IN THE MATTER OF SALT LAKE COMMUNITY COLLEGE,
Respondent.

Docket No. 94-92-SP
Student Financial Assistance Proceeding

Appearances: Thomas C. Anderson, Esq., and Constance L. Hughes, Esq., of Salt Lake City, Utah, Office of the Utah Attorney General, for the Respondent.

James Gette, 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

Salt Lake Community College (Salt Lake) is a two-year state institution of higher learning located in Salt Lake City, Utah. Salt Lake participates in the various student financial assistance programs that are authorized under Title IV of the Higher Education Act of 1956, as amended (Title IV). 20 U.S.C. . 1070 et seq. Title IV Programs are administered by the Office of Student Financial Assistance Programs (SFAP), United States Department of Education (ED).See footnote 1 [1]

During the period August 2 6, 1993, program reviewers from SFAP's Region VIII, Denver, Colorado, conducted a program review of the Title IV programs administered at Salt Lake. The program review report contained six findings; all except one have been resolved. On the contested finding, a final program review determination (FPRD), issued on December 28, 1993, found that Salt Lake had violated federal regulations by improperly administering ability-to-benefit (ATB) tests to 37 students between July 1, 1991, and June 29, 1992. As a result, Salt Lake was ordered to remit $10, 539 to the holders of the promissory notes for student loans to those ATB students and $48,894 to ED for Pell Grants and Supplemental Education Opportunity Grants awarded to those students. An informal fine of $5,000 was proposed, but not pursued by SFAP. After a period of active settlement negotiations between SFAP and Salt Lake, the FPRD was reissued on May 11, 1994. Salt Lake filed a timely appeal which was routinely assigned to me for resolution. In due course, briefs and evidentiary matters were timely filed by both parties, an oral argument was held, post-hearing submissions were filed, and the case was taken under advisement.

ISSUE

The FPRD contains one finding. It determined that between July 1, 1991, and June 29, 1992, Salt Lake administered only three out of the six parts of the Adult Basic Learning Examination (ABLE) as an ATB examination for admission. In addition, it concluded that between November 1991 and April 1992, Salt Lake failed to administer all three parts of the Computerized Placement Test (CPT) as an ATB examination. In each instance, SFAP found that the examinations, as they were administered by Salt Lake, were not proper ATB tests. Therefore, the

sole issue for me to decide in this case is whether Salt Lake's administration of ATB examinations, as enumerated above, satisfied the Title IV ATB requirements.

DISCUSSION

To qualify for federal student financial assistance, a postsecondary institution, which admits a student who possesses neither a high school diploma nor its equivalent, on the basis of a demonstrated ability-to-benefit, must administer a test approved by the Secretary of Education. 20 U.S.C. . 1091(d). The Secretary generally shall prescribe his approval of tests through the promulgation of regulations. However, during the period of time at issue, the Secretary had not issued final regulations concerning his approval of the ATB testing requirements. Although the Secretary had not promulgated final regulations announcing approval of ATB tests, he did publish a list of tentatively approved examinations on December 19, 1990, in the Federal Register. See 55 Fed. Reg. 52,160 (1990). This list was supplemented three times through "Dear Colleague" letters. The Secretary issued a second notice on December 30, 1992, which updated the list of approved examinations. See 57 Fed. Reg. 62,442 (1992).

Included within the second Notice was a notation that if the approved test consisted of more than one subpart, a student must pass all subparts to be eligible for Title IV funding. Also, the 1991-92 Federal Student Financial Assistance Handbook (Handbook), which was distributed by SFAP to all eligible postsecondary institutions (including Salt Lake), provided that if a test had multiple parts, all parts had to be given in order for the test to be a valid ATB test. It is an undisputed fact that Salt Lake administered only portions of the ABLE and CPT tests, supplemented by an English writing test of its own, during the periods in question. Thus the question to be decided here is whether, under the circumstances, Salt Lake's administration of parts, but not all of, the ABLE and CPT tests satisfied the ATB requirements.

It is Salt Lake's position that as a state institution, governed by the State Board of Regents, it was implementing state policy when it administered these ATB tests in this way. Consequently, it argues, it complied with Title IV because the ATB tests were "[t]ests used by States for assessing the basic skills of entering postsecondary students," a category of approved tests enumerated in the Secretary's 1990 Notice. Alternatively, Salt Lake argues that its administration of only parts of the ABLE and CPT tests was correct because it was done with the coordination of the test publishers and there was no limitation placed on giving only parts of the ABLE and CPT tests in the 1990 Notice. In comparison, and to strengthen its argument, Salt Lake points out that such restrictions were included in that Notice as it related to some other approved tests. Salt Lake concedes that the 1992 Notice contained a specific provision requiring that all parts of a test must be administered in order to constitute a valid ATB test; however, it points out that the Notice was issued after the period at issue and after it ceased that practice and, therefore, is inapplicable. It also argues that the Handbook was not an enforceable regulatory action because it was not appropriately promulgated by the Secretary.

In rejoinder, SFAP argues that Salt Lake was on "full notice" of the requirement that in order to constitute a valid ATB test under Title IV, all parts of an approved test must be administered. Notice of such requirement was contained in the 1992 Notice and in the Handbook, which was distributed to all institutions participating in the Title IV program in June 1991. SFAP also

argues that partial administration of the two tests in question was forbidden by the respective test publishers and the 1990 Notice required that approved tests be administered in accordance with procedures prescribed by the publishers.

