



UNITED STATES DEPARTMENT OF EDUCATION

THE SECRETARY

In the Matter of

WAUKEGAN SCHOOL OF HAIR DESIGN

Respondent

Docket Number 96-66-SP
Student Financial
Assistance Proceeding

DECISION OF THE SECRETARY

PROCEDURAL HISTORY

On March 28, 1996, the Student Financial Assistance Programs (SFAP), Institutional Review Branch, issued a final program review determination finding Waukegan School of Hair Design (Respondent), in violation of several provisions of Title IV of the Higher Education Act of 1965, as amended 20 U.S.C. section 1070. In the final program review, SFAP specifically determined that during the award years of 1991 to 1992, and 1992 to 1993, Respondent: a) maintained excess cash in its Federal Pell Grant fund (Finding 5, \$234.61); b) improperly administered ability to benefit provisions (Finding 7, \$9,076.00); and c) failed to complete verification on a student selected for the verification process (Finding 9, \$100.00). Respondent appealed review Finding 5, asserting it had not improperly administered ability to benefit provisions. On August 29, 1996, Administrative Judge Frank K. Krueger, Jr. issued a decision denying SFAP's request to impose liability upon Respondent for improperly administering ability to benefit provisions. It is that finding that SFAP now appeals to the Secretary, pursuant to 34 C.F. R. section 668.119(a).

BACKGROUND

Title IV section 484(d) requires applicants without a high school diploma, or its equivalent, seeking financial assistance to take an independently administered examination approved by the Department of Education. This examination seeks to determine a student's ability to benefit from the education or training offered at the school where the applicant is seeking admission.¹ In accordance with this statutory requirement, Respondent contracted with The College of Lake County (Lake County), a degree granting institution and community college in the State of Illinois, to administer the ability to benefit exam to its applicants. Respondent paid Lake County to administer the examination, but the two parties have no other fiscal ties. Lake County administered an exam published by Wonderlic. Wonderlic required exam administrators to register and report exam results. Lake County failed to comply with these requirements.

¹The ability to benefit test requirement was established in 1991.

DISCUSSION

The issue before the Secretary is whether Respondent violated Title IV when the test administrator failed to comply with all of the requirements of the publisher. Title IV, 20 U.S.C. section 1091 (d) provides in pertinent part that:

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 under ... this title ... the student shall meet either 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.

The purpose of requiring the ability to benefit exam is to prevent institutions from receiving tuition from unqualified students. Thus, the examination must be independently administered to satisfy its purpose. The applicable regulations seek to remove the institutions from the process of giving and scoring tests. Thus, the objective and independent administration of the examination controls when determining institutional accountability for funds disbursed as a result of ability to benefit testing. The regulations at 34 CFR section 668.154 provide that:

An institution shall be liable for the Title IV, HEA program funds disbursed to a student whose eligibility is determined under this subpart **only if** the institution:

- (a) Used a test administrator who was not independent of the institution at the time the test was given;
- (b) Compromises the testing process in any way; or
- (c) Is unable to document that the student received a passing score on an approved test.
(emphasis added.)

This provision limits institutional accountability to three areas which focus on the integrity of the examination. In the instant case, it is undisputed that the test administrator, Lake College, was fully independent of the institution, Respondent. The contract between the parties for administration of the ability to benefit exam was an appropriate arms length agreement. No evidence exists to establish that Respondent tampered with the testing process in any way. In addition, there are no allegations of Respondent's inability to produce documentation of the test scores. Therefore, Respondent may not be held accountable for the Title IV, HEA program funds disbursed to students

whose eligibility was determined by the examination independently administered by Lake College.

SFAP argues that the integrity and reliability of the exam is considered preserved when an examination is independently administered, and that without full and total compliance with publisher requirements an examination may not be considered independently administered. SFAP points to the Federal Register as authority for its position. Specifically, SFAP cites 55 Fed. Reg. section 52160 which states that:

The Secretary considers an examination to be independently administered if it is administered in accordance with the procedures specified by the test publisher, and by an individual or organization that has no current or prior fiscal interest in the institution other than an arms length arrangement to administer the examination.

