IN THE MATTER OF HEALTH CARE TRAINING INSTITUTE,
Respondent.

Docket No. 92-124-SP
Student Financial Assistance Proceeding

DECISION

Appearances: Robert S. Butler, Esq., of Arlington, Tennessee
for the Respondent

Donald C. Phillips, Esq., of Washington, D.C.,
Office of the General Counsel, United States
Department of Education for the Office of Student
Financial Assistance

Before: Judge Allan C. Lewis

This is a proceeding initiated by the Office of Student Financial Assistance, United States Department of Education (ED), to recover $21,900,000 in Federal funds advanced to Health Care Training Institute (HCTI) under the student financial assistance programs, to require HCTI to repurchase from the lending institutions the outstanding balances on all Stafford Loans for the period of July 1, 1987 through December 31, 1990, and to repay to the Department all interest and special allowances paid on the Stafford Loans. By letter dated November 16, 1992, HCTI filed an appeal of the program review determination issued on September 30, 1992. Due to related issues, this matter was then consolidated for hearing with a termination and a fine proceeding initiated against the institution.

Thereafter, on January 19, 1993, HCTI filed a motion for summary disposition alleging that it properly administered the ability to benefit test, and, since no triable issue of material fact exists, HCTI is entitled to, in effect, judgment as a matter of law related to the program review determination and a partial judgment in the termination and fine proceedings. ED responds to this motion by urging this tribunal to deny HCTI's motion for summary disposition and to grant its motion for summary judgment on the grounds that the ability to benefit test administered by HCTI did not adequately measure the student's aptitude to successfully complete the program to which he or she has applied.
For the reasons stated infra, the HCTI's motion for summary disposition relating to the program review determination is granted, ED's motion for summary judgment in this regard is denied, and the program review determination is found not to be supportable in its entirety.

I. OPINION

Under the Federal student financial assistance programs, financial assistance is available for postsecondary education to qualified students. A qualified student is an "eligible student" who is

admitted to an institution of higher education by receiving a high school diploma, securing a general education development certificate, or demonstrating an ability to benefit from the training offered.See footnote 1 1/ See 20 U.S.C. § 1141(a) (1991).

Under the ability to benefit requirement, a student is eligible for financial assistance under a Title IV, HEA program, only if the student--

[is] administered a nationally recognized, standardized or industry developed test, subject to the criteria developed by the appropriate accrediting association, measuring the applicant's aptitude to complete successfully the program to which the applicant has applied . . . .

20 U.S.C. § 1091(d)(3)(A).

Similarly, 34 C.F.R. § 668.7(b)(1) provides that a student becomes eligible for financial assistance if, before admission, he or she--

(1)(i) [i]s administered a nationally recognized, standardized, or industry-developed test, subject to the criteria developed by the institution's nationally recognized accrediting agency or association, that measures the student's aptitude to complete successfully the educational program to which he or she has applied; and
(ii) [d]emonstrates that aptitude on that test . . . .

Initially, there is no dispute between the parties that, under 20 U.S.C. § 1091(d)(3)(A) and 34 C.F.R. § 668.7(b), HCTI utilized a valid, nationally recognized test from July 1, 1987 through December 31, 1990 as part of its admission procedure. In this regard, it employed the Wonderlic Scholastic Level Exam (Wonderlic) which measures aptitude for training in a particular job task by assessing general adult intelligence.

In administering the Wonderlic test, HCTI utilized a cutoff or pass/fail score of 7 in determining whether an applicant possessed the ability to benefit from its nursing assistant program. This standard was established by virtue of the criteria of its accrediting agency which required each member institution to establish written procedures regarding the admission of students on an ability to benefit basis. ED asserts that HCTI should have used the Wonderlic test publisher's suggested cutoff score of 15. Thus, the dispute centers on whether, in determining the aptitude of an applicant, the standard is determined pursuant to criteria promulgated by the accrediting agency of the institution or whether the standard shall be the test publisher's cutoff or pass/fail score.

According to ED, the statutory and regulatory phrase "measuring the applicant's aptitude to complete successfully the
program" somehow mandates the usage of the test publisher's cutoff score. On the other hand, HCTI focuses on the dependent clause in the statute and regulation "subject to the criteria developed by the appropriate accrediting association." It argues that this dependent clause requires that an accrediting association, not a test publisher, establishes the criteria employed by its member institutions to determine whether an applicant possesses the ability to benefit.

In the instant case, the language of 20 U.S.C. § 1091(d)(3)(A) and 34 C.F.R. § 668.7(b) is clear and unambiguous. The accrediting association establishes the criteria for its member institutions to ascertain whether a student applicant possesses the ability to benefit. Such a directive by Congress includes the selection of the appropriate cutoff score for a national test by the accrediting agency or association. The plain meaning of the phrase relied upon by ED--measuring the applicant's
aptitude--does not mandate the usage of the test publisher's cutoff score. Rather, this phrase simply articulates the type of national test to be administered by each institution, namely, one that measures the aptitude of an applicant regarding the particular program for which he or she is applying. Thus, ED's legal position is not supported by the statute or the underlying regulations.

This analysis is consistent with the statutory scheme adopted by Congress in the student financial assistance area. Accrediting agencies are employed to establish and monitor a wide range of educational standards for vocational institutions, colleges, and universities from the approval of an institution's curriculum and course content to its physical facilities. Hence, accrediting agencies possess the expertise, at least in the view of Congress, to establish an appropriate ability to benefit standard.

ED also relies upon the testimony of the Director of the Division of Policy and Program Development for the Office for Student

Financial Assistance. In the Director's view, the regulations require an institution to establish a cutoff score "in accordance with the standards established by the test developer and the accrediting agency." ED Br. at 14-15. ED urges the tribunal to adopt the Director's oral interpretation asserting that the Supreme Court in Chevron, U.S.A. v. Natural Defense Council, Inc., 467 U.S. 837 (1984) has instructed courts to defer to the agency's interpretation as long as the interpretation is not clearly erroneous or contrary to the plain meaning of the statute.

This approach was rejected in In re Technical Career Institute, Dkt. No. 92-91-ST, U.S. Dep't of Education (Oct. 8, 1993) and its reasoning is equally applicable in the instant case--

ED is wrong in its contention. This Tribunal owes no deference to unsupported interpretations, positions, or characterizations of the HEA or its implementing regulations, the source of which is an administrative component within the Department of Education. Chevron deference is owed to the Secretary. In this proceeding ED is an advocate for its position and does not speak for or stand in the shoes of the Secretary and therefore is not entitled to clothe itself in the mantle of Chevron deference. For the purposes of this case, the Tribunal also is an administrative component of the Department of Education. Interpretations should be based upon statute, legislative history and decisions of the Secretary.

Technical Career Institute at 24.

ED also complains that the cutoff score of 7 employed by HCTI was not a valid indicator of an applicant's ability to benefit. Such a score, according to testimony in a prior proceeding between the parties, is equivalent to an IQ score of 73 which is on the borderline of the mentally retarded

range.See footnote 2 2/ ED has a legitimate concern; however, the real source of its complaint lies with HCTI's accrediting agency, not HCTI.

HCTI's accrediting agency, the Commission on Occupational Education Institutions of the Southern Association of Colleges

and Schools, promulgated criteria for its member institutions regarding the admission of students on an ability to benefit basis--

> [p]rovisions may be made for the admission of students on an "ability to benefit" basis. If students are admitted on this basis, the institution must establish written admission procedures, apply these procedures uniformly, provide documented evidence on the use of the procedures, maintain records on the progress of students admitted under this provision, and evaluate the effectiveness of the procedures used in identifying students who are capable of benefiting from the training offered.

In short, HCTI's accrediting agency delegated the responsibility to select the appropriate national test and to establish the cutoff score to its member institutions. While common sense dictates that HCTI's selection of 7 as a cutoff score was inappropriate, its action was, nonetheless, performed in conformance with the procedures adopted by its accrediting agency pursuant to 20 U.S.C. § 1091(d)(3)(A) and 34 C.F.R. § 668.7(b).

While the standards adopted by HCTI's accrediting agency were questionable, ED is not without fault in this case. Under the Department's initial and continuing recognition process for accrediting agencies, the Secretary determines, inter alia, whether--

> an accrediting agency maintains . . . current written materials clearly describing . . .
> (k) [w]ith regard to institutions . . . that admit students on the basis of their ability to benefit from the education or training offered, any criteria established by the agency with respect to nationally recognized, standardized, or industry-developed tests designed to measure the aptitude of prospective students to complete successfully the program to which they have applied.

34 C.F.R. § 602.13.

Moreover, the Secretary also determines whether an accrediting agency, in making its accrediting decisions regarding its current and prospective members, obtains and considers accurate information by--

> [d]etermining that institutions . . . admitting students on the basis of ability to benefit employ appropriate methods, such a preadmission testing . . . for determining that such students are in fact capable of benefiting from the training or education offered.

34 C.F.R. § 602.17(d).

In addition, the Secretary re-evaluates each recognized accrediting agency at least once every five years and employs the National Advisory Committee on Accreditation and Institutional Eligibility to assist the Department. 34 C.F.R. §§ 602.3(e) and 602.4.

Under these circumstances, ED had the means and opportunity to correct its perceived problem regarding the cutoff score in the present case. In fact, HCTI's accrediting agency was re-evaluated in 1989 and 1990 by the Department and the National Advisory Committee and received a renewal of its recognition by the Department. However, no changes were proposed or made in its criteria governing the procedures concerning the ability to benefit determinations.

Accordingly, HCTI's motion for summary disposition is granted and ED's motion for summary judgment is denied.

II. ORDER

On the basis of the foregoing findings of fact and conclusions of law, and the proceedings herein, it is HEREBY ORDERED--

1. That the program review determination is found not supportable in its entirety;

2. That the demand by ED to recover $21,900,000 in Federal funds advanced to Health Care Training Institute is vacated;

3. That the demand by ED to require Health Care Training Institute to repurchase from the lending institutions the outstanding balances on all Stafford Loans for the period of July 1, 1987 through December 31, 1990, is vacated; and

4. That the demand by ED to require Health Care Training Institute to repay to the Department all interest and special allowances paid on the Stafford Loans is vacated.

Allan C. Lewis
Administrative Law Judge

Issued: November 4, 1993
Washington, D.C.

Footnote: 1 1/ The pertinent findings of fact are set forth in the opinion.

Footnote: 2 2/ While ED's position is rejected as a matter of law, it is not without other inherent problems. In the instant case, ED proposes the Wonderlic's suggested cutoff score of 15; yet, in 1991, ED imposed a lower score of 11 as the cutoff score for the same test after it was empowered by Congress under Section 3005 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (to be codified as 20 U.S.C. § 1091(d)) as the sole party to approve examinations under the ability to benefit alternative.