UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of **Docket No. 94-189-SA**

MODERN HAIRSTYLING INSTITUTE, INC., Student Financial Assistance Proceeding
Respondent.

Appearances: Arturo Diaz-Angueira, Esq., and Roberto Feliberti, Esq., Cancio, Nadal, Rivera & Diaz, San Juan, Puerto Rico, for Respondent.

Stephen M. Kraut, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before: Frank K. Krueger, Jr.
Administrative Judge

DECISION

The Respondent, Modern Hairstyling Institute, Inc.(MHI), is a proprietary school of cosmetology which operates four facilities in Puerto Rico. MHI is accredited by the National Accrediting Commission of Cosmetology Arts and Sciences (NACCAS). MHI enrolls approximately 500 students and has been in operation since 1957.

In 1990 the Office of the Inspector General (OIG), U.S. Department of Education (ED), conducted an audit of MHI, and determined that MHI was ineligible to participate in the Federal student aid programs because it admitted as regular students persons without high school diplomas or the equivalent without determining that those persons had the ability to benefit from the training offered. The OIG determination was incorporated into a final audit determination issued by the Student Financial Assistance Programs (SFAP) on August 23, 1994, in which SFAP seeks a reimbursement of approximately $3 million. It is the OIG determination concerning MHI's alleged failure to determine whether its students have the ability to benefit from its training program that is the subject of this decision.See footnote 1 *1*

For the reasons provided below, I conclude that MHI has met its burden of persuasion that the expenditures questioned by SFAP were allowable and in compliance with all program requirements. *See* 34 C.F.R. § 668.116 (d).

DISCUSSION

I.

For the period covered by the audit, July 1, 1987, to June 30, 1990, to qualify as an eligible institution, MHI could admit as regular students only persons with a high school diploma or its equivalent, or persons who had the ability to benefit from its program, as determined under 20 U.S.C. § 1091(d), which provided as follows:

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 --

* * *

(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; . . . .

See also 34 C.F.R. §§ 600.11 and 668.7(b) (1989). As of 1991, this section was modified, as part of the Omnibