IN THE MATTER OF CERRITOS COMMUNITY COLLEGE, Respondent.

Docket No. 94-107-SP
Student Financial Assistance Proceeding

DECISION

Appearances: Michael Y. Toy, Esq., and Spencer E. Covert, Esq., Parker, Covert & Chidester, for Cerritos Community College.

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

Before: Judge Richard F. O'Hair

Cerritos Community College (CCC) participates in the various student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* These programs are administered by the Office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED). On May 6, 1994, SFAP issued a Final Program Review Determination (FPRD) for CCC. The findings in the determination are based on the program review report for the 1991-92 and 1992-93 award years. CCC filed a request for review on June 21, 1994. Both parties have filed submissions to this tribunal in response to the Order Governing Proceedings. See footnote 1 *1*

The FPRD concludes that CCC administered an ability-to-benefit (ATB) test that was not approved by the Secretary of Education. As a result, SFAP claims that the school must return all Title IV funds awarded to the 46 students who were administered the unapproved ATB test and who subsequently withdrew before completion of their program. CCC admits that it did not use Form E of the Nelson-Denny testSee footnote 2 *2* in its entirety, but argues, in its defense to these proceedings, that the school acted in good faith, that California law prevented it from using the whole test, and that the school reasonably believed that it was not required to administer an ATB test that was approved by the Secretary. Under 34 C.F.R. § 668.116(d), CCC has the burden of proving that its questioned expenditures were proper and that it complied with program requirements.

During the time period at issue, 20 U.S.C. § 1091(d) provided that students who had not received a high school diploma or did not have a GED equivalency were not eligible for student financial assistance unless they successfully passed an ATB test which confirmed their ability to benefit from the education or training being offered. Furthermore, the ATB test had to be one that was approved by the Secretary.

Pursuant to this statutory requirement, the Secretary published several lists of approved ATB tests through the use of both the Federal Register and "Dear Colleague" letters. The 1991- 92 Federal Student Financial Aid Handbook also listed approved ATB tests at page 3-10. That list included the Nelson-Denny Reading Tests, Forms E or F (which also had been listed as approved by the Secretary at 55 Fed. Reg. 52160-1 (1990)). The Handbook admonished schools that "[i]f a form or test has multiple parts, *all* parts must be used in order for the test to be valid."

Although CCC stated in its initial brief that it used Form D of the Nelson-Denny test, a test not approved by the Secretary, the school later argued that it used Form E of that test and introduced additional evidence to support this assertion. SFAP's objections notwithstanding, I find this evidence persuasive of the fact that CCC administered Form E of the Nelson-Denny test.See footnote 3 *3* The school admitted, however, that it did not use Form E in its entirety because it omitted the vocabulary section of Form E. As a result, because CCC did not use both parts of Form E of the Nelson-Denny test, the school's ATB test was not approved by the Secretary, rendering the students admitted on the basis of this test ineligible to receive Title IV funds.

CCC makes several unsuccessful arguments in defense of its use of only a portion of the Nelson-Denny test. The school argues that it acted in good faith and that its ATB test successfully measured prospective ability to benefit. CCC observes that because 11 of the 46 students left school prior to graduating with a grade point average of 2.0 or better, these students demonstrated an ability to benefit from the training offered. Yet it remains true that these students did not graduate, so it is highly questionable whether they actually demonstrated an ability to benefit.

CCC also contends that 18 students demonstrated an ability to benefit under the standards imposed by the Federal Register notice of December 19, 1990. That notice required students admitted on the basis of an ATB test to have scored no lower than one standard deviation below the mean for that ATB test. According to CCC, a score of 55.2 is one standard deviation below the mean for the Nelson-Denny test. CCC argues that because 18 students scored at least a 30 on the reading comprehension portion of the test, a score that is more than one half of 55.2, these students' reading comprehension scores were above the minimum cutoff score of one standard deviation below the Nelson-Denny test mean. Nonetheless, because these students were only given a part of Form E of the Nelson-Denny test, their scores cannot be considered to be valid. Furthermore, the reliability of such a prorating system--administering only half of the test and cutting the minimum passing score in half--is suspect because the portion of the test given may not be representative of the whole test. This is especially true where, as here, the half of the test given contained a different type of questions than the half not given. Also, as discussed above, because these students did not graduate, it is highly questionable whether they actually demonstrated an ability to benefit.

The school also attempts to minimize the significance of this finding by noting that the 46 students whose ATB tests were questioned represent only about one percent of the 3,646 students who received financial assistance during the time period at issue. These 46 students, however, include only students who were given an unapproved ATB test and who did not graduate. The total number of students who were given an unapproved ATB test may have been much higher, but those students are not at issue here because they graduated from the program.

The fact remains that these students were not given an ATB test approved by the Secretary; had the number of such students been higher, CCC would be liable for a much larger amount of Title IV funds, and possibly even subject to a termination and/or fine action under 34 C.F.R. Part 668, Subpart G.

