

IN THE MATTER OF PHILLIPS JUNIOR COLLEGE (Gulfport),  
Respondent.

Docket No. 93-144-SP  
Student Financial Assistance Proceeding

Appearances: Leslie H. Wiesenfelder, Esq., of Dow, Lohnes & Albertson, Washington, D.C., for the Respondent.

Howard D. Sorensen, Esq., Office of the General Counsel, U.S. Department of Education, Washington, D.C., for the  
Office of Student Financial Assistance Programs.

Before: Judge Ernest C. Canellos

## DECISION

Phillips Junior College of Gulfport, Mississippi (Phillips) is one of a number of proprietary schools owned by Phillips Colleges, Inc. On August 30, 1993, Region IV of the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (ED), issued a final program review determination (FPRD) on the results of a program review performed at Phillips. The report analyzed Phillips' administration of the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV) for the period July 1, 1990, to May 22, 1992.

The FPRD contained six findings, only two of which are subject to this appeal. The two are: Phillips disbursed Title IV funds in two rather than the required three installments, and Phillips admitted students on the basis of an ability-to-benefit test which was administered by a non-independent tester.

The issue of the payment in two rather than three installments, has been litigated previously between Phillips Colleges Inc., the parent of Phillips, and ED. In *In the Matter of Edmondson Junior College*, Docket No. 93-7-SP, U.S. Dep't of Educ. (June 4, 1993), I found that another school in the Phillips Colleges Inc. family did not violate the Title IV regulations by dispensing federal student financial assistance in two payments as a non-term school, rather than in three payments as a term school. On April 5, 1994, the Secretary affirmed my decision. On November 15, 1994, the Secretary refused to reconsider his decision when requested to do so by SFAP. The law in this area is abundantly clear. I find that the facts of the current case and those in *Edmondson*, are clearly indistinguishable, therefore, I find that Phillips did not disburse federal student financial assistance by utilizing incorrect payment periods. See also, *In the Matter of Phillips College of Chicago*, Docket No. 93-58-SP, U.S. Dep't of Educ. (November 14, 1994), and the cases cited therein.

SFAP also seeks recovery for Phillips' use of one of its own employees to administer ability-to-benefit tests between July 1, 1991 and September 30, 1991. SFAP points out that, in accordance with 20 U.S.C. . 1091(d), a student who is being admitted to an institution on the basis of an ability-to-benefit must pass an independently administered test approved by the Secretary. SFAP asserts that an employee, by definition, cannot be independent and, therefore, cannot legitimately administer an ability-to-benefit test. However, On December 9, 1990, the Secretary issued a Notice in the Federal Register in which he announced an exception. In the case of a degree granting institution, which at the time of the Notice, had an established testing center independent of the admissions process, the independently administered requirement of ability-to-benefit testing was satisfied. 55 Fed. Reg. 52160 (December 9, 1990).

Phillips presented evidence that it is a degree granting institution and that it had a qualifying independent testing center during the period in issue. SFAP presented nothing other than an argument questioning the weight of that evidence. I find that Phillips has met its burden of proof on this issue and, therefore, I dismiss the finding regarding ability-to-benefit requirements.

Accordingly, Phillips Junior College of Gulfport, Mississippi, is relieved of any obligation to refund funds to the U.S. Department of Education as a result of this proceeding.

SO ORDERED:

Judge Ernest C. Canellos

Issued: November 16, 1994