IN THE MATTER OF Pan American School, Inc.,
Respondent.

Docket No. 92-118-SP
Student Financial Assistance Proceeding

Appearances: Angelo Chavez, President, Pan American School, New York, New York, for Pan American School.

Jennifer L. Woodward, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before: Judge Ernest C. Canellos.

DECISION

On August 26, 1992, the Office of Student Financial Assistance Programs (SFAP) of the United States Department of Education (ED) issued a final program review determination (FPRD). SFAP found that during the 1988-89, 1989-90, and 1990-91 award years, Pan American School (Pan American) disbursed Pell Grant funds to ineligible students, failed to make timely refunds to ED of disbursed Pell Grant funds and, disbursed Pell Grant and Guaranteed Student Loan (GSL) program funds to students while failing to obtain documentation that the institution's ability-to-benefit test was approved by the school's accrediting agency.See footnote 1 *1* Although the FPRD included six additional findings against the institution, SFAP declined to impose a liability for those findings.

SFAP seeks recovery of **$3,005,041**: $2,474,252 in Pell Grant funds and $530,789 in GSL funds, amounting to all Pell Grant and GSL funds disbursed by Pan American during the 1988-89, 1989-90, and 1990-91 award years

On December 27, 1993, I dismissed the FPRD on the basis of a jurisdictional defect inasmuch as it was not issued by the proper authority. On February 16, 1994, the Secretary

determined that the FPRD was properly issued. The Secretary reinstated the FPRD and remanded the case to me for further proceedings.

For the reasons stated below, I find that Pan American failed to sustain its burden of proof that its ability-to-benefit test was approved by the school's accrediting agency.See footnote 2 *2*

DISCUSSION

I

To be eligible to receive Title IV student financial assistance, a student attending an eligible institution of higher educationSee footnote 3 *3* must have a high school diploma, its equivalent, or a demonstrated "ability-to-benefit" from a program of study offered by the institution. 20 U.S.C. § 1091(d). To qualify for admission to an institution by proof of a demonstrated ability-to-benefit, a student must be administered a nationally recognized, standardized or industry developed test measuring the prospective student's aptitude to complete successfully the program of study to which the student has applied.See footnote 4 *4* In addition, the test administered must be approved or subject to criteria developed by the institution's accrediting agency. 20 U.S.C. §§ 1088(b) & 1091(d); 34 C.F.R. § 600.11 (1988).

During the 1988-89, 1989-90, and 1990-91 award years, applicants seeking admission to Pan American by proof of a demonstrated ability-to-benefit were administered two tests: the Pan American School Achievement TestSee footnote 5 *5* and the University of Michigan Examination in Structure Test (Michigan Test). Upon the successful completion of the tests, Pan American admitted the applicant into one of its three programs: the Executive Bilingual Secretary program, the Travel Agent program, or the English as a Second Language (ESL) stand alone program. SFAP argues that neither test was approved by Pan American's accrediting agency, the Accrediting Commission for Independent Colleges and Schools (AICS), during the years at issue.

In its defense, Pan American argues that the admission tests the institution administered complied with the relevant statutory and regulatory requirements of Title IV because the tests were, in fact, approved and subject to criteria developed by the institution's accrediting agency. To support its position, Pan American submitted a copy of a letter, dated August 14, 1991, addressed to the school's president from AICS's assistant director. The letter states, in pertinent part:

> [t]his letter will confirm that the Accrediting Commission has no objection to your school's use of the Michigan Test Examination in Structure as an entrance/placement tool for students applying for admission to your stand-alone English as a Second Language (ESL) program. This letter also confirms that your policy is to admit only students who have earned a high school diploma or the equivalent to this ESL program.

According to Pan American, the letter from AICS shows that at least one admission test the school administered, the Michigan Test, was a valid industry developed test that met the institution's accrediting agency criteria for use in admission.

SFAP argues that AICS's letter cannot be interpreted as approving Pan American's use of the Michigan Test for admission purposes because the sentence in the letter indicating that Pan American has a policy of only admitting students who have earned a high school diploma or its equivalent is inconsistent with the previous sentence in the letter approving the use of the Michigan Test. Consequently, SFAP argues that because of the letter's ambiguity, "[it] does not suffice as documentation from [Pan American's] accrediting agency necessary to voice the agency's approval of the school's use of the University of Michigan test as an [ability-to- benefit] test."