Additionally, CCC attacks the use of the Nelson-Denny test by pointing out that it has been found to show evidence of deficiencies in, among other areas, sensitivity and placement validity, and explains that California law prevented the school from using tests that evidence bias in placing and assessing students. Yet the Federal Register notice of December 19, 1990, as well as the various "Dear Colleague" letters and the 1991-92 Federal Student Financial Aid Handbook , all listed many other ATB tests that colleges such as CCC could choose as an alternative. CCC was not limited to administering the Nelson-Denny test in order to comply with federal law. If CCC considered itself restricted by California law from administering the Nelson-Denny test, it

could have chosen another approved ATB test, rather than unilaterally deciding to administer only what it considered to be the unoffending part of the Nelson-Denny test. Despite CCC's assertions to the contrary, the portion of the Nelson-Denny Examiner's Manual provided by the test publisher and contained in the exhibits does not authorize use of only the reading comprehension portion of the test. While the California Matriculation Act may have required CCC to administer a separate state testing battery, it did not mandate usage of the Nelson-Denny test.

Finally, CCC argues that the lawsuit instituted by the state of California in response to the statutory changes concerning ATB testing, the subsequent statutory changes, and the related correspondence from both ED and the State of California resulted in the school's "understanding" that, as of July 1, 1991, it did not have to administer an ATB test that was approved by the Secretary. Neither the statutory amendments contained in P.L. 102-26, the ATB advisory from the Chancellor of the California Community Colleges dated April 15, 1991, nor the "Dear Colleague" letter of June, 1991 provide any reasonable basis to believe that, for periods of enrollment beginning on or after July 1, 1991, schools were not required to administer an ATB test that had been approved by the Secretary. Moreover, the "Dear Colleague" letter of June 1991, which was issued after the settlement of the lawsuit and the resulting statutory changes, specifically referenced the December 19, 1990 notice, thus reaffirming its validity. In addition, contrary to CCC's argument, the controlling statute, 20 U.S.C. § 1091(d), did not require the Secretary to enact a regulation in order to "approve" ATB tests. As SFAP notes, the logical result of CCC's position would be that no institution had authority to disburse Title IV funds to ATB students during this time period because the Secretary had not published a regulation that listed approved ATB tests. Certainly, Congress did not intend such a result, nor did the statute require it. Finally, CCC cites the July 19, 1991, advisory from the Chancellor of the California Community Colleges for the following proposition: because the Chancellor advises member colleges that they may, at their own risk, set passing scores that do not conform to the December 19, 1990, notice, CCC could also choose to administer an ATB test that had not been approved by the Secretary. Yet in that very same advisory, the Chancellor discussed the Secretary's lists of approved ATB tests and stated, "(i)t is now my understanding that you must use one of those specifically-named instruments to achieve compliance with the Secretary's interpretation of the law." Therefore, CCC had no reasonable basis upon which to believe that, for periods of

enrollment beginning on or after July 1, 1991, it was not required to administer an ATB test that was approved by the Secretary either in the December 19, 1990 Federal Register notice or in the subsequent "Dear Colleague" letters.

For the foregoing reasons, CCC is liable for all amounts assessed in the FPRD, with the exception of the informal fine.

ORDER

Based on the foregoing, it is hereby--

ORDERED, that Cerritos Community College refund to the Department of

Education $49,256 (composed of $46,131 in Pell Grant payments, $500 in SEOG payments, and $2,625 in interest and special allowance payments) and refund to the lenders of federal student loans $19,690. In addition, the school must deposit $375 into its Perkins Loan account.

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Judge Richard F. O'Hair

Issued: January 3, 1995
Washington, D.C.

S E R V I C E

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

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Footnote: 1 *1 SFAP submitted a motion to strike evidence, in which SFAP requests the tribunal to strike the exhibits submitted with Respondent's reply brief on the basis that they are both untimely under, and outside the scope of, 34 C.F.R. § 668.116(e). In its motion, counsel for SFAP does not discuss the Secretary's decision in* ***In the Matter of Baytown Technical School, Inc.*** *, Dkt. No. 91-40-SP, U.S. Dep't of Educ. (Decision of the Secretary) (April 12, 1994), which held that the tribunal has the discretion to accept exhibits submitted outside the time limits imposed by § 668.116(e). Subsequently, this tribunal accepted untimely exhibits on several occasions. See In the Matter of Flavio Beauty College, Dkt. No. 93-71-SA, U.S. Dep't of Educ. (July 25, 1994) at 2-4; In the Matter of Derech Ayson Rabbinical Seminary, Dkt. No. 94-50-ST, U.S. Dep't of Educ. (October 4, 1994) at 1 n.1; In the Matter of New York Business School, Dkt. No. 93-81-SP, U.S. Dep't of Educ. (July 22, 1994), at 1 n.1; In the Matter of Santa Clara Beauty College, Dkt. No. 94-24-SP, U.S. Dep't of Educ. (November 14, 1994), at 1 n.1. As for SFAP's admissibility argument, I note that these exhibits qualify as "institutional records and materials" under 34 C.F.R. § 668.116(e)(1)(ii) and (iv). Additionally, SFAP was afforded the opportunity to respond to this new evidence in its reply brief. Therefore, all exhibits will be admitted, with their weight to be determined as necessary in the discussion below.*

Footnote: 2 *2 Form E of the Nelson-Denny test is merely one of many versions of the Nelson-Denny battery of tests. Form E contains both a vocabulary and a reading comprehension section.*

Footnote: 3 *3 I do agree with SFAP, however, that Dr. Rodriguez's assertions that CCC demonstrated "good faith" in complying with ATB requirements should be viewed as primarily legal arguments.*