LONG BEACH COLLEGE OF BUSINESS,
Respondent.

Docket No. 92-132-SP
Student Financial Assistance Proceeding

Appearances: Sara W. Goddard, Esq., of Irvine, CA, for the Respondent.

Edmund J. Trepacz, II, Esq., of Washington, D.C., Office of the General Counsel, United States Department of Education, for the Office of Student Financial Assistance Programs.

Before: Judge Ernest C. Canellos

DECISION

PROCEDURAL HISTORY

Long Beach College of Business, Inc., (LBCB) is a proprietary trade school. The School participates ln the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). These programs are administered by the Off ce of Student Financlal Assistance Programs (SFAP), of the Unlted States Department of Education (ED). ED's Regionai Inspector General for Audit, Region IX, issued an audit report of March 1992 (audit report) concluding that LBCB improperly administered student financial assistance programs for the period February 16, 1988, to December 31, 1990.

On September 30, 1992, ED's Institutional Participatlon and Oversight Service issued a final audit determination letter (FADL) based upon the audit report. The FADL concluded that LBCB was ineligible to participate in Title IV programs due to: (1) the enrollment of non high school graduates without proper determination of their ability-to-benefit and (2)the improper conversion of programs from a clock-hour to a credit-hour basis. The second finding of the FADL was later withdrawn by ED with prejudice. LBCB was directed to remit $1,474,050 to ED, including $657,000 in Pell Grants, $741,000 in campus-based funds, and $76,050 in interest and speclal allowance costs. In addition LBCB was directed to reimburse $2,553,000 to lenders for Guaranteed Student Loans made durlng the audit period. LBCB filed a timely appeal. This matter has been fully briefed by he parties and an Oral Argument was held.

On November 30, 1993 I dismissed the FADL witthout prejudice on the ground that it was not issued by the proper authority, which **constitutes** a jurisdictional defect. On February 16, 1994, the Secretary determined that the FADL was properly issued. The Secretary reinstated the FADL and remanded the case to me for further proceedlngs. Upon receipt of the Secretary's decision, I took the case under advisement for a decision on the merits.

ISSUE

Four issues present themseives in this case: (1) whether all exhibits in Respondent's Initial and

Reply Briefs should be stricken on the ground that such evidence s untimely and inadmissible, (2) whether LBCB **properly determined applicants'** ability-to-benefit (3) whether SFAP is barred from recovery due to the doctrine of estoppel, and (4) wnether LBCB was eligible to receive Title IV funds. I will discuss these seriatim.

DISCUSSION

LBCB, as the institution requesting review of an FADL, bears the burden of persuasion. Therefore, LBCB must prove (1) that expenditures questioned or disallowed were proper and (2)that complied wlth the program requirements. 34 CFR 668.116(d)

Evidence Exclusion

Regulations require that evidence submitted for review must be **both timely and** admissible. 34 **CFR** 668.116(e) & (f). They also **provide that any materials that have** not been submitted to ED in connection with an audit or program review should be provided no later than 30 days after the institution's filing of its request for review. 34 CFR 668.116 (e)(1)(v). If the materials are not submitted within 30 days, then said materials, pursuant to the regulations, are neither timely nor admisslble.

LBCB's request for review is dated November 12, 1992. The evidence in question was introduced as exhibits to LBCB's initial and reply briefs. These briefs were dated April 24, 1993 and July 8, 1993, respectively.

SFAP contends that the evidence submitted with LBCB's briefs is untimely pursuant to 34 C.F.R. 668.116. SFAP also contends that LBCB's evidence does not fall within the categories of admissible evidence set forth in 34 CFR 668.116(e)(1)(i),(ii), (iii), (iv), and (v). SFAP concludes that, as such, this evidence is inadmissible .

LBCB claims that the exhibits in question fall into the categories set forth in 34 CFR 668.116(e)(1) because they were submitted to ED in the course of the original audit. LBCB also claims that SFAP's failure to object in a timely manner constituted a waiver. Finally, LBCB claims that the evidence should be admitted in the interests of justice.

In, In the Matter of Baytown Technical Sch., Inc., Dkt. No. 9140-SP, U.S. Dep't of Educ. (Decision of the Secretary) (April 12, 1994), the Secretary concluded that admission of evidence should be guided by the Hearing Official's obligation to provide a fair and impartial proceeding. According to the Secretary, this obligation transcends the stringent evidentiary requirements of 34 CFR 668.113(b) and 668.116(e)(2).

Having reviewed the evidence in question, I find that it is not persuaslve. Therefore, its admittance would not affect this proceeding in any way.

Ability-to-Benefit

In order to be eligible to receive Title IV assistance, a student must have a high school diploma, its equivalent, or a demonstrated ability-to-benefit from a program of study. 20 USC 1091(d).

Pursuant to the relevant regulations, an applicant may be administered a nationally recognized, standardized, or industry developed test in order to demonstrate that ability-tobenefit. This test must be administered as part of the student's admissions requirements. If an applicant is unable to satisfy admissions testing requirements, then that applicant may complete a program of remedial education, not to exceed one year, or enter a certified GED program in order to qualify for federal ald. 34 CFR 600.11.

LBCB used a nationally recognized test, published by E.F. Wonderlic, Inc. (Wonderlic), to determine whether students could benefit from its programs. However, LBCB accepted a minimum score of nine. In most cases, this was significantly below the publisher's suggested minimums, which ranged from 18 to 10. SFAP contends that LBCB did not provide valid evidence to support acceptance of scores so low. It is also SFAP's position that the acceptance of scores so far below the publisher's minimum has resulted in an excessive drop out and default rate among ability to-benefit students.