The first sentence in AICS's letter clearly expresses AICS's approval of the Michigan Test for admission and placement purposes for prospective students applying for admission to Pan American's ESL stand alone program. Nothing in the letter's subsequent sentence changes that result. The second sentence reflects AICS's confirmation that Pan American's current admission policy, a period after the period at issue in this proceeding, no longer permits the admission of a student into its stand alone ESL program on the basis of a student's ability-to- benefit. As such, AICS's letter demonstrates that AICS approved the use of the Michigan Test for determining ability-to-benefit admission in the school's stand alone ESL program. Consequently, on the facts of this case, I find that the students admitted to Pan American's ESL stand alone program under the ability-to-benefit criteria were administered a nationally recognized, standardized, or industry developed test to evaluate the student's ability-to- benefit. Accordingly, SFAP is not entitled to recover Title IV funds awarded to students who were admitted to Pan American's ESL stand alone program, by proof of a demonstrated ability-to-benefit from the ESL program, on the basis that Title IV funds were awarded in violation of 34 C.F.R. § 600.11.

Pan American's evidence is not sufficient, however, to prove that AICS approved the use of either the Michigan Test or the Pan American School Achievement Test for students admitted into the school's executive bilingual secretarial program or its travel agent program. As I noted above, the letter, Pan American's most compelling evidence on this issue, refers to the ESL stand alone program only. The other programs offered by Pan American are not mentioned in the letter. Consequently, the letter, without more, cannot constitute proof that applicants admitted into programs other than the ESL stand alone program were administered an approved ability-to-benefit test.See footnote 6 *6*

Further, Pan American makes no showing that its other ability-to-benefit admission test, the Pan American School Achievement Test, was recognized or approved by AICS for use as the basis for admission decisions for any of the school's programs. Indeed, it is doubtful that such a showing could be made since Pan American concedes that the achievement test is not a standardized or industry developed test as required by 34 C.F.R. § 600.11, but rather the institution's own edited version of an exam developed by an independent publisher.

The institution's failure of proof in this regard is a fatal defect to its defense.See footnote 7 *7* Based on its own admission, Pan American enrolled more than 2,200 students during a portion of the award years in question. More than 600 of its students were enrolled in a program other than the ESL stand alone program on the basis of a demonstrated ability-to-benefit, as measured by Pan American's admission tests. Accordingly, I am persuaded that a significant number of Pan American's students were admitted to the school on the basis of ability-to- benefit tests which did not meet AICS's criteria for use in admission as required by 34 C.F.R. § 600.11.

II

Finally, Pan American challenges SFAP's regulatory authority to recover all Pell Grant and GSL funds disbursed by the institution during the 1988-89, 1989-90, and 1990-91 award years on the basis of a finding that the school improperly administered its ability-to-benefit tests. As Pan American points out, SFAP initially only identified eight students who had demonstrated an ability-to-benefit on the basis of an admission test, yet the FPRD requires Pan American to repay

ED all Pell Grant funds disbursed during the program review period and $530,789 in GSL funds.See footnote 8 *8*

The gravamen of Pan American's argument was carefully considered and rejected in In the Matter of Long Beach College of Business, Dkt. No. 92-132-SP, U.S. Dep't of Education (July 14, 1994). In that case, I affirmed SFAP's contention that in instances where it is shown that an institution followed a policy where it *systematically* failed to comply with the ability-to-benefit requirements of Title IV, ED is entitled to recover the Title IV funds disbursed by the institution during the period in question as long as that period occurred prior to Congress' amendment of 20 U.S.C. § 1085(c).See footnote 9 *9*

To its credit, SFAP attempted to strike a balance between its dual role of enforcing the statutory requirements of Title IV and of ensuring the protection of public funds. Upon completion of the program review, SFAP requested Pan American to complete a review of its student financial assistance files and submit to ED a report of the results of the file review, verified by a certified public accountant. Specifically, the institution was asked to review the files of all of its students who had enrolled from July 1, 1987, to December 31, 1990, on the basis of an ability-to-benefit. The result of such a review, apparently, would enable SFAP to calculate liability on the basis of the school's certified data. Pan American conducted an in-house file review, but was unable to comply with SFAP's request to submit a report by a certified public accountant due to a financial hardship faced by the school as a result of, according to the school, ED's imposition of a reimbursement system for the receipt of Title IV funds.

It is well established that the nature of the enforcement of Title IV programs through the use of program review determinations creates the need for institutions to cooperate with SFAP by providing the agency with complete file reviews when that information is needed to determine whether any, if not all, Title IV funds disbursed to the institution were spent contrary to the statutory and regulatory requirements. More fundamentally, an institution's cooperation in providing SFAP with documentation of its expenditure of Title IV funds is

consistent with its fiduciary duty to account for the disbursement of Title IV program funds. Consequently, under the circumstances of this case, Pan American's refusal to provide SFAP with the data requested undercuts the school's position that all Title IV funds should not be recovered.

Undoubtedly, in determining the amount of liability in a case like this one, the rule of *de minimis non curat lex* should prevail. Isolated or nominal violations of Title IV's ability-to- benefit provisions are not sufficient to justify the extraordinary remedy that SFAP seeks in this proceeding. In this respect, it is not proper to require an institution to return all Title IV funds disbursed in a given period, which otherwise would have been disbursed in compliance of Title IV, on the basis of a *de minimis* violation of 34 C.F.R.§ 600.11. However, SFAP has no choice, in circumstances such as the ones before me, where the institution fails to provide ED with the requisite data needed to determine whether, and, if so, to what extent, Title IV funds were spent contrary to the requirements of Title IV, other than to require the return of all Title IV funds disbursed during the period at issue. Accordingly, excluding Title IV funds awarded to students

who were admitted to Pan American's ESL stand alone program, SFAP may recover all Title IV funds disbursed during the program review period.See footnote 10 *10*

FINDINGS

I FIND the following:

1. Pan American failed to document that the institution's ability-to-benefit tests were approved by the school's accrediting agency for use in admission for all ability-to-benefit students, except those admitted to the ESL stand alone program, during the 1988-89, 1989-90, and 1990-91 award years.

2. Pan American, in violation of 34 C.F.R. § 600.11, disbursed Pell Grant and Guaranteed Student Loan (GSL) program funds to ineligible students.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED, that the Pan American School, not inconsistent with the exceptions noted in this decision, repay to the United States Department of Education all Pell Grant and GSL funds disbursed during the 1988-89, 1989-90, and 1990-91 award years.

Ernest C. Canellos
Issued: October 18, 1994 Chief Judge
Washington, D.C.

Footnote: 1 *1 The GSL program is the predecessor student loan program for the current Federal Family Education Loan (FFEL) program. The GSL and Pell Grant programs are authorized by Title IV of the Higher Education Act of 1965, as amended, Pub. L. No. 89-329, 79 Stat. 1219 (Title IV) (to be codified as amended at 20 U.S.C. § 1070 et seq.).*

Footnote: 2 *2 Since the resolution of the ability-to-benefit issue entitles SFAP to recover ostensibly all of the Title IV funds in issue in the FPRD, it is unnecessary to resolve the remaining issues.*

Footnote: 3 *3 To be eligible to participate in Title IV student financial assistance programs, an institution must satisfy the definition of an eligible institution set forth at 20 U.S.C. § 1085(a).*

Footnote: 4 *4 Although 34 C.F.R. § 600.11(b)(2) and (3) set out alternative means for demonstrating an ability-to-benefit, those regulations are not relevant here.*

Footnote: 5 *5 Apparently the Pan American School Achievement Test is a Spanish language version of the Metropolitan Achievement Test published by Harcourt Brace Jovanovich, Inc.*

Footnote: 6 *6 This decision is not inconsistent with a prior decision issued by ED involving the same party. See In the Matter of Pan American School, Dkt. No. 91-91-SA, U.S. Dep't of Education (February 25, 1994). There, the administrative law judge (ALJ) determined that the manner in which Pan American utilized the Michigan Test demonstrated that the school did not use the test for admission purposes. Rather, the test was used as a placement test to determine the initial academic level for each student. Undoubtedly, the finding of that decision stands on its own as an evaluation of the facts at issue in that case. Although the issue of whether the Michigan Test was used for admission or placement purposes is not specifically before me, the record in this case shows that AICS had at least approved Pan American's use of the Michigan Test for both purposes for the ESL stand alone program.*

Footnote: 7 *7 In this proceeding, the institution has the burden of proving that the questioned expenditures were proper. 34 C.F.R. § 668.116(d); see also In the Matter of Sinclair Community College, Dkt. No. 89-21-S, U.S. Dep't of Education (Decision of the Secretary September 26, 1991). Consequently, to sustain its burden of persuasion, the institution must present a compelling showing that Pan American obtained the requisite approval of its ability-to-benefit tests from AICS.*

Footnote: 8 *8 According to SFAP, the total GSL liability includes the excess subsidies paid to lenders by ED on ineligible GSL loans disbursed by Pan American.*

Footnote: 9 *9 Under its amendment of Section 1085(c), Congress removed the ability-to-benefit provisions from the institutional eligibility requirements of Title IV.*

Footnote: 10 *10 I make this determination with one caveat. In Pan American, supra, the administrative law judge ordered Pan American to repay ED a portion of Pell Grant funds disbursed by the institution from July 1, 1987, through June 30, 1990. The judge's determination was made on the basis that Pan American had administered an unacceptable ability-to-benefit test to a limited number of students. Recognizing that this liability was imposed and that it may overlap with the liability imposed in this case, I find that the amount recoverable for disbursed Pell Grant funds during the period at issue, here, should be reduced by the amount for which the liability imposed in Pan American, supra, satisfies the liability imposed here.*