IN THE MATTER OF RICE COLLEGE,
Respondent.

Docket No. 91-102-SA
Student Financial Assistance Proceeding

DECISION

Appearances: Steve Butler, Esq., of Butler and Associates, for Rice College.

Edmund J. Trepacz, II, Esq., Office of the General Counsel, for the Office of Student Financial Assistance, U.S. Department of Education.

Before: John F. Cook, Chief Administrative Law Judge

I. PROCEDURAL BACKGROUND.

On September 25, 1991 the Office of Student Financial Assistance Programs (SFAP)See footnote 1 *1* of the U.S. Department of Education (Department) issued a Final Audit Determination (FAD) for Rice College (Rice). The findings in the determination were based on the Review of Administration of Federal Student Financial Assistance Programs (audit) of Rice by the Office of the Inspector General (OIG) during the period July 1, 1987 through June 30, 1990. The audit found that Rice failed to comply with ability-to-benefit requirements and that Rice did not manage Perkins loan funds according to requirements. The audit report also noted the high withdrawal rate for Rice of 52.44%. The determination required Rice to refund $99,835.00 to the Department.

Rice filed a request for review on November 11, 1991. A Prehearing Order with a briefing schedule was issued to all parties by the tribunal.

The parties have filed briefs, exhibits, and a statement as to stipulations of fact and law.

II. ISSUES.

Is the final audit determination issued by the designated Department official supportable, in whole or in part?

A. Should the final audit determination finding that Rice failed to comply with ability-to-benefit (ATB) requirements be upheld, in whole or in part?

1. Were Rice's scoring procedures on the Wonderlic Personnel Test (WPT or Wonderlic) valid?

2. Was Rice's use of score adjustments on the Wonderlic test based on the test-taker's age valid?

3. Did Rice fail to enforce the 12 minute time limit for the Wonderlic test for certain of its ability-to-benefit students?

B. Should the final audit determination finding that Rice failed to comply with Perkins Loan funds handling requirements be upheld, in whole or in part?

III. EXHIBITS.

A. SFAP's Exhibits.

Respondent has no objections as to the authenticity or admissibility of any of the exhibits SFAP submitted in their initial brief.See footnote 2

Ex. E-1. Final Audit Determination Letter, from Molly Hockman, Division of Audit and Program Review, to Mr. Ted Little, President, Rice College, dated September 25, 1991.

Ex. E-2. Inspector General Report on Review of Administration of Student Financial Assistance Programs at Rice College, dated June, 1991.

Ex. E-3. Rice College appeal of Final Audit Determination Letter, letter from Richard K. Rice, President, to Molly Hockman.

Ex. E-4. Rice College Program Participation Agreement, dated June 27, 1988.

Ex. E-5. Memorandum from Judith G. Brantley, Chief, Institutional Review Branch, Region IV, to Robert Coates, Chief, Campus-Based Programs Branch, DPOS, dated March 27, 1990.

Ex. E-6. Letter from Richard K. Rice, President, to William M. Pouncey, Institutional Review Specialist, Region IV, dated May 3, 1988, with attached March 18, 1988 Program Review Report.

Ex. E-7. Office of Inspector General Review of Rice College SFA authorization totals 1987-88 through 1989-90.

Ex. E-8. Office of Inspector General workpapers on Ability to Benefit Tests at Rice College.

Ex. E-9. Office of Inspector General workpapers on Cash Management for Perkins Loan Program at Rice College.

B. Respondent's Exhibits.

SFAP has made no statement regarding the authenticity or admissibility of Respondent's exhibits.

Ex. R-1. Wonderlic Personnel Test Manual (Copyright 1983).

Ex. R-2. Wonderlic SLE Exam Form T-51 and T-71.

Ex. R-3. December 1989 "Dear Colleague" letter.

Ex. R-4. Carol Sperry Deposition, page 8.

Ex. R-5. Larry Oxendine Deposition, pages 12-13.

Ex. R-6. Judith Brantley Deposition, pages 109-110.

Ex. R-7. Marvin Weindorff Deposition, page 93.

Ex. R-8. Judge Julia Gibbons Order Denying Preliminary Injunction in HCTIA, Inc. v. U.S. Department of Education, Et. Al., No. C-91-2787 (1991) pages 5, 6 and 8.

Ex. R-9. Letter from Lawrence G. Brett and enclosed list of students who were the subject of finding Number 1.

Ex. R-10. Documents relating to list of 22 students provided by Lawrence Brett.

Ex. R-11. Documents relating to list of 9 students provided by Lawrence Brett.

IV. FINDINGS OF FACT AND OPINION.

A. STIPULATIONS OF FACT.See footnote 3

1. The United States Department of Education ("ED") and Rice College of Memphis ("Rice") have entered into a Program Participation Agreement ("PPA"), dated June 27, 1988, regarding Rice's participation in Title IV, HEA programs.

2. ED Ex. 4 to OSFA's Initial Brief is a true and accurate copy of the latest PPA signed by Rice and ED.

3. The Department's Office of Inspector General for Region IV ("Inspector General") conducted a Review of Administration of Federal Student Financial Assistance Programs ("Audit") at Rice.

4. Fieldwork for the Audit was conducted from April 10, 1990-June 8, 1990.

5. The Audit Report was issued in June, 1991 and included two findings, a)that Rice did not comply with ability-to-benefit requirements and, b)that Rice did not manage Perkins loan funds according to requirements.

6. The Audit stated that the student withdrawal rate at Rice for 1988 and 1989 was 52.44 percent.

7. ED Ex. 2 to OSFA's Initial Brief is a true and accurate copy of the June, 1991 Inspector General Report.

8. ED's Division of Audit and Program Review issued a final audit determination letter on September 25, 1991, with respect to the issues addressed in the Audit.

9. ED Ex. 1 to OSFA's Initial Brief is a true and accurate copy of that September 25, 1991 final audit determination letter.

10. The audit letter required the institution to make payments to the Department and the Perkins Loan Fund totalling $103,632.

11. The institution made the $3,797 payment that it owed to the Perkins loan fund, as required in the audit letter.

12. The amount that the Department is claiming from Rice is $99,835.

13. By letter dated November 15, 1991, including exhibits, Rice appealed the final audit determination.

14. ED Ex. 3 to OSFA's Initial Brief is a true and accurate copy of that November 15, 1991 appeal of the final audit determination.

15. ED Ex. 8 to OSFA's Initial Brief is a true and accurate copy of certain Office of Inspector workpapers from the Audit, regarding Ability to Benefit tests at Rice.

16. ED Ex. 8, at pp. 5-6 lists the 31 students for whom ED contends that Rice failed to follow the ability-to-benefit regulations.

17. Rice used a passing score of 10 on the Wonderlic Personnel Test ("Wonderlic") for its ability to benefit students.

18. During the period covered in the Audit, Rice's accrediting body was the Association of Independent Colleges and Schools ("AICS").

19. ED Ex. 8, at pp. 25-28 contains AICS's standards for admitting ability to benefit students at the schools it accredits.

20. AICS Eligibility Criteria for ability to benefit student, effective 1985, provide that an institution should enroll only students "who...demonstrate through valid assessment an ability to benefit from the educational experience."

21. The AICS Accreditation Criteria also states: "For institutions admitting students under an ability-to-benefit determination, documentation shall be maintained to evidence the relationship between test cut-off scores on whatever test the institution uses, and successful academic or employment outcomes."

22. Rice admitted 22 ATB students who had unadjusted raw scores of 10 or less, who withdrew from Rice, did not graduate, and received Title IV, SFA funds totalling $47,198.

23. ED is claiming that $47,198 amount from Rice in finding number 1 of its final audit letter.

24. ED is also claiming, in finding number 1 of its final audit letter an additional $17,531 which was disbursed to nine ATB students who apparently had more than the allotted 12 minute test period, as they attempted questions numbered between 40 and 50, were admitted, and then dropped out, before completing an educational program at Rice.

25. By letter dated March 27, 1990 from Judith G. Brantley, Chief, Institutional Review Branch, Region IV, to Robert Coates, Chief, Campus-Based Programs Branch, DPOS, ED noted that Rice was accumulating excess amounts of Perkins loan funds, was seeking more funds, and was not willing to return the excess funds it had to ED. This letter was not supplied to Rice prior to its appeal.

26. ED Ex. 5 is a true and accurate copy of that March 27, 1990 letter.

27. ED Ex. 9 is a true and accurate copy of certain Office of Inspector General workpapers for the Audit on cash management for the Perkins Loan program at Rice.

28. ED Ex. 6 is a true and accurate copy of a March 18, 1988 Program Review Report of Rice, as well as a May 3, 1988 letter of transmittal.

29. ED Ex. 7 is a true and accurate copy of an Office of Inspector General review of Rice SFA authorization totals for 1987-1988 through 1989-1990.

30. Rice drew $233,283 in Perkins Loan Funds in 1987-88 and $183,764 in 1988-89.

31. Rice College had $315,489 in Perkins funds on hand as of June 30, 1988 and $540,102 cash on hand as of June 30, 1989.

32. ED claims in its final audit letter that Rice owes ED $35,106 in interest charges by drawing down the Perkins loans funds far in advance of the time it was provided to students.

B. OPINION AND ADDITIONAL FINDINGS OF FACT.

1. Rice's challenge to procedural regulations.

Initially, the tribunal notes Rice's challenge to certain of the regulations that govern this Subpart H proceeding. At page 2 of its initial brief, Rice states as follows:

Specifically Respondent contends that 34 C.F.R. 668.117(b) which prohibits the Administrative Law Judge from issuing subpoenas or compelling discovery, as provided for in the Federal Rules of Civil Procedure is in violation of the Administrative Procedures Act and in violation of the Respondent's constitutional rights. Respondent also takes issue with the other provisions in 34 C.F.R. 668.117(d)(1 & 2) which also violates the Administrative Procedures Act and Respondent's constitutional rights. It is Respondent's position that not only should the Federal Rules of Civil Procedure apply to these Administrative proceedings, but so should the Federal Rules of Evidence so that the Administrative Law Judge could conduct a true hearing on the record and a party could properly create a record for purposes of appeal.

As SFAP notes and Rice itself acknowledges, 34 C.F.R. § 668.117(d)See footnote 4 prohibits this tribunal from waiving or ruling invalid any applicable statutes or regulations. That regulation states:

(d) The administrative law judge is bound by all applicable statutes and regulations. The administrative law judge may not--

(1) Waive applicable statutes and regulations; or

(2) Rule them invalid.

§ 668.117(d).

Therefore, the tribunal has no authority to waive this regulation or to rule it invalid.

§ 668.117(b) states as follows:

(b) The administrative law judge is not authorized to issue subpoenas or compel discovery as provided for in the Federal Rules of Civil Procedure.

Pursuant to § 668.117(d), the tribunal similarly has no authority to waive this regulation or to rule it invalid. Therefore, the tribunal has no authority, in this or any other Subpart H cases, to issue subpoenas or compel discovery as provided for in the Federal Rules of Civil Procedure.

It is not within the province of this tribunal to determine whether §§ 668.117(b) & (d) violate the Administrative Procedure Act or Respondent's constitutional rights. For the purposes of this proceeding, the tribunal must, and does, accord these regulations full force and effect.

2. Ability-to-benefit students.

SFAP contends that Rice violated regulations governing the admission of students based on their ability to benefit from an educational program because the College admitted students with a score of 10 on the WPT, adjusted the score on some tests based on the test-taker's age, and allowed some students too much time in taking the test. SFAP Initial Br. at 2-6; SFAP Reply Br. at 4-6.

Rice responds that it did comply with the ability-to-benefit regulations because neither Wonderlic nor the Department established a minimum passing score on the WPT; the law did not prohibit the adjustment of test scores based on age, and the WPT Manual specifically recommended such adjustments; and the Department is merely speculating that Rice allowed some students too much time in taking the WPT. Resp. Initial Br. at 2-11; Resp. Reply Br. at 1-4.

a. Passing score.

§ 600.11 requires institutions that admit as regular students persons who do not have a high school diploma or its equivalent to determine, at the time of admission, whether those students have the ability to benefit from the education or training that the institution offers. Institutions can determine this in one of three ways, to wit:

(1) Administering to the person a nationally recognized, standardized, or industry developed test, subject to criteria of the institution's accrediting agency or association, that measures the applicant's aptitude to successfully complete the educational program for which the student has applied; or

(2) Determining that the person has the capability to successfully complete a GED preparation program by the end of the first year of the course of study or prior to the student's certification or graduation from the program of study, whichever is earlier; or

(3) Placing the person, after counseling or failure to meet the institution's admission's testing requirement, in an institutionally prescribed program or course of remedial or developmental education not to exceed one academic year or its equivalent.

34 C.F.R. § 600.11(b)(1)-(3) (1988-1989) (emphasis added).See footnote 5

"Rice elected to determine a student's ability-to-benefit from the training offered through the testing option . . . Rice selected the Wonderlic Scholastic Level Exam published by E.F. Wonderlic & Associates ('Wonderlic') as its nationally recognized test to determine students' ability-to-benefit." Resp. Initial Br. at 4.

Relating to such tests, § 668.7(b) states, in pertinent part, as follows:

A student who is admitted to an institution as a regular student on the basis of that student's ability to benefit from the institution's education or training program remains eligible for any assistance under a Title IV, HEA program only if the student--

(1) Before admission--

(i) Is administered a nationally recognized, standardized, or industry-developed test, subject to 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) Demonstrates that aptitude on that test . . . .

§ 668.7(b) (1988-1989) (emphasis added).

Therefore, both § 600.11 and § 668.7(b) require institutions, such as Rice, that admit students by administering a nationally recognized, standardized, or industry-developed test to follow "criteria developed by the institution's nationally recognized accrediting agency or association[.]"

During the period covered in the Audit, Rice's accrediting body was the Association of Independent Colleges and Schools ("AICS"). Stip. of Fact No. 18. Ex. E-8, at pages 25-28, contains AICS's standards for admitting ability to benefit students at the schools it accredits. Stip. of Fact No. 19. AICS Eligibility Criteria for ability to benefit students, effective 1985, provide that an institution should enroll only students "who . . . demonstrate through valid assessment an ability to benefit from the educational experience." Stip. of Fact No. 20. The AICS Accreditation Criteria also states: "For institutions admitting students under an ability-to-benefit determination, documentation shall be maintained to evidence the relationship between test cut-off scores on whatever test the institution uses, and successful academic or employment outcomes." Stip. of Fact No. 21.

The auditors' notes include the conclusion that "Rice College did not comply with the AICS ability to benefit criteria in three areas." The auditors state as one of these three areas that "The college did not maintain documentation of the relationship between the passing score of 10 on the WPT and successful academic outcomes. This violated [AICS] regulation 3- 1-304(c). . . ." See Ex. E-8-24. AICS regulation 3-1-304(c) contains the sentence quoted above from Stip. of Fact No. 21. Ex. E-8-27. The audit report repeated this finding. Ex. E-2-6- 7.

In its institutional appeal, Rice argues as follows:

The school contends that the allegation that their admissions policy (ie ATB test score) was not in compliance with AICS accrediting standards cannot be substantiated. The institution's procedure for the admission of the ability to benefit student [sic] has been reviewed and approved by AICS. That procedure is enclosed and marked Exhibit 1-1(b). The school further contends that the auditor has gone beyond the purview of the Department of Education in attempting to interpret AICS policy.

Ex. E-3-3. The tribunal must disagree. As discussed supra, §§ 668.7 and 600.11 explicitly require institutions, such as Rice, that admit students by administering a nationally recognized, standardized, or industry-developed test to follow "criteria developed by the institution's nationally recognized accrediting agency or association[.]" Therefore, it is well within the purview of the Department of Education to ascertain Rice's compliance with that policy.

Similarly, the tribunal rejects Rice's argument, at page 3 of its reply brief, that "The Department has no standing to assert violations of accrediting agency standards absent some substantive finding by the Respondent's accrediting agency." Where adherence to accrediting agency standards is mandated by federal statutes and regulations, the Department has standing, and in fact is obligated, to determine whether or not the institution complied with federal law by following such accrediting agency standards. A finding of violation by the accrediting agency is additional evidence that the institution did not follow such standards, but is not necessary before the tribunal can make such a finding.

Upon reviewing the policies and procedures of Rice for ability-to-benefit students contained at Ex. E-3-5-8, the tribunal notes that these policies and procedures related solely to the admission of ATB students and to follow-up counselling that "should occur no more than 4-6 weeks after the student has started classes." Ex. E-3-6. This does not satisfy Rice's duty to comply with the AICS accreditation criteria, which state that "documentation shall be maintained to evidence the relationship between test cut-off scores on whatever test the institution uses, and successful academic or employment outcomes." Ex. E-8- 27. Rice's briefs have not pointed to, nor has the tribunal found, any evidence in the record indicating that Rice collected data to evaluate the long-term correlation between test cut-off scores on the Wonderlic exam and successful academic or employment outcomes.

Therefore, the tribunal finds that Rice failed to maintain documentation to evidence the relationship between test cut-off scores on the WPT and successful academic or employment outcomes, as is required by the AICS Accreditation Criteria. Ex. E-8-27.

Indeed, the AICS Accreditation Criteria go on to state as follows:

> For students tested and enrolled based on a test's validity to predict aptitude, the test score should be a good predictor of successful completion of the program. The Commission recognizes that many human conditions and external factors can affect the validity of a testing instrument for a given cohort relative to predicting success. Success may not just be the completion of a program, but the reality of a student being employed with some skills after some training. It is instructive to institutions for them to develop longitudinal data comparing the test cut-off score(s) utilized for acceptance with the eventual success of students.
>
> It is reasonable to assume, and the Commission will assume, that an institution admitting a high percentage of applicants based on testing, and losing a comparable high percentage of those students before completion (even allowing for factors other than ability), may not be using the appropriate test to measure aptitude, or the cut-off score for admission is too low, or both.

Ex. E-8-28.

Rice used a passing score of 10 on the Wonderlic Personnel Test ("Wonderlic") for its ability to benefit students. Stip. of Fact No. 17. The auditors found that "There were 36 ATB students who had unadjusted raw scores of 10 or less. Of that group 28 students withdrew from school, and 22 of the 28 dropouts received $47,198 in Title IV SFA funds. (The other six dropouts received no financial aid.)". Ex. E-2-7; Ex. E-8-3.See footnote 6 Only 2 of those 36 students graduated from Rice. Ex. E-8-3.

As a result, Rice admitted 22 ATB students who had unadjusted raw scores of 10 or less, who withdrew from Rice, did not graduate, and received Title IV, SFA funds totalling $47,198. Stip. of Fact No. 22. These 22 students are listed at ED Ex. 8- 5. ED is claiming that $47,198 amount from Rice in finding number 1 of its final audit letter. Stip. of Fact No. 23.

The tribunal is compelled to draw the conclusion that Rice lost a high percentage of its students before completion of their educational program, where they scored 10 or less on the ability to benefit test.

Based on the AICS language in its Accreditation Criteria that "the Commission will assume, that an institution admitting a high percentage of applicants based on testing, and losing a comparable high percentage of those students before completion (even allowing for factors other than ability), may not be using the appropriate test to measure aptitude, or the cut-off score for admission is too low, or both", it is arguable that the cut- off score for admission at Rice was too low, and therefore that this aspect of Rice's admissions procedure was also not in compliance with the requirements of Rice's accrediting agency.See footnote 7

In sum, while it can be argued that the cut-off score for admission at Rice was too low, the tribunal relies solely on its finding that Rice did not maintain documentation to evidence the relationship between test cut-off scores on the WPT and successful academic outcomes for its determination that Rice was not in compliance with the requirements of its accrediting agency, AICS, and therefore was in violation of §§ 600.11 and 668.7(b). By failing to maintain the required documentation, Rice was unable to demonstrate whether the challenged students actually had the ability to benefit from the institution's education or training programs.

Rice argues that Congress changed the ability-to-benefit determination procedure with the passage of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101-508, enacted November 5, 1990), and that the Department subsequently required institutions that admitted ability-to-benefit students after July 1, 1991, to admit only those students who had passed an independently administered test approved by the Secretary of Education. Rice contends that SFAP is seeking to apply retroactively this requirement to a time period when not only did the Department have no such requirement, but in fact was prohibited from establishing a minimum cut-off score on an ability-to-benefit test. Resp. Initial Br. at 4-10; Resp. Reply Br. at 2-3.

The tribunal agrees that the statutes (20 U.S.C. § 1232a and § 481(b) of Part G of the Higher Education Act, also contained at 20 U.S.C. § 1088(b) during the period in question), the 1989 Department of Education "Dear Colleague" letter (Ex. R-3), the deposition testimony, and the order in HCTIA, Inc. v. U.S. Department of Education, et. al., No. 91-2787 (W.D. Tenn. Dec. 2, 1991) (order denying preliminary injunction), cited by Rice, all stand for the proposition that prior to 1991, the Department did not have the authority to specify uniform minimum cut-off scores on an ability-to-benefit test.See footnote 8

Nonetheless, while the Department did not have the authority to specify minimum cut-off scores on an ability-to-benefit test during the period in question, the institution's accrediting agency did have this authority, as well as the authority to specify other requirements. Therefore, no minimum cut-off score requirement is being retroactively enforced here. As Rice itself states, "The Dear Colleague Letter also provides that the Secretary does not specify what criteria the

accrediting agencies must use regarding aptitude testing . . . ." Resp. Initial Br. at 6-7; see also Ex. R-3-6.See footnote 9

As noted above, §§ 600.11 and 668.7 required Rice to comply with the criteria developed by Rice's accrediting agency, AICS. As was also discussed above, Rice did not do so. Accordingly, the tribunal finds, pursuant to 34 C.F.R. § 668.116(d), that Rice has failed to satisfy its burden of proving that the expenditures on these 22 students were proper. Rice must cause reimbursements as to the $47,197.91 in question. This is broken down into $18,969.00 in SEOG and Pell grant awards and $28,228.91 in GSL payments as set forth in Exhibit E-8-5.

b. Test scores adjusted for age.