I disagree with SFAP's application of this statement. This interpretive statement functions as guidance for the institutions to follow when seeking to ensure the independent nature of examinations administered to determine a student's eligibility for financial assistance. This provision delineates what will support a finding that a particular test is independently administered. Title IV does not mandate liability for those institutions which fail to fully comply with publisher requirements. By complying with all of the publisher's procedures an institution can avoid questions regarding the examination's integrity. It does not follow, however, that any failure to comply with publisher procedures renders the test unreliable so that it may not be considered independently administered.

SFAP does not dispute that Lake County is fiscally independent of Respondent. Instead, SFAP contends that Lake County's failure to register with the publisher, and send scores to the publisher, prevents the exam given from being considered independently administered. SFAP asserts that Respondent's failure to entirely comply with the publisher requirements automatically taints the entire examination process beyond repair. This argument would hold Respondent to a testing standard that is unnecessary in this case to meet the purpose of the examination process. It is not the Secretary's position that publisher requirements are unimportant. Full compliance, however, with the very numerous publisher directives may be a hardship in some instances, particularly when the institution must rely upon the test administrator to comply with the publisher requirements. Lake County, as the test administrator in this case, failed to register with the publisher and failed to report test scores to the publisher. Despite this error, there is no evidence of any substantive impact upon the reliability of the examination administered. Accordingly, it would be unreasonable to discipline Respondent for the negligence of the administrator when the lapse did not substantively affect the examination process.

The ability to benefit test administered by Lake County on behalf of Respondent did not lack in integrity. Lake County administered an exam approved by the Secretary while using accepted testing and scoring procedures. These factors should be given significant weight when determining whether Title IV funds have been properly disbursed. Further, regulation 34 CFR section 668.151(c) should also be heavily relied upon as authority for what factors would undermine the independent and objective nature of an examination. 34 CFR section 668.151(c) provides:

The Secretary considers that a test is not independently administered if an institution:

- (1) Compromises the test security or testing procedures;
- (2) Pays a test administrator a bonus, commission or any other incentive based upon the test scores or pass rates of its students who take the test.

Respondent did not compromise the testing security or testing procedures used by Lake County. Further, SFAP does not allege that Respondent paid any bonuses or commissions to Lake County. Without evidence of either of the breaches described in 34 CFR section 668.151(c) the ability to benefit examination in question should be deemed independently administered. Moreover, the Secretary "will not hold institutions financially responsible if they award Title IV, HEA program funds to ability to benefit students who present evidence that they passed approved tests, as long as the institutions did not interfere with the independence of the testing process and were not involved in the testing." 60 Fed. Reg. section 61836. It is undisputed that the students in the case at hand passed approved tests without any interference from the Respondent. Therefore, Respondent should not be held financially responsible for the disbursed awards.

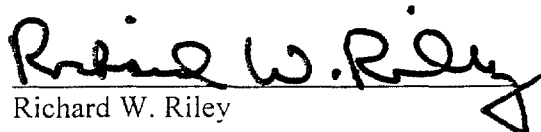
CONCLUSION

After the completion of the substantive testing process, Lake County failed to complete certain publisher requirements that did not bear upon the accuracy of the test findings. The purpose of the examination was achieved. SFAP rests its entire argument upon its interpretation of regulation 55 Fed. Reg. section 52160 and finds no other authority for Respondent's liability. In this case the deviation from certain compliance with publisher requirements simply does not warrant a severe penalty. It is significant that Respondent neither altered the examination, nor interfered with the independent administration of the examination. The test given on behalf of Respondent was independently administered and produced reliable scores. Therefore, the financial awards were properly disbursed and Respondent is not liable under Title IV.

ORDER

Accordingly, I hear by affirm Judge Krueger's finding that Respondent is not liable for the amount in finding seven, (7), of the Final Program Review Determination.

So ordered this eighth day of September, 1997.


Richard W. Riley

Washington, DC