held liable because it has otherwise shown that both students possessed the ability to benefit from Avalon's program of instruction. In FSA's view, Avalon's evidentiary submissions do nothing more than reveal that student #2 failed the Wonderlic initially administered on October 9, 2001, and that student #3's test was neither scored nor administered to the student properly. Moreover, the institution's failure to properly administer the Wonderlic represents a defect in the institution's administration of Title IV programs that cannot be repaired or mitigated by administering the Wonderlic under alternative circumstances, according to FSA. In this respect, FSA urges that it is of no consequence that Avalon attempted to remedy the failures set forth in the FPRD by: (1) in student #2's case, showing that the student successfully completed her program and six months after she graduated passed the Wonderlic, and (2) in student #3's case, while the student was enrolled at the institution passed the Wonderlic.

Although, in FSA's view, the sole question before the tribunal turns on the enforcement of a condition precedent[7] that presumably establishes a mandatory timing requirement on the administration of the ability to benefit exam, the scope of the question presented extends beyond the boundary that FSA excludes.[8] The question presented requires at least two determinations. First, the tribunal must determine whether Avalon has met its burden of proof. This inquiry requires a determination of whether the evidence shows that Avalon disbursed Title IV funds

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[6] FSA's reduced liability is composed of $8,583 in Title IV funds and $282.16 in interest.

[7] As applied here, the term "condition precedent" derives from its common usage as a clause in a contract or a deed to real property that sets forth a future act or event that must be met before an obligation in the contract (or, the contract, itself) must be performed. BLACK'S LAW DICTIONARY 124 (2nd ed. 2001). Even in that context, however, conditions may be waived, suspended, revoked or modified depending on the purpose of the obligation.

[8] FSA's reference to "condition precedent" adds a circular quality to their overall argument. It simply does not follow that the successful completion of an obligation *must* precede-in-time the accrual of a benefit simply because the obligation is denominated a condition precedent; call it what you may, but, the question of whether an eligibility requirement *may* be fulfilled following-in-time rather than beforehand is left unanswered by simply restating what the requirement is under a different name. More directly, if an eligibility requirement constitutes a condition precedent that does not, itself, require a finding that a particular eligibility requirement can never be met following-in-time the institution's disbursement of Federal funds.

only to students who possessed an ability to benefit from the institution's education programs or training, and did so in the manner prescribed by regulation and statute.

As noted, for students who do not have the credential of a high school diploma or a GED, a basic minimum competency must be demonstrated to show, by examination, that the student may benefit from a postsecondary education program. In this regard, section 1091(d) provides, in pertinent part:

> (d) Students who are not high school graduates
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> In order for a student who does not have a certificate of graduation from a school providing secondary education, or the recognized equivalent of such certificate, to be eligible for any assistance…. the student shall meet one of the following standards:
>
> (1) The student shall take an independently administered examination and shall achieve a score, specified by the Secretary, demonstrating that such student can benefit from the education or training being offered. Such examination shall be approved by the Secretary on the basis of compliance with such standards for development, administration, and scoring as the Secretary may prescribe in regulations.
>
> (2) The student shall be determined, as having the ability to benefit from the education or training in accordance with such process as the State shall prescribe….

Section 1091(d) confirms that the broad goals of Congress in establishing the ability to benefit requirement include the goal that students who obtain the benefit of Federal student financial assistance have the skills to meet the cognitive demands of the occupations for which they are in training. Students must demonstrate an ability to benefit, and it is reasonable to expect that they do so before the disbursement of Federal funds or prior to a student's enrollment. However, the tribunal is not persuaded that this reasonable expectation can be transformed into the absolute legal standard that FSA urges that it is.

The text of the statute is instructive because the words "prior to enrollment" were removed from the text of section 1091(d) in 1992.[9] When Congress removed the words "prior to enrollment" from section 1091(d) in 1992, Congress must have intended to effectuate a particular purpose. Although the 1992 amendment differs from the 1987 language in section 1091(d), both versions similarly are devoid of the words "prior to enrollment" and contain no otherwise pertinent language limiting the ability to benefit determination to an absolute time preceding enrollment or disbursement of Title IV funds. In this regard, the 1987 version of

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[9] In 1990, an amendment to section 1091(d) substituted the requirement that to be eligible for Title IV funds a student "prior to enrollment" with "in order to remain eligible" a student must pass an ability to benefit exam. Higher Education Amendment of 1990, Pub. L. No. 101-508, Title III, § 3005(a), 104 Stat. 1388. Congress apparently recognized a mistake it made since the amendment to section 1091(d) had not accomplished a change in the language of the statute. As such, in 1991 Congress repealed the 1990 "change" in section 1091(d) and inserted the words "prior to enrollment." Higher Education Amendment of 1991, Pub. L. No. 102-26, § 2(d)(2), 105 Stat. 123 (repealing section 3005(a)) In 1992, Congress revisited section 1091(d); on this occasion, among the changes to section 1091(d), Congress removed "prior to enrollment," added an eligibility standard for home school students, and restructured the provision in the manner quoted in the text of this opinion. To date, section 1091(d) remains as amended in 1992. Higher Education Amendments of 1992, Pub. L. No. 102-325, Title IV, § 484(d), 106 Stat. 615

section 1091(d) more precisely than the version at issue allows for ability to benefit determinations subsequent to a student's enrollment in a program of study or receipt of Federal financial assistance.

In 1987, for example, the ability to benefit standard in section 1091(d) governed how a student may "remain eligible" for financial assistance and provided the student until "the end of the first year of the course of study" to meet the standard. In its current form, section 1091(d) is somewhat less precise than in 1987, the statutory provision, *inter alia*, provides the Department with authority to prescribe regulations on how the eligibility standard may be met. On this basis, the Department promulgated pertinent regulations, and in this regard, FSA directs the tribunal's attention to 34 C.F.R. 668.151(d)(2). Section 668.151 sets forth general criteria for test administrators to follow to properly administer an ability to benefit exam, and subsection 668.151(d)(2) contains one criterion, which requires the test administrator to administer the test in accordance with instructions from the test publisher and in a manner that ensures the integrity and security of the test.[10] These general requirements highlight the uniquely important role of the ability to benefit determination, which comport with FSA's position regarding the appropriateness of administering the ability to benefit exam prior to disbursing Federal financial assistance. Even so, however, the statutory and regulatory authorities do not render the timing of the test as an absolute requirement.[11] There may be facts and circumstances, as is true here, that caution against recovering funds from institutions that otherwise demonstrate that the students at issue maintained an ability to benefit from the institution's postsecondary programs. [12]

More to the point, the tribunal finds that an absolute standard of disgorging institutions of Title IV funds under the circumstances of this case is inconsistent with the wide-ranging conditional and qualified treatment of student eligibility determinations throughout Title IV program requirements. Although student eligibility determinations often occur prior to a student's enrollment in an institution or before the disbursement of an initial payment of Title IV funds, some determinations do not.

As noted *supra*, under an earlier version of section 1091(d), the ability to benefit determination could have been undertaken at any time until the completion of the first year of a student's program of study, if not later. Similarly, additional student eligibility factors such as satisfactory progress, verification of selective service registration, and verification of social security number may be established subsequent to enrollment in an institution and disbursement

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[10] Section 668.154 provides that an institution "shall be liable for the program funds disbursed" in the administration of the ability to benefit exam "only if the institution…is unable to document that the student received a passing score on an approved test." Avalon submits evidence to this effect, but FSA urges the tribunal to reject it.

[11] *See also* 34 C.F.R. §§ 668.31 & 668.32.