Of the 22 students discussed in the previous section concerning Rice's use of a cut-off score of 10 on the WPT, SFAP separately alleges that for some of these students, "The school arbitrarily adjusted the score on some tests based on age, without maintaining records or proper documentation of the rationale for and consequences of making those adjustments, which was contrary to the recordkeeping required by Rice's accrediting agency . . . ." SFAP Initial Br. at 4. Of the 22 students listed at Ex. E-8-5, eight students received adjustment points based on their age. See Ex. E-8-3. Six of these students had a raw score of 10, which was increased through the use of age adjustment points. The other two students had a raw score of 9, which is below Rice's minimum cut-off score of 10. However, each of these two students received an age adjustment of one point, boosting their scores to 10, which satisfied Rice's minimum cut- off score. Ex. E-8-3.

The tribunal agrees with Rice that the use of age adjustments, per se, did not violate either the Department's regulations, the accrediting agency's criteria, or Wonderlic's guidelines. Through its briefs, SFAP has not pointed to, nor is the tribunal aware of, any regulation in effect during the period in question that prohibited Rice from using age adjustments on its ability-to-benefit test. Nor has SFAP pointed to any evidence that Rice's accrediting agency, AICS, forbids member institutions from engaging in such practices. SFAP states merely that Rice was required by §§ 668.7(b) and 600.11 to administer its ability-to-benefit test subject to criteria developed by Rice's accrediting agency, a requirement that was thoroughly discussed in the previous section. SFAP does not identify any AICS rule that prevented Rice from using age adjustments.

Nor has Rice violated the testmaker's guidelines by using age adjustments. In fact, Wonderlic's guidelines include a section entitled "Score Adjustment for Age". The Wonderlic Manual states that "the table below provide[s] our suggested adjustments to equate the scores of older job applicants." The Manual includes the following table:

Age		
15-29	Add	0 to 12 minute raw score
30-39	1	
40-49	2	
50-54	3	
55-59	4	
60+	5	

Ex. R-1-7. Given the fact that Wonderlic itself recommended that test scores be adjusted based on the age of the test-taker, the tribunal finds that Rice's practice of doing so in accordance with Wonderlic's guidelines was completely appropriate.

However, the auditors claimed that Rice violated AICS rule 3-1-304(b). That rule states as follows:

For all students admitted under an ability-to-benefit determination, the institution shall maintain records of the validated test scores, academic and career advising, and any other factors used by the institution to support its admissions determination. (See Explanation of this Section for illustration of "other factors.")

See Ex. E-8-27; Ex. E-2-8; Ex. E-8-24.

The "Explanation of this Section" portion of the AICS accreditation criteria contains the following statement:

Documentation that an institution might provide to supplement the requirement of Section 3-1-304(b) could include such data as admissions rate (acceptances versus rejections), training completion rate of those enrolled, general placement rate, or specific career placement rate.

Ex. E-8-28.

According to the auditors, "Rice used the adjustment points as a factor to support a determination of admission. However, we found no evidence that the school complied with accrediting agency criteria to justify the use of adjustment points." Ex. E- 2-8. In their notes, the auditors phrased it this way: "The college did not maintain a record, or documentation, of why students were given Adjustment Points on the Wonderlic Personnel Test. The Adjustment Points were a factor used by the college to support admissions determinations. This violated regulation 3-1- 304(b)[.]" Ex. E-8-24.

Initially, the tribunal questions the auditors' claim that the adjustment points were a factor used by the college to support admissions determinations. The AICS accreditation criteria require member institutions that admit ability-to- benefit students to "maintain records of the validated test scores, academic and career advising, and any other factors used by the institution to support its admissions determination." Since this phrase already includes the requirement that institutions maintain records of validated test scores if such tests are used by the institution to support its admissions determination, the phrase "other factors" must refer to factors other than "validated test scores". It can be argued, although the assertion is not free from doubt, that the phrase "validated test scores" refers to the final WPT score after the age adjustments have been included, so that "other factors" must refer to factors other than those age adjustments.

More importantly, even if the adjustment points were a separate factor used by the college to support admissions determinations, in addition to the validated test scores, Rice has satisfied its obligation to maintain records of these age adjustments. The records for the eights students at issue in this section can be found in the exhibits for this case at Ex. E- 8-3, Ex. E-8-7, and Ex. R-

10-11, 15, 20, 41, 46, 76, 103, and 108. In response to the auditors' claim that "The college did not maintain a record, or documentation, of why students were given Adjustment Points on the Wonderlic Personnel Test", the tribunal notes again that the Wonderlic Manual itself recommended such adjustments. The tribunal considers this to be sufficient documentation of why students were given adjustments points on the WPT based on their age. No additional records or documentation were necessary. Moreover, the "Explanation of this Section" portion of the AICS accreditation criteria begins with the phrase "Documentation that an institution might provide to supplement the requirement of Section 3-1-304(b)". Ex. E-8-28 (emphasis added). Thus, while an institution may wish to provide such supplemental documentation, it was not specifically required to do so under rule 3-1-304(b).

To summarize, AICS rule 3-1-304(b) only requires member institutions to maintain records of factors used by the institution to support its admissions determination. The WPT exams contained in the exhibits for this case satisfy that requirement. The "Explanation" of rule 3-1-304(b) gives examples of how an institution might "supplement" the records that are required by that rule, but such supplements themselves are not required by that rule. In any case, the recommendations for age adjustments contained in the Wonderlic Manual are satisfactory supplements.

However, as was discussed in the previous section on passing scores, Rice violated §§ 668.7(b) and 600.11 by failing to administer its ability-to-benefit test subject to other criteria developed by Rice's accrediting agency. As noted above, Rice did not maintain documentation to evidence the relationship between test cut-off scores and successful academic or employment outcomes. This requirement was contained in AICS rule 3-1- 304(c). See Ex. E-8-27-28; see also discussion in "Passing score" section of this opinion.

Therefore, even though six of the 22 students actually had scores greater than 10 on the WPT after Rice's proper use and documentation of age adjustments, Rice still violated §§ 668.7(b) and 600.11 as to these six students because the College failed to maintain documentation to evidence the relationship between test cut-off scores and successful academic or employment outcomes, as AICS criteria required it to do.

Accordingly, Rice must cause reimbursements as to the full $47,197.91 that was discussed in the section on the College's passing score on the WPT.

c. Time allowed during testing.

ED is also claiming, in finding number 1 of its final audit letter an additional $17,531 "which was disbursed to nine ATB students who apparently had more than the allotted 12 minute test period, as they attempted questions numbered between 40 and 50, were admitted, and then dropped out, before completing an educational program at Rice." Stip. of Fact No. 24.