Initially, LBCB argues that there are no laws prescribing which test scores to use. However, it is important to note that Wonderlic's exams and scoring guidelines are the products of extensive study and testing. The procedures established by Wonderlic with regard to the application and scoring of their exams are well established components of those exams. As such, wnen an institution chooses to use the Wonderlic exam (Exam), this choice necessarily encompasses all of the procedures prescribed by Wonderlic. I find that without comprehensive **evidence** supporting the use of different procedures, LBCB must **defer** to the scoring guidelines established by Wonderlic.

Next, LBCB claims that it was within their discretion to accept lower test scores for several reasons. One reason, according to LBCB, was that the Exam was culturally biased. Another was the contention that the Exam was supplemented by counseling, remediation, and a GED program. However, mere assertions, such as these, will not meet LBCB's burden of persuasion. The evidence produced does not support these claims and, as a result, I **find that** they lack any weight.

LBCB also produced a Longitudinal Study produced in an attempt to establish the acceptability of a score of nine. This study compares test scores of ability-to-benefit students with those of high school graduates and indicates that ability-to-benefit students actually scored marginally higher than high school graduates. However, the conclusions that LBCB generates from this study are invalid. The ability-to-benefit requirement is a **legislatively created** alternative to a high school diploma. It **is the final** opportunity for students to establish their eligibility. As such, it stands on its own and must be accepted without comparison to alternate standards of eligibility.

LBCB also claims that the Association of Independent Colleges and Schools (AICS) approved the ability-to-benefit procedures at **issue. Whether AICS, as** LBCB's accrediting **body, even had the** authority to approve LBCB's ability-to-benefit program is **questionable. In any** event, there is no evidence that AICS **explicitly** approved this program. The re-accreditation of LBCB, by AICS, is neither an appropriate nor an adequate sign of approval. Even ignoring Ihe questionable nature of AICS's **authority in** this matter, I find that such, at best, implicit approval will not support LBCB's acceptance of below average test **scores.**

Finally LBCB disagrees with SFAP's correiation of default rates to improper testing procedures. The abil ty-to-benefit **requirement** is a precondition to eligibility. It is immaterial whether improper determination of the ability-to-benefit really led to high default rates. Therefore, I find that LBCB **did not** properly determine the ability-to-benefit of its applicants.

Estoppel

As a separate and distinct defense, LBCB asserts that SFAP is estopped from claiming that respondent's ability-to-benefit procedures were deficient. This argument is based upon a 1988 program review that the respondent claims impiicitly accepted LBCB's procedures. However, the program review in question specifically states that the absence of statements regarding specific policies or procedures cannot be construed as acceptance of those policies or procedures. Factually, LBCB's argument **fails.**

It is also important to point out that, as a rule, estoppel will not lie against the government. See Schweiker v. Hansen, 450 U.S. 785 (1981), Utah Power and T ight v. United States, 243 U.S. 389 (1971). The Secretary conf med this rule when he affirmed that ED may not be estopped from -ecovering funds disbursed **contrary** to law, even if eligibility had been mistakenly granted. In the Matter of Academia La Danza Artes Del Hogar, Docket No. 90-31-SP, U.S. Dep't of Educ. (May 19, 1992), Aff'd (Certification of Decision by the Secretary) (Aug. 20, 1992). **Therefore, I find** no basis in law or fact for LBCB's argument **that ED is estopped** from enforcing the ability-to-benefit **findings** here.

Eligibility

It is SFAP's contention that LBCB was ineligible to participate in Title IV programs during the ?eriod in dispute. As a result, SFAP demands that all funds tendered during that period be repaid. There is, however, much dispute as to whether the ability-to-benefit should be an institutional eligibility requirement or an individual eligibility requirement. When it removed ability-to-benefit from the institutional eligibility provisions, 20 USC 1085(c), Congress apparently recognized that **it would be** unjust to revoke the eligibility of an institution **solely because** a minority of students is ineligible.* Although this change occurred after the audit period, it is **still a consideration.**

While ability-to-benefit can be an individual eligibility question, a school must establish an ability-to-benefit program.

* Even before this change, the fairness of enforcing the ability-to-benefit requirements as criteria for institutional **eligibility was** obvious. It appears clear, to me, that some **consideration should** be given to whether it is fair to apply the requirements in this manner. However, I do not have the **authority to waive** or avoid the regulations in question. **Ultimately,** it is only the Secretary who has plenary authority.

Consequently, ability-to-benefit may also be an institutional eligibility question. LBCB insisted as a policy issue that during the audit period it accepted scores as low nine on the Exam. LBCB

has failed to prove that this was an acceptable procedure. Since no evidence has been presented to determine otherwise, during the period in question LBCB did not properly enforce the ability-to-benefit provisions and was therefore ineligible to participate in Title IV programs.

FINDINGS

I FIND the following:

Long Beach failed to follow the guidelines established by the test manufacturer, Wonderlic, when it determined the ability-to-benefit of applicants based on the Wonderlic test;

Long Beach failed to meet its burden of establishing that its ability-to-benefit procedures were valid;

SFAP is not estopped from recovery as claimed;

Long Beach was ineligible to participate in Title IV programs during the period in question; and

Long Beach's liability amounts to $1,474,050 to ED and $2,553,000 to lenders in the Guaranteed Student Loan Program.

ORDER

On the basis of the foregoing it is hereby--

ORDERED, that the Long Beach College of Business, repay to **the United** States Department of Education the sum of $1,474,050 for PELL grants and campus-based funds awarded to **ineligible** students and $2,553,000 to the respective lenders for ineligible loans in the Stafford and Supplemental **Loans to Students programs.**

Ernest C. Canellos
Issued: July 14, 1994
Washington, D.C.