[12] *See In re Rice College*, Dkt. No. 91-102-SA Dep't of Educ. (December 29, 1993) (noting that aside from achieving an exam score, an important underlying question regarding compliance with the ability to benefit exam is under all of the circumstances "whether the challenged students actually had the ability to benefit from the institution's education or training programs.")

of Federal financial assistance.[13] In the case at bar, Avalon's evidence shows that student #2 successfully completed her program of study, passed a cosmetology State of California licensing exam, obtained employment in the field for which the student was trained and, six months after she graduated from Avalon, passed the Wonderlic that was administered as part of the institution's response to the program review report issued in this case.[14] In addition, student #3, while enrolled at the institution and in response to FSA's program review, passed the Wonderlic, and as of April 21, 2004, completed successfully 900 hours of an 1141.69-hour program.[15] Clearly, these facts show that the students at issue maintained an ability to benefit from the program for which Title IV financial assistance was disbursed. Though it is clear that Avalon ill advisedly accepted the risk that failure to administer the ability to benefit exam prior to enrollment could mean that some of its students would never pass the exam or otherwise evidence an ability to benefit, the facts in this case do not comport with an absolute standard that must be construed mechanically or perfunctorily in order to find liability; instead, the facts are consistent with the exercise of reasonable judgment that may effectuate the long-standing broad purposes of section 1091(d) of ensuring that students who obtain the benefit of Federal student financial assistance have the skills to meet the cognitive demands of the occupations for which they are in training. More fundamentally, the goal of advancing the quality of the nation's workforce by encouraging post-secondary instruction that will enable individuals to advance in their jobs or careers is served in this case; access to Title IV funds were provided only to students who have the skills to meet the cognitive demands of the occupations for which they are in training (or, have completed training).

In summary, FSA elected to bring this case pursuant to the procedures set forth under Subpart H wherein the remedies available to FSA are contractual in nature and allow only for recovery of damages.[16] Alternative proceedings clearly available to FSA include remedies that are unavailable in this proceeding; namely, the possibility of imposing a fine, termination, or some other form of punitive sanction against the institution. As such, in selecting a subpart H proceeding, FSA must be mindful that requiring the full recovery of funds under circumstances

[13] *See, e.g.*, 34 C.F.R. § 668.37(c)(2) (an "institution must give a student at least 30 days, or until the end of the award year, whichever is later, to provide evidence to establish" that the student is registered or is not required to be registered); 34 C.F.R. § 668.36(a)(3) (an "institution must give a student at least 30 days, or until the end of the award year, whichever is later, to produce" evidence indicating the accuracy of the student's social security number).

[14] According to Avalon, student #2 achieved a score of 14 on the Wonderlic administered prior to the student's enrollment, and as a result of an error, Avalon awarded this student Federal financial assistance despite the student's score falling below the minimum passing score of 15 on the Wonderlic.

[15] According to Avalon, the test administrator did not administer the exam properly when the student was examined prior to enrolling in Avalon. FSA presented evidence that the Wonderlic test publishers had no record of receiving the student's exam prior to the student's re-testing in April 2004.

[16] *See, e.g.*, *In re Phillips Junior College, Melbourne*, Docket No. 93-90-SP, U.S. Dep't of Educ. (November 23, 1994); *In re Macomb Community College*, Docket No. 91-80-SP, U.S. Dep't of Educ. (May 5, 1993).

like those existing in this case would be anomalous, at least, if a student, who is the beneficiary of Title IV program funds and was otherwise eligible to receive program funds, would owe a debt to the institution, if the student graduated or otherwise obtained the benefit of the institution's training program. Under such circumstances, full recovery of program funds from the institution would not only undermine the purpose of the ability to benefit requirement, but would defeat the very purpose of Federal student financial assistance.

The tribunal's finding in this case is a narrow one. By this determination, the tribunal does not, as it clearly could not, provide imprimatur of an institution's complete and utter failure to administer an ability to benefit exam appropriately. Nor does the tribunal embrace the indefensible proposition that FSA can never recover improperly spent funds in a subpart H proceeding when the matter at issue involves the ability to benefit exam. Instead, the finding, here, follows from the facts of this case showing that the students at issue clearly have the ability to benefit from their program of instruction and that disgorging the institution of the Federal funds supporting the students' instruction is unwarranted.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Avalon Beauty School of Santa Barbara, California is relieved of any obligation to repay funds to the U.S. Department of Education as a result of this proceeding.

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Ernest C. Canellos
Chief Judge

Dated: December 29, 2004

SERVICE

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

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