According to the auditors, "Students attempted significantly more questions than can normally be answered in 12 minutes, suggesting that they were allowed excess time in order to complete and pass the test." Ex. E-2-7. The auditors explained how they arrived at this finding as follows:

On an additional 16 tests the students attempted significantly more questions than the norm for a 12 minute test. Consequently, we concluded that the students took more than the allotted 12 minutes to complete and pass the test.

According to Wonderlic and Associates, the adult population averages 29 items attempted on the 50 question test. The 16 students did answer questions numbered between 40 and 50. In order to omit a question the student first had to read it. The test instructs students, "The questions become increasingly difficult, so do not skip about." Therefore, it was not to a student's advantage to omit a question without reading it, or to answer the more difficult questions numbered 40 and above, without first attempting the earlier questions.

Ex. E-2-8. Neither the FAD nor SFAP's briefs in this proceeding offer any further evidence or explanation.

While the facts discussed by the auditors raise the possibility that some students were allowed more than 12 minutes to complete the test, these facts are not very convincing. For example, while the auditors quote Wonderlic as stating that the adult population averages 29 items attempted out of the 50 questions on the test, they assume that because some Rice students answered questions numbered between 40 and 50, the students were allowed more than 12 minutes to take the test. Although the instructions do advise students not to skip about, this does not necessarily mean that all students followed this advice. Moreover, the instructions also advise students: "Do not spend too much time on any one problem." Ex. R-2-1. Thus, while the instructions advise students not to skip about randomly, they also encourage students to skip questions that are too difficult or are taking up too much time.

Furthermore, while the auditors assumed that "In order to omit a question the student first had to read it", this is not necessarily so. The Wonderlic exam contains questions of varying length and composition. Ex. R-2. Some of these questions contain geometric shapes or lists of names, phrases, or numbers. Other questions consist of only one line. Therefore, it is quite plausible that some students may have been intimidated by the questions that appeared to be more lengthy or complicated. Students who were running out of time may very well have merely glanced at and then skipped these questions without reading them, attempting to answer the shorter questions because they felt that they could answer more such questions in a limited amount of time. This is especially true in light of the instructions' warning not to spend too much time on any one problem.

Finally, Wonderlic itself has stated that "We would expect that instances of students answering all 50 questions would arise from their guessing at the answers." Ex. E-8-20.

Therefore, it is incorrect to assume that because a student answered some of the questions numbered 40 to 50, that student was allowed more than 12 minutes to take the WPT. A more reliable method of determining whether students were given excess time is to compare the number of questions that they attempted to answer with the average number of questions attempted by the adult population, rather than to look at which parts of the test they attempted to complete. Despite the fact that the exhibits for this case contain WPT exams taken by 31 Rice students, neither the auditors nor SFAP has undertaken such an analysis. Therefore, an analysis

of the timing of the test and the number of questions attempted by the average student is necessary.

The Wonderlic Personnel Test Manual indicates that the test is normally timed at 12 minutes. See Ex. R-1-4. However, the instructions contained in Ex. R-1-4 also state that the 12 minute time limit may be inappropriate under certain circumstances, and that the test may be administered on an untimed basis in those situations. These instructions do caution that "the untimed score will be approximately six points higher than the score achieved under a timed administration . . . ." They further caution that "At present we must consider the untimed score a valuable estimate of mental ability, but less reliable than the timed score. The timed score should be obtained and used whenever conditions permit." Ex. R-1-4.

In a February 13, 1989 letter from Eliot R. Long, Vice President, E.F. Wonderlic Personnel Test, Inc. (Wonderlic), to M. Bruce Nestlehutt of OIG, Wonderlic discusses timing of the WPT as follows:

Administering the WPT on an un-timed basis is appropriate in certain cases. Directions for un-timed administration and scoring are provided in the Manual. Un-timed administration is appropriate, for example, when the applicant has dyslexia or other disabilities preventing fluid working of the test items. Un-timed administration is only an approximate of the timed score and should be limited to special circumstances.

. . .

Valid test score/criterion relationships depend on standardized test administration and scoring procedures. This means that all individuals take the same test (or separate forms of the same test), under the same conditions, and that it be scored in the same manner. A school could elect to administer the WPT on a 15 minute basis, but this would require them to develop an entirely new set of normative and distribution statistics. In any event, careless attention to the discipline of uniform test administration will invalidate the test results.

. . .

We would expect that instances of students answering all 50 questions would arise from their guessing at the answers. In studies where we have administered tests on an un-timed basis, we find most modest ability individuals "giving up" well before they complete all the test items. If the school test administrator is encouraging students to complete all test items by guessing at them during the timed 12 minute period, this will most likely result in lower test scores. The time spent guessing at the later items on the test would be more profitably used working on the earlier items. The WPT is not very susceptible to guessing.

. . .

The adult population average is 29 items attempted and 21 answered correctly. The difference, 29 minus 21 or 8 items incorrect, include [sic] both incorrect answers and items left blank

interspersed among answered items. A higher number of incorrect items usually indicates guessing, which, as mentioned above, usually works to the disadvantage of the test taker.

Ex. E-8-20-21 (emphasis added).

This evidence indicates that the WPT normally should be administered with a 12 minute time limit. However, the test can be administered using a longer time limit, or even on an untimed basis, under certain narrowly-defined circumstances. If the test is given with a longer time limit or no time limit at all, the results must be considered only an approximate of and less reliable than the results obtained from administering the test with a 12 minute time limit. Moreover, the school must develop an entirely new set of normative and distributive characteristics. When the test is administered with the standard 12 minute time limit, some test takers may be able to answer all 50 questions by guessing at some of them. Nonetheless, the average adult will attempt to answer 29 questions.

Here, there is no evidence in the record indicating that any of Rice's students who took the WPT suffered from dyslexia or other disabilities that prevented fluid working of the test items.See footnote 10 Nor is there any evidence that the College developed its own set of normative and distributive characteristics and used such in its appraisal of the test results.

As stated supra, neither the auditors nor SFAP have offered any evidence that they compared the average number of questions attempted by Rice students with the average number of questions attempted by the adult population.

Ex. R-9 contains a letter from counsel for SFAP in which he includes a list of the nine students whom SFAP alleges were allowed excess time and for whom SFAP is seeking to recover $17,530.96. Ex. R-11 contains various documents relating to these students, including copies of the WPT exams taken by these students. Although, on the average, these nine students attempted more questions than the adult population generally, this is not surprising, given that SFAP selected these nine students out of the 136 ATB students whose tests were reviewed by the auditors. Ex. E-2-6. It is quite plausible, and should be expected, that out of 136 ATB students, a significant number will attempt fewer questions than the average adult, and a significant number will attempt more questions than the average adult. Since SFAP has not demonstrated that these 136 ATB students as a group attempted more questions on the average than the adult population generally, the tribunal is unable to draw such a conclusion.

Against this extremely weak evidence, the College offers the November 15, 1991 affidavit of Rhonda Solomito. Ms. Solomito states:

I, Rhonda Solomito, certify that I was the primary test administrator for Rice College during the 1987-88 award year. I used a typing timer which signaled the expiration of time after twelve minutes. In no case did I ever allow a student more than twelve minutes.

Ex. E-3-11.

As a result, the tribunal finds that Rice has satisfied its burden of persuasion with respect to the issue of whether or not the WPT was properly timed by the College at 12 minutes. Consequently, Rice will not be required to return the $17,531 claimed by the Department.

3. Perkins Loan funds.

SFAP argues that Rice did not manage Perkins loan funds in accordance with federal requirements because the College accumulated excess amounts of Perkins loan funds during years when it was not making Perkins loans. SFAP Initial Br. at 7-9; SFAP Reply Br. at 7-8.

Rice responds that it has managed its Perkins loan funds in accordance with statutory and regulatory requirements. Resp. Initial Br. at 11-12; Resp. Reply Br. at 5.

The auditors found that "Rice deposited the 1987-88 FCC of $233,283 into a non-interest bearing account in September, 1988, and did not transfer the loan fund balance to a money market account until January, 1989." Ex. E-2-11. According to the auditors, "Rice did not earn interest of at least $3,798 for the period officials did not deposit Perkins Loan funds in an interest-bearing account." Ex. E-2-12. The FAD recommended that the College return $3,797 to the Department. Ex. E-1-6-7. The institution made the $3,797 payment that it owed to the Perkins loan fund, as required in the audit letter. Stip. of Fact No. 11.

Consequently, only $35,106 remains in dispute from Finding 2 of the FAD.

20 U.S.C. § 1094(a) required institutions that participated in the student financial assistance programs, including the Perkins Loan program, to enter into a program participation agreement with the Secretary of Education. That statute, during the applicable period, further stated:

(3) The institution will establish and maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students under this subchapter and part C of subchapter I of chapter 34 of Title 42.

20 U.S.C. § 1094(a)(3).

The FAD offered the following interpretation of this statute:

Such a standard recognizes that the institution is a fiduciary charged with exercising a high degree of care over the management of those Federal funds. Excess cash--funds drawn down too far in advance of the institution's needs or otherwise idled in school accounts--deprives the Department of the interest benefits it would receive from the use of those funds.

The duty to manage the Federal funds efficiently and avoid excess cash accumulations is set out in multiple sources: the 1985 ED Payment Management System Users Manual; the April 1989 Payment Management System Recipient's Guide; the 1988 Audit Resolution System Directive, Appendix 6; and generally through the institution's obligation to show that it is administratively capable of adequately administering the Federal student financial aid programs.

See 34 CFR Section 668.14(d)(1) and 34 CFR Section 668.82(a) and (b). Since Rice College receives funds through the ACH/EFT Payment System, the Academy is required to monitor its cash balances and only draw down funds required to meet the 3 day cash needs for the Federal student financial aid programs.

Ex. E-1-6.

The last requirement stated in the quoted language above, that Rice could draw down funds required to meet the 3 day cash needs for the Federal student financial aid programs, is contained in a publication entitled "The Blue Book--Accounting, Recordkeeping, and Reporting by Postsecondary Educational Institutions for Federally-Funded Student Financial Aid Programs" ("Blue Book"). Excerpts from the Blue Book are contained at Ex. E-9-41-43. The Blue Book states that for the Perkins Loan program, "The Federal Capital Contribution should not be drawn unless the monies available in the fund are insufficient to make loan advances. The request should be limited to the federal share of the amount to be advanced to students and must be drawn down in a manner which meets the definition of immediate need." Ex. E-9-43 (emphasis in original). For institutions using ACH/EFT, "immediate need" is defined as a three day period. Ex. E-9-43.

The tribunal notes that § 668.14(d) requires an institution that participates in any Title IV, HEA program to demonstrate to the Secretary that it is capable of adequately administering that program. One of the requirements for demonstrating such administrative capability is that the institution:

(d)(1) Administers Title IV, HEA programs with adequate checks and balances in its system of internal controls[.]

§ 668.14(d)(1) (1988).

The tribunal also notes § 668.82, which states, in pertinent part, as follows:

(a) A participating institution acts in the nature of a fiduciary in its administration of the Title IV, HEA programs.

(b) In the capacity of a fiduciary, the institution is subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs.

§ 668.82(a) and (b) (1988).

The regulations mirrored the requirement of 20 U.S.C. § 1094(a)(3) that institutions that participated in the Perkins Loan program[See footnote 11] must enter into an institutional agreement with the Secretary of Education. This agreement required such institutions to use Perkins Loan funds solely for the purposes specified in 34 C.F.R., Part 674 and to administer the program in accordance with the student assistance general provisions contained in 34 C.F.R. Part 668. § 674.8 (1987). That regulation further stated:

(a) The institution will establish and maintain a Student Loan Fund (Fund).

It must deposit into the Fund--

(1) Federal capital contributions appropriated under section 461 of the Act;

(2) Institutional capital contributions equal to at least one-ninth of the Federal contributions described in paragraph (a)(1) of this section[.]

. . .

§ 674.8(a)(1)-(2) (1987).

In 1988, § 674.19(c) required an institution to deposit its ICC (Institutional Capital Contribution) into its Fund prior to or at the same time that it deposits any FCC (Federal Capital Contribution).

Turning to the evidence, the auditors found the following:

Rice has shown a pattern of maintaining Perkins Loan funds on hand that were in excess of immediate need. Excess funds on hand were cited in a 1985 ED program review. During subsequent periods of little or no loan activity, cash on hand grew. A 1987 audit by an Independent Public Accountant showed minimal loan activity. The Fiscal Operation Reports and Applications to Participate (FISAP) for award years ending June 30, 1988 and 1989, respectively, showed no loan activity. However, during the period June 30, 1986 to June 30, 1989 cash on hand grew from $12,605 to $540,102.

Ex. E-2-10. In addition, the auditors stated:

Rice was late in depositing its ICC [Institutional Capital Contribution] for the Perkins Loan fund for award years 1987-88 and 1988-89. The college deposited the FCC of $233,283 for 1987-88 on September 21, 1988, but did not deposit its required matching ICC until June 27, 1989. Rice Companies acknowledged this delinquency in an internal memorandum identifying the 1987-88 ICC for Rice and two other schools. The memorandum stated, "We have been holding these checks for almost a year; it will be time to match again shortly."See footnote 12

The college continued the pattern of delinquency in depositing the ICC into the 1988-89 year. On June 26, 1989 Rice deposited the 1988-89 FCC [Federal Capital Contribution] of $183,764, but as of March 30, 1990 had not deposited the 1988-89 ICC into the Perkins Loan fund. The college did deposit the matching funds on April 18, 1990.

Ex. E-2-11 (footnote added).

The auditors concluded that "Rice's mismanagement of the Perkins Loan fund has cost the Federal government $35,106 in unnecessary interest, based on 1988 and 1989 Treasury Bill borrowing rates, on the excess funds on hand." Ex. E-2-11. The FAD sustained these

conclusions. Ex. E-1-6-8. The calculations that the auditors used to reach this amount are contained at Ex. E-9-39.

Other than to state "Respondent contends that it has properly administered and managed its Perkins Loan Funds in accordance with federal requirements",See footnote 13 Rice, which has the burden of persuasion as to this issue,See footnote 14 does not in its briefs dispute any of the factual bases for the auditors' findings. In fact, the parties have stipulated that Ex. E-9 is a true and accurate copy of certain Office of Inspector General workpapers for the Audit on cash management for the Perkins Loan program at Rice. Stip. of Fact No. 27. These workpapers document the findings of the auditors and the conclusions contained in the FAD.

