

IN THE MATTER OF PAN AMERICAN SCHOOL,
Respondent.

Docket No. 91-94-SA
Student Financial Assistance Proceeding

DECISION

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

Russell B. Wolff, Esq., of the Office of General Counsel, United States Department of Education, for the Office of Student Financial Assistance Programs.

This is an action initiated by the United States Department of Education (ED) to recover \$2,873,190 in Federal funds advanced to the Pan American School (Pan American) under the Pell Grant program during the period from July 1, 1987, through June 30, 1990, and \$24,994 in interest. This action was proposed following a final audit report which determined that Pan American was an ineligible institution for failure to properly administer an acceptable ability to benefit test. The final audit determination also concluded that Pan American maintained excess cash-on-hand. Pan American argues, in effect, that it utilized an acceptable ability to benefit test and was, therefore, an eligible institution. Pan American concedes that it maintained excess cash-on-hand. Based on the findings of fact and conclusions of law, *infra*, the Department may recover \$606,243 in Federal funds advanced to Pan American and \$24,994 in interest. [See footnote 1 1/](#)

I. FINDINGS OF FACT

The pertinent findings of fact are set forth in the opinion. The detailed findings of fact are set forth in the appendix, *infra*. To the extent that proposed findings of fact or conclusions of law by a party have not been adopted in this decision, they are

rejected as being inaccurate or unnecessary to the disposition of this case.

II. OPINION

On September 18, 1991, ED issued a final audit report to recover Federal funds advanced under the Pell Grant program. On November 6, 1991, and within the period specified by 34 C.F.R. § 668.113(b), Pan American requested a review of the final audit determination. Accordingly, jurisdiction is proper before this tribunal.

Under the Pell Grant program, the Secretary provides grants to eligible, financially needy students attending eligible institutions of higher education. 20 U.S.C. § 1070a(a) and (b) (1987).

An institution of higher education includes, inter alia, a proprietary institution of higher education. 20 U.S.C. § 1088(a)(1)(A). A proprietary institution of higher education is an institution which admits students who have received a high school diploma, secured a general education development certificate, or demonstrated the ability to benefit from the training offered by the institution. See 20 U.S.C. §§ 1088(b) and 1141(a).

Under the ability to benefit requirement, the institution may obligate Federal student financial assistance funds under Title IV only if the student--

[is] 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.

20 U.S.C. § 1091(d)(3)(A). See 20 U.S.C. § 1088(b).

Additionally, 34 C.F.R. § 600.11 (1987) provides that the institution must administer the nationally recognized, standardized or industry developed test at the time of admission--

(a) [i]f an institution admits as a regular student a person who does not have a high school diploma or its equivalent, the institution shall determine, at the time of admission, whether that person has the ability to benefit from the education or training the institution offers.

(b) [a]n institution shall determine whether a person described in paragraph (a) . . . has the requisite ability by--

(1) [a]dministering to the person a nationally recognized, standardized, or industry developed test, subject to the

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.

The sole dispute between the parties is whether students admitted to Pan American's English as a Second Language (ESL) program under the ability to benefit criteria were administered a nationally recognized, standardized, or industry developed test to evaluate the student's ability to benefit.

Pan American administered two tests to its applicants. One test was the Pan American School Test (Pan American Test), an in-house test. The second test was the University of Michigan Examination in Structure Test (Michigan Test), a nationally recognized, standardized, or industry developed test. The dispute between the parties is whether the Michigan Test was used for purposes of determining whether a student has the ability to benefit from the training offered as required by the regulations.

Pan American asserts that the Pan American Test and Michigan Test were used to determine a student's ability to benefit and that the Michigan Test was also used to ascertain the initial academic level for each student. In this regard, Pan American relies on its catalog which states

that the Michigan Test was part of its entrance examination for the ESL program. Pan American offers a sworn statement by one of its Admission's Officers who identifies the Michigan Test as an admission's test. Finally, Pan American relies on the response by its President to the audit report issued by the Department which maintains that the Michigan Test was used for admission purposes.

On the other hand, ED asserts that the Pan American Test was used to determine whether a student possessed the ability to benefit from the training offered and the Michigan Test was used solely for placement purposes. In other words, ED asserts that the Michigan Test was used to determine whether a student should be placed within the beginner, intermediate, or advanced level of the ESL program. As support, ED cites the cover sheet to Pan American's entrance examination which portrays the Pan American Test as the entrance test and the Michigan Test as the placement test. ED also relies on the program reviewer's assertion that Pan American's President stated, on more than one occasion, that the Michigan Test was used solely for placement purposes.

In a case where, as here, there exists conflicting evidence as to whether the Michigan Test was used for admission purposes, ED bears the burden of production and Pan American bears the burden of persuasion. 34 C.F.R. § 668.116(d). See *In re Stautzenberger College*, Dkt. No. 90-102-SA, U.S. Dep't of Education 4 (Mar. 11, 1991). For the reasons stated, *infra*, the weight of the evidence supports ED's position.

The strongest evidence in support of Pan American's view is the statement by one of its Admission's Officers which indicates that the Michigan Test was administered prior to a student's admission and was not used merely for placement. This statement is significant in that the Admission's Officer was an employee of Pan American with no apparent financial interest in the school and no apparent relationship to the institution's Owner and President. Therefore, the statement is entitled to substantial weight.

On the other hand, the President's response to the Department's audit report is self-serving and was obviously written by counsel in contemplation of the potential appeal of the final audit report. Accordingly, the weight assigned to this evidence is minimal.

Finally, Pan American's catalog indicates that the Michigan Test was used to admit students to the ESL program. In addition, Pan American notes that it represented to the State of New York that a student must attain a minimum passing grade of 10 on the Michigan Test to gain admission to the ESL program. It was on this basis, in part, that New York approved this program. In most circumstances, this evidence would be entitled to substantial weight; however, in this case, it is inconsistent with the manner in which the Michigan Test was, in fact, utilized.

The cover sheet for the entrance examination clearly indicates that the Pan American Test was the "entrance test" and that a passing grade of 65 was necessary for admission. Further, the cover sheet designated the Michigan Test as a "placement test." The cover sheet also contained a table which assigned students to various instructional levels based on their scores on the Michigan Test. [See footnote 2 2/](#) Inasmuch as the lowest score of 1 correct answer placed the student in the "beginner" course, this indicates that the Michigan Test was used for placement and not to

ascertain the student's ability to benefit. Thus, the manner in which the Michigan Test was employed is inconsistent with its purported usage as an ability to benefit test.

Finally, the President of Pan American admitted, on more than one occasion, that the Michigan Test was used only for the placement of students after the students had passed the Pan American Test and were admitted to the school. This information was proffered by ED's program reviewer, was based on two conversations with the President, and was confirmed by his contemporaneous notes. As such, this evidence is entitled to substantial weight.

In considering the contradictory evidence, the greater weight of the evidence supports the conclusion that the Michigan Test was not used to measure a student's ability to benefit for purposes of admission to the ESL program. Accordingly, Pan American administered an unacceptable ability to benefit test for the period in question and, as a result, is liable to ED for the harm caused to the Department by the improper admission of these students.

Under the Program Participation Agreement executed by Pan American and ED, Pan American agreed to adhere to the program statutes and implementing regulations for each Title IV program in which it participated, as well as to comply with the Student General Assistance Provisions set forth in 34 C.F.R. Part 668. Inasmuch as Pan American admitted students based on an ability to benefit test that was not nationally recognized, standardized, or industry developed, Pan American did not comply with the mandates of the Program Participation Agreement. See 20 U.S.C. §§ 1088 and 1091. See also 34 C.F.R. §§ 600.11, 668.7, and 668.12. As a result of a breach of the Agreement, ED, as the aggrieved party, is entitled to compensation to the extent of the harm incurred.

The harm in this case was the financial assistance in Pell funds awarded to students who were admitted to the institution without demonstrating the requisite ability to benefit from the training offered. The remaining students, who attended other programs, were qualified to receive Federal assistance and, therefore, the harm to the Department is, at best, nominal.

In order to determine the amount of ED's recovery, it is necessary to ascertain the amount of Pell funds received by the students in the ESL program based on the limited information available in the record. During the period in issue, July 1, 1987, through June 30, 1990, Pan American enrolled a total of 2,284 students in three programs -- the ESL program, the Travel Agent program, and the Executive Bilingual Secretary program.

There were 1,202 students enrolled in the ESL program, of which 60% or 721 students were admitted as high school graduates or the equivalent. Therefore, the remaining 40% or 481 students were admitted based on an improper ability to benefit test. These 481 students represent 21.1% of the student population during the period in issue from July 1, 1987, through June 30, 1990.

During the period in issue, Pan American awarded \$2,891,177 in Pell funds. Of this amount, \$17,987 is at issue in an unrelated audit. Accordingly, for purposes of this proceeding, the amount at issue is \$2,873,190, of which 21.1% was improperly awarded. Therefore, ED may recover 21.1% of \$2,873,190 or \$606,243.

ED also alleges that Pan American maintained excess cash-on-hand, and, as a result, seeks to recover the interest associated with the excess cash. The interest was calculated as \$24,994. Pan American concedes that it maintained excess cash-on-hand, and, as a result thereof, acknowledges this liability. Accordingly, Pan American is liable to the Department for \$24,994 in interest.

III. ORDER

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

ORDERED that Pan American School immediately, and in the manner provided by law, pay the United States Department of Education a sum of \$606,243; it is further

ORDERED that Pan American School immediately, and in the manner provided by law, pay the United States Department of Education a sum of \$24,994 in interest charges.

Allan C. Lewis

Administrative Law Judge

Issued: February 25, 1994
Washington, D.C.

APPENDIX -- FINDINGS OF FACT

1. Pan American School (Pan American) is wholly owned by Pan American School, Inc., 244 West 14th Street, New York, New York.
2. Pan American School is a private career school located in New York City. It is licensed by the Bureau of Proprietary School Supervision of the New York Education Department. Pan American is accredited by the Commission on Independent Colleges and Schools of the Career College Association (Career College Association). The institution became eligible to participate in the student financial assistance programs in 1986.
3. Pan American's main campus is located at 244 West 14th Street, New York, New York. Pan American also maintains an auxiliary facility at 116 West 14th Street, 5th Floor, New York, New York.
4. The President and Director of Pan American is Angelo Chavez. The Financial Aid Director is Angelo P. Chavez, Jr. The Admission's Officers are Hilda Vega and Diana Navarro.
5. The United States Department of Education conducted an audit of Pan American for the period of July 1, 1987, through June 30, 1990, to determine whether Pan American administered the Title IV programs in accordance with applicable laws, regulations, and agreements. The fieldwork for this audit was conducted between June 4, 1990, and July 6, 1990.

6. Pan American's catalog for years 1989, 1990, and 1991 lists a number of programs offered at the institution. These programs include English as a Second Language (ESL), Travel Agent, and Executive Bilingual Secretary. The catalog indicates that the University of Michigan Examination in Structure Test (Michigan Test) is used to admit students in the ESL program. The Michigan Test is a nationally recognized, standardized, or industry developed test which is approved by ED to determine whether a student possesses the ability to benefit from the training offered.

7. Several levels of the ESL program were approved by the Bureau of Proprietary School Supervision, State Education Department of the State of New York on October 15, 1987. The entrance requirements for English As A Second Language (All Levels) consist of--

Students must be age 17 years or older, have a personal interview, and pass with a 65% or higher [on] the Pan American School Achievement Test (Spanish Edition) and with a minimum passing grade of 10 on the English language test of the University of Michigan.

The entrance requirements for English As A Second Language (Beginners) consist of--

Students must be age 17 years or older, have a personal interview, and pass with a 65% or higher [on] the Pan American School Achievement Test (Spanish Edition) and with a minimum passing grade of 10 on the English language test of the University of Michigan.

The entrance requirements for English As A Second Language (Intermediate) consist of--

Students must be age 17 years or older, have a personal interview, and pass with a 65% or higher [on] the Pan American School Achievement Test (Spanish Edition) and with a grade of 40 or higher [on] the English language test of the University of Michigan.

The entrance requirements for English As A Second Language (Advanced) consist of--

Students must be age 17 years or older, have a personal interview, and pass with a 65% or higher [on] the Pan American School Achievement Test (Spanish Edition) and with a minimum grade of 60 on the English language test of the University of Michigan.

8. Pan American's accrediting association, Career College Association, indicated on August 14, 1991, that--

This letter will confirm that the Accrediting Commission has no objection to your school's use of the Michigan Test Examination in Structure as an entrance/placement tool for students applying for admission to your stand-alone English as a Second Language (ESL) program. This letter also confirms that your policy is to admit only students who have earned a high school diploma or the equivalent to this ESL program.

9. Hilda Vega was a Pan American Admission's Officer from October 14, 1987, to October 1989, and testified that students were admitted to the ESL program--

based on the administration of an exam which gauged their need for English language instruction, called the University of Michigan Examination in Structure. In addition, students were given a short exam in their language, known as the Pan American Test. . . . The examination was given prior to admission, and was not used merely for placement. Students who were not in need of English instruction were not admitted via this process.

10. Several sworn statements by students who attended Pan

American during the period in issue indicate that each student took two entrance exams prior to admission.

11. The Supervisory Auditor for the Office of Inspector General, Tom Whiting, directed his staff to conduct an interview with one of Pan American's Admission's Officers, Diana Navarro, to determine the normal course of admissions. Ms. Navarro stated that, when necessary, potential students are asked to take an ability to benefit test. The test administered is the Pan American Test, a test developed in-house, which requires a passing score of 65. If the prospective ESL individual passes this threshold, the student is advised of his/her eligibility for admission. During this interview, Ms. Navarro made no mention of utilizing the Michigan Test for admission purposes.

12. Mr. Whiting personally conducted an interview with Pan American's President, Angelo Chavez, on June 18, 1990. During this interview, Mr. Chavez indicated that the Pan American Test was used for admission purposes and that the Michigan Test was used as a placement tool subsequent to the admission of students. Mr. Chavez further stated that he was unaware of any potential problem utilizing the Pan American test for admission under the ability to benefit criteria. This information is confirmed by the Mr. Whiting's notes of the same day.

13. Prior to the issuance of the draft audit report, on January 4, 1991, Mr. Whiting contacted Mr. Chavez who reconfirmed that the Michigan Test was used for placement purposes and not as an ability to benefit admission's test.

14. Mr. Chavez told OIG auditors that the Pan American Test had been included in the application for eligibility to participate in Federal student financial assistance programs. On August 2, 1990, Mr. Whiting contacted the Eligibility and Certification Division to verify Pan American's contention. Pan American's file contained only the Metropolitan Achievement Test, and not the Pan American ability to benefit test.

15. An unidentified Office of Inspector General (OIG) official discussed the admissions testing policy of Pan American with its President. This discussion was incorporated into the final audit report--

Discussions with PAS' [Pan American School] President disclosed that he was unaware of the ATB [ability to benefit] requirements and was unaware that the test it developed and used to admit students to the ESL course did not meet the Federal criteria [sic]. The school's President indicated that PAS submitted its ATB test to ED, when applying for eligibility to participate in

the SFA [student financial assistance] programs, and to AICS [Association of Independent Colleges and Schools], when applying for

accreditation. And, neither ED nor AICS raised any objections to the use of the ATB test it developed. The President stated that this test was also submitted to and approved by New York State as part of the admission criteria. PAS, therefore, assumed that this ATB test was acceptable.

Based on our discussions with the school's President, we contacted ED's Eligibility, and Certification Division to determine what information was supplied to ED by PAS when applying for eligibility in the SFA programs. The Eligibility and Certification Division indicated that there was no record of PAS ever submitting the PAS developed ATB test to ED. ED Form 1059, Request for Institutional Eligibility for Programs, submitted by PAS to ED indicated that ATB testing was used as a basis for admissions. However, only the MAT [Metropolitan Achievement Test] test was on record as being used by PAS for such ATB testing.

16. Pan American maintained in its response to the audit report that two tests were given for purposes of admission to the ESL program--

[t]hese [ESL] students were required to take both the University of Michigan Test and the Pan American Test. Both tests were used for placement of the student, but the validated University of Michigan Test was used as an entrance test as required by our accrediting commission, The Association of Independent Colleges and Schools (AICS).

...
It is Pan American School's contention that given the fact that the University of Michigan Examination in Structure is a valid industry developed test which meets accrediting agency criteria, concurrent administration of the PAS exam and other initiatives aimed at determining a student's ability to benefit from the ESL program become supernumerary. That is to say, all the law requires is that if testing is employed, that a test be used which meets certain criteria. It does not state or imply that if a number of tests are used that in each instance these tests must meet the ATB criteria.

17. In response to the Pan American's comments regarding the final audit report, the Department issued an Auditor's Response. The Response provided in pertinent part--

[w]e thoroughly reviewed the auditee's comments and found no basis for changing our finding or recommendations. During our audit we were aware of PAS' use of the University of Michigan Test. However, during our discussions with PAS' President, we were informed that the University of Michigan Test was used only for placement of students after the

student had passed the Pan American Test and was admitted to PAS. These statements were supported by copies of PAS' listing of tests given to ESL student [sic] which show the Pan American Test to be an "entrance test" with a passing grade of 65, whereas the University of Michigan test was a "placement test" with the test scores used to determine which ESL level the student should be placed in after enrollment. Also, our discussions with PAS' Admissions Officer

indicated that she determined eligibility for admission based on the student obtaining a passing score of 65 on the Pan American Test, with no mention of the University of Michigan Test.