Under 34 C.F.R. . 668.116(d), Salt Lake has the burden of proving that it complied with program regulations and that its expenditure of Title IV funds was correct. Insofar as this case is concerned, that burden extends to a showing that its ATB tests were "approved." Salt Lake seeks to sustain such a burden by showing in the alternative: (1) that its decision to administer the ABLE and CPT tests as it did was reasonable and satisfied the requirement that tests be "approved by the Secretary" and (2) its testing practices complied with the ATB requirements because the tests that were utilized were "tests used by States for assessing the basic skills of entering postsecondary students."

It is clear that Salt Lake raises two distinct and separately defensible arguments regarding the efficacy of the ATB tests that it administered. First, it argues that the tests it gave (the ABLE and the CPT) were ATB tests approved by the Secretary and which were included in the Notice in the Federal Register announcing such approval. Moreover, it asserts that since there was inadequate notice that all parts of the tests had to be administered, and since SFAP failed to inform it that the tests they administered were inadequate, when it inquired, the tests should be considered as qualified ATB tests. Based upon the evidence, I find that Salt Lake has not sustained its burden of convincing me that the ABLE and CPT tests it administered were in the form approved by the Secretary, therefore they were not approved ATB tests. See generally, In the Matter of Cerritos Community College, Docket No. 94-107-SP, U.S. Dep't of Educ. (January 3, 1995).See footnote 2 [2]

Second, Salt Lake argues that its tests were included in the category of tests used by states to determine the basic skills of entering students and, therefore, were tests approved by the Secretary. SFAP disputes this claim by asserting that Salt Lake's tests did not so qualify because the tests were neither required state-wide, nor approved by the state. My review of the record convinces me that Salt Lake has met its burden of proof that its tests qualified as ATB tests under the Title IV requirements because they are "tests used by states." I find no basis for SFAP's assertion that for a test to so qualify, it must be mandated state-wide. Certainly that position is not apparent from the plain reading of the Notice, it was never posited until late in the proceeding, and it was never communicated to Salt Lake during any of its inquiries regarding this question. Rather, in keeping with the regulatory scheme established by the Secretary, state approved tests are but one category of approved tests, and nothing requires that any particular test be given to the exclusion of any other approved test. It is quite clear from the Notice itself that "[i]nstitutions may use more than one examination on the Secretary's list in identifying students who have the ability to benefit from the education or training being offered by the institution."

In order to determine whether or not the actions of Salt Lake comported with the requirements of the Secretary's Notice, we must examine such actions against the backdrop of Utah law. See generally, In the Matter of Gulf Coast Trade Center, Docket No. 89-16-S, U.S. Dep't of Educ. (Decision of the Secretary) (October 19, 1990). Utah law provides: for the establishment of a state system of public higher education (Utah Const. Art. X); Salt Lake is designated as an

institution in the state system of higher education (UTAH CODE ANN. . 53B-1-102(1); the President of each institution may authorize the faculty, through faculty committees, to determine the general initiation and direction of instruction and the examination, admission, and classification of students (UTAH CODE ANN. . 53B-2-106(2)(c); and, all citizens of Utah capable of benefiting from postsecondary education are given the opportunity to enroll in the Utah system of higher education (Utah Board of Regents, R461-3.2.1 (Sept. 21, 1976).

I am convinced that, by virtue of the delegations of authority under Utah law, to the President of each state university or community college, to include the authority to set admission criteria, the approval of the ATB tests by Salt Lake constituted authorized state action. As such, the tests qualified for ATB purposes as "[t]ests used by States for assessing the basic skills of entering postsecondary students."

My finding here is bolstered by three facts. First, it is commonly understood that there is a partnership between the federal and state governments in the enforcement of Title IV requirements.See footnote 3 [3] Second, there is every indication that Salt Lake was acting in good faith in the manner in which it promulgated its ATB tests; the faculty committee which determined the make-up of the admissions tests diligently carried out its functions. Finally, and most importantly, rather than benefiting financially from admitting these ATB students, Salt Lake's actions caused the state to expend a substantial sum of its own funds for each student that was admitted to the program. I also note as significant that of the approximately 900 students who were admitted to Salt Lake on the basis of ATB during the period in question, all but the 37 at issue were requalified utilizing other ATB tests; moreover, almost all of those 37 had dropped out of school and could not be contacted to be retested.See footnote 4 [4]

FINDINGS

I FIND that Salt Lake Community College has met its burden of proof of showing that it properly administered ability-to-benefit tests during the period of July 1, 1991 to June 29, 1992.

ORDER

ORDERED, that Salt Lake Community College is relieved of any obligation to pay the United States Department of Education for the above finding.

Judge Ernest C. Canellos
Issued: March 1, 1995

Washington, D.C.

Footnote: 1 [1] *1/Salt Lake Community College is a state funded institution. Approximately one-third of the cost of attendance of each student is paid by the State of Utah out of state funds.*

Footnote: 2 [2] *2/My review of the Cerritos Decision reveals that the respondent did not raise the issue of "state action" to justify its use of only a portion of an approved ATB test.*

Footnote: 3 [3] *3/Congress recognized that states have a vested interest in assuring that Title IV funds flow to students at institutions that have programs of quality and fiscally-sound management. H.R. REP. No. 447, 102nd Cong., 2nd Sess. 85 (1992), reprinted in 1992 U.S.C.C.A.N. 334, 418.*

Footnote: 4 [4] *4/SFAP also argues that allowing a state institution to independently approve ATB tests would exempt public institutions from ATB regulations. This concern is unwarranted. Currently, before an ATB test developed by a state can be utilized, it must be submitted to the Secretary. 20 U.S.C. . 1091(d)(2). This requirement became effective in 1992, after the period at issue.*