In addition, the parties have stipulated that Rice drew $233,283 in Perkins Loan funds in 1987-88 and $183,764 in 1988- 89. Stip. of Fact No. 30. Rice College had $315,489 in Perkins funds on hand as of June 30, 1988 and $540,102 cash on hand as of June 30, 1989. Stip. of Fact No. 31.

Based on the evidence, the tribunal finds that Rice has not satisfied its burden of persuasion of proving that the expenditures questioned or disallowed were proper and that the institution complied with program requirements. § 668.116(d). Therefore, Rice College must repay $35,106 to the Department in the manner authorized by law.

4. Student withdrawal rate.

In their briefs, the parties dispute the accuracy of both the methodology and the actual calculations that were used by the auditors and adopted by SFAP in reaching the conclusion that Rice's combined 1988 and 1989 withdrawal rate was 52.44 percent, as is stated in Finding 3 of the FAD and in the "Other Matters" section of the audit report.See footnote 15 However, since "the Department has not fined Rice for its [alleged] high withdrawal rate, or taken any separate administrative action against Rice at this time by virtue of its [alleged] very high withdrawal rate,"See footnote 16 the tribunal declines to address this issue at the present time.See footnote 17

V. CONCLUSIONS OF LAW.

In accordance with 34 C.F.R. § 668.118(b), the final audit determination issued by the designated Department official is supportable, in part.

A. The final audit determination finding that Rice failed to comply with ability-to-benefit (ATB) requirements should be upheld, in part.

1. Rice's scoring procedures on the Wonderlic Personnel Test (WPT or Wonderlic) were invalid because the College violated §§ 668.7 and 600.11 by failing to comply with the criteria developed by Rice's accrediting agency in that it failed to maintain documentation to evidence the relationship between test cut-off scores and successful academic or employment outcomes.

2. Rice's use of score adjustments on the Wonderlic test based on the test-taker's age was not invalid per se, but Rice still violated §§ 668.7(b) and 600.11 as to these six students because the College failed to maintain documentation to evidence the relationship between test cut-off scores and successful academic or employment outcomes, as AICS criteria required it to do.

3. Rice enforced the 12 minute time limit for the Wonderlic test for the ability-to-benefit students in question.

B. The final audit determination finding that Rice failed to comply with Perkins Loan funds handling requirements should be upheld.

VI. DETERMINATIONS OF TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The College and SFAP filed briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are contrary to the facts and law or because they are immaterial to the decision in this case.

VII. ORDER.

Based on the foregoing findings of fact and conclusions of law, IT IS ORDERED, That as relates to the award years 1987-88 through 1989-90:

1. Rice shall refund to the U.S. Department of Education $18,969.00 in SEOG and Pell Grant awards made to students who were given Wonderlic tests which involved invalid scoring procedures. The names of the applicable students and the amounts of grant awards are enumerated at Exhibit E-8-5.

2. Rice shall identify and purchase, from the holders of notes, all GSL loans, made in the amount of $28,228.91,See footnote 18 for students who were given Wonderlic tests which involved invalid scoring procedures. The names of the applicable students and the amounts of GSL loans are enumerated at Exhibit E-8-5.

3. Rice shall contact its guarantee agencies and determine the total amount of interest and special allowances paid by the Department as to the GSL loans awarded to the students as described in paragraph 2 above. Interest and special allowance paid unnecessarily must be reimbursed to the Department.

4. Rice shall remit to the U.S. Department of Education $35,106 in unnecessary interest costs caused by excess cash on hand in Perkins Loan funds.

_____

John F. Cook

Chief Administrative Law Judge

Issued: December 29, 1993
Washington, D.C.

SERVICE

A copy of the attached initial decision was sent to:

The Honorable Richard W. Riley
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

A copy of the attached initial decision was also sent by **CERTIFIED MAIL RETURN RECEIPT REQUESTED** to the following:

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Footnote: 1 1 SFAP was formerly known as the Office of Student Financial Assistance (OSFA).

Footnote: 2 See the Joint Memorandum on Stipulations numbers 2, 7, 9, 14, 15, 26, 27, 28 and 29 and also Respondent's reply brief at page 6.

Footnote: 3 This portion of the findings of fact is based upon the Joint memorandum on Stipulations filed by the parties.

Footnote: 4 Unless indicated otherwise all citations as to Code of Federal Regulations will be from 34 C.F.R.

Footnote: 5 The ability to benefit requirements now found in § 600.11 became effective as of the 1987-88 award year. The Higher Education Amendments of 1986 added the ability to benefit requirement as a student eligibility criterion for continued aid. Section 407 stated:

(a) AMENDMENT--Part G of title IV of the Act (as redesignated by section 406) is amended to read as follows:

. . .

(b) EFFECTIVE DATES--(1) Sections 483(e) and 484(d) of the Act as amended by this section shall apply to student assistance awards for periods of enrollment beginning on or after July 1, 1987.

HEA § 407 (emphasis added).

Section 484(d), as amended, stated as follows:

(d) ABILITY TO BENEFIT--A student who is admitted on the basis of the ability to benefit from the education or training in order to remain eligible for any grant, loan, or work assistance under this title shall--

(1) receive the general education diploma prior to the student's certification or graduation from the program of study, or by the end of the first year of the course of study, whichever is earlier;

(2) be counseled prior to admission and be enrolled in and successfully complete the institutionally prescribed program of remedial or developmental education not to exceed one academic year or its equivalent; or

(3)(A) be administered a nationally recognized, standardized, or industry developed test, subject to criteria developed by the appropriate accrediting association, measuring the applicant's aptitude to
complete successfully the program to which the applicant has applied; and

(B) with respect to applicants who are unable to satisfy the institution's admissions testing requirements specified in subparagraph (A), be enrolled in and successfully complete an institutionally prescribed program or course of remedial or developmental education not to exceed one academic year or its equivalent.

HEA § 484(d) (emphasis added). This language was also contained in 20 U.S.C. § 1091(d) (1990).

HEA § 481(b) defined "proprietary institutions of higher education" and stated, in pertinent part:

Such term also includes a proprietary educational institution in any State which, in lieu of the requirement in clause (1) of section 1201(a), admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located and who have the ability to benefit (as determined by the institution under section 484(d)) from the training offered by the institution. . . .

HEA § 481(b) (emphasis added). Essentially similar language was also contained in 20 U.S.C. § 1088(b) (1990).

Therefore, the ability to benefit requirements for proprietary institutions of higher education embodied in the regulations at 34 C.F.R. § 600.11, from 1988-1989, were effective as of the 1987-88 award year.

Footnote: 6 The parties have stipulated that Ex. E-8 to SFAP's Initial Brief is a true and accurate copy of certain Office of Inspector [General] workpapers from the Audit, regarding Ability to Benefit tests at Rice. Stip. of Fact No. 15. The parties have further stipulated that Ex. E-8, at pages 5-6, lists the 31 students for whom the Department contends that Rice failed to follow the ability-to-benefit regulations. Stip. of Fact No. 16.

22 of these students are in issue in this discussion of Rice's passing score on the WPT. 8 of these same 22 students are also discussed in the section on age adjustments. The other 9 students are in issue in the discussion on the amount of time that students were allowed in taking the WPT.

Footnote: 7 SFAP also noted in its initial brief that

The Vice-President of E.F. Wonderlic & Associates, Inc [sic] stated in a 1981 letter to the Regional Inspector General for Audit that a score of 10 on the Wonderlic Personnel Test, the level which Rice considered "passing," was "equivalent to an 80 I.Q. and represents the critical failure level in the Armed Forces Qualification Test. Fewer than 5% of persons scoring at that level will succeed in the academic curriculum of high school . . . . Certainly a critical score of 10 will eliminate only that small portion of the general population with very little chance of success in any academic program." (ED Ex. 8, p. 15).

SFAP Initial Br. at 5-6; see also Ex. E-8-15.

Other evidence in the record also indicates that Rice's cut- off score of 10 on the WPT may have been too low (see Ex. R-1 at pages 6-7, 10, 12-13, 15-18, 20-23, 25-26). Rice offered nursing assistant, computer accounting, medical secretary, and secretarial word processing curricula. Ex. E-2-4. The Wonderlic Manual states as follows:

The great wealth of experience of business executives who have used the Personnel Test for many years and the results of carefully conducted validity studies show that the normal or central tendency score of job applicants for a specific position is the same score that should be used as a guide in employee selection. (According to the Wonderlic Manual, "Central tendency refers to the pattern of scores where most individuals score very nearly the same . . . ." Ex. R-1-5.) Business managers who are seeking to improve the capability of their employees most often use this score as a minimum. In times when qualified applicants are difficult to find or when an applicant demonstrates a history of quality performance,
exceptions to the minimum are made--but only to the extent of accepting scores two points below the normal minimum.

Ex. R-1-5 (parenthetical statement added).

The Manual indicates that the minimum score for a nurse's aide position is 15. Ex. R-1-6. The Manual lists minimum scores for accountants of 28 and accountingclerk of 25. Ex. R-1-6. The Manual identifies a central tendency score for medical secretaries of 28.9. Ex. R-1-12. For other secretaries, the Manual lists a recommended minimum score of 25. Ex. R-1-6. All of these recommended minimum scores for the professions for which Rice trains its students are well above Rice's cut-off score of 10. Even the Wonderlic schedule of "Minimum Passing Scores In Compliance with U.S. Dept. of Education" submitted by Rice in its institutional appeal and contained in Ex. E-3-4, lists minimum scores for nursing assistants of 11, accounting clerks of 17, medical secretaries of 17; the schedule lists minimum scores for students planning to study secretarial skills at 17, and word processing at 15.

All of this evidence suggests that Rice is admitting and training students whose likelihood of success in these professions, or even in the College's academic program, is doubtful at best. The very low graduation rate for these students bears this out.

Footnote: 8 The tribunal notes that on page 7 of the order in the HCTIA case, which Rice omitted from its Ex. R-8, Judge Gibbons made the following statements:

At the preliminary injunction hearing a great deal of expert proof was presented concerning whether HCTIA's selection of seven as a minimum score [on the WPT] was appropriate. . . . it is unnecessary to resolve the ultimate issues concerning selection and use of a score of seven at this time. . . . Clearly, however, this is a serious issue with some evidentiary support for both parties' positions. Common sense seems to support the Department's position. Evidence was introduced that a score of seven is equivalent to an IQ score of seventy-three, which is in the borderline mentally retarded range. Given this fact and the information available to plaintiff

concerning the minimum score recommended to employers by Wonderlic and the median score for job applicants, see n.5 supra, it seems that a reasonable conclusion from the outset would have been that potential students scoring seven were unlikely to benefit from the training. . . .

HCTIA, Inc. v. U.S. Department of Education, et. al., No. 91-2787 (W.D. Tenn. Dec. 2, 1991) (order denying preliminary injunction) (emphasis added).

Judge Gibbons then made the statements wherein, as Rice describes them on page 9 of its initial brief, she "expressed concern about the Department's challenging the institution's selection of its cut-off score".

Footnote: 9 That "Dear Colleague" letter included the following statements:

The institution may evaluate the test results or a third party may do the evaluation and provide the results to the institution. In either case, the standards must be set by the institution in accordance with any accrediting agency standards that are applicable.

. . .

The Secretary does not specify what criteria accrediting agencies must use regarding aptitude testing, nor does the Secretary specify what constitutes an "acceptable score." Acceptable standards are determined by the institution in accordance with any applicable instructions provided by the developer of the test and any accrediting agency standards that are applicable.

. . .

Under the provisions of § 600.11 of the Institutional Eligibility regulations, when determining a student's ability to benefit through the use of a nationally recognized, standardized, or industry-developed test, an institution must use a test that is "subject to criteria of the institution's accrediting agency or association." However, according to the analysis of comments and changes on § 602.13 of the Secretary's Procedures and Criteria for Recognition of Accrediting Agencies, published July 1, 1988 (53 FR 250a1), an agency need not promulgate criteria with regard to testing a student's ability to benefit. Therefore, if an institution's accrediting agency has not developed such criteria, the institution may not use the testing option for determining a student's ability to benefit. . . .

Ex. R-3-6-7 (emphasis in original).

Footnote: 10 The tribunal makes this finding independently from the "Auditor's Note" scrawled in handwriting at the bottom of the page at Ex. E-8-20. Given that this handwriting could have been added to the Nestlehutt letter for purposes of an audit other than the one at issue in this proceeding, the tribunal cannot accord this unverified statement any weight.

Footnote: 11 The Perkins Loan program was formerly known as the NDSL program.

Footnote: 12 See Ex. E-9-8.

Footnote: 13 Resp. Reply Br. at 5.

Footnote: 14 See § 668.116(d).

Footnote: 15 See SFAP Initial Br. at 9-10; Resp. Initial Br. at 12; SFAP Reply Br. at 8-9; Resp. Reply Br. at 5-6. See also Ex. E-2-12; Ex. E-1-9.

Footnote: 16 SFAP Initial Br. at 10.

Footnote: 17 While the auditors recommended that Rice develop a comprehensive student retention program, the FAD did not adopt this proposal. Ex. E-2-12. The FAD merely stated: "We have notified the Department of Education's Institution and Lender Certification Branch (ILCB) of the institution's high withdrawal rate so that office may determine if it should conduct a re-certification of the institution." Ex. E-1-9.

Inasmuch as neither SFAP nor the FAD requested this tribunal to take any action as to Rice's alleged high withdrawal rate, the tribunal does not consider this issue to be ripe for review and therefore makes no findings. See BLACK'S LAW DICTIONARY 1192-1193 (5th ed. 1979) ("Basic rationale of 'ripeness doctrine' arising out of courts' reluctance to apply declaratory judgment and injunctive remedies unless administrative determinations arise in context of a controversy ripe for judicial resolution, is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties . . . .").

Footnote: 18 The original listing of $28,228.91 in GSL payments relating to the 22 students set forth at Exhibit E-8-5 should be reduced by recognized credits such as: amounts already paid by students, amounts already refunded by the institution, amounts of proposed loans which were never paid out, and any other properly recognized credits not enumerated. In the cases where the Department paid default claims, reimbursement should be made to the Department in the amount of the default claims.