18. The Pan American test and the Michigan Test were included together in a booklet prepared and used by Pan American. The cover page provided--

ENTRANCE EXAMS FOR ADMISSION
OF THE CONTINUING EDUCATION DIVISION

1- P.A.S. ENTRANCE TEST - PASSING GRADE 65
TEST (Spanish or English)

2- ESL PLACEMENT TEST (University of Michigan Test).

Beginner : No of Correct Answers 1 - 35 = Book I Level I

Beginner : No of Correct Answers 36 - 39 = Book II Level II

Intermediate : No of Correct Answers 40 - 60 = Book III Level III

Intermediate : No of Correct Answers 60 - 79 = Book IV Level IV

Advanced [sic]: No of Correct Answers 80 - 89 = Book V Level V
Advanced [sic]: No of Correct Answers 90 - 100 = Book VI Level VI

Based on the above, not only is it noted that the Michigan Test is used for placement and the Pan American Test is used for admissions, but also the minimum score for the ESL Beginner is one. The effect of this minimum score is that zero is the only score under which a student would fail this test. Therefore, the Michigan Test was not employed as an entrance test.

19. Between July 1, 1987, and June 30, 1990, a total of 2,284 students were admitted to the ESL program, the Travel Agent program, and the Executive Bilingual Secretary program. Of these students, 1,202 enrolled in the ESL program, 423 enrolled in the Travel Agent program, and 659 enrolled in the Executive Bilingual Secretary program.

20. Statistics indicate that 60% of the students enrolled in the ESL program were high school graduates or the equivalent, and that 40% were ability to benefit students and were required to

take the Pan American Test to determine if they possessed the ability to benefit from the training offered. Therefore, 40% of the ESL students were admitted based on a score achieved on an improper ability to benefit test.

21. In the Travel Agent program, 40% of the students were found to be high school graduates or the equivalent and 60% were ability to benefit students who were required to take the Metropolitan Achievement Test as an admission's examination. This test is a nationally recognized, standardized, or industry developed test and is acceptable by ED to determine whether a student possesses the ability to benefit from the training offered.

22. In the Executive Bilingual Secretary program, 40% of the students were found to be high school graduates or the equivalent and 60% were ability to benefit students and were required to take the Metropolitan Achievement Test and the Michigan Test as admission examinations prior to enrollment. These tests are nationally recognized, standardized, or industry developed tests and are acceptable by ED to determine whether a student possesses the ability to benefit from the training offered.

23. Pan American awarded a total of \$2,891,177 in Pell funds for award years 1988 through 1990. Pan American awarded \$877,994 in Pell funds for 1988, \$1,008,907 for 1989, and \$1,004,276 for 1990.

24. On September 18, 1991, ED issued its final audit determination in which it asserted that ED was entitled to recover \$2,873,190 from Pan American for administering an unacceptable ability to benefit test. This amount is based on the total Pell funds awarded for award years 1988 through 1990, reduced by \$17,987 in Pell Grant refunds requested by ED in an unrelated program and compliance audit which was conducted during the same period of time. ED also sought to recover \$24,994 in interest based on Pan American's excessive cash-on-hand.

25. On November 6, 1991, Pan American appealed the final audit determination. Pan American contested ED's assertions regarding the ability to benefit issue; however, it conceded its liability for the interest associated with the maintenance of excess cash.

Footnote: 1 1/ This is a 34 C.F.R. Subpart H proceeding which is resolved based upon the written submissions of the parties. 34 C.F.R. § 668.116(b). Upon review of this material, it was evident that an oral argument was not necessary to decide this matter and, as a separate matter, the school ceased operations during 1992.

Footnote: 2 2/ The table listed three categories and six levels of placement depending on the student's score on the Michigan Test--

Beginner: No of Correct Answers 1-35 = Book I Level I

Beginner: No of Correct Answers 36-39 = Book II Level II

Intermediate: No of Correct Answers 40-60 = Book III Level III

Intermediate: No of Correct Answers 61-79 = Book IV Level IV

Advanced [sic]: No of Correct Answers 80-89 = Book V Level V

Advanced [sic]: No of Correct Answers 90-100 = Book VI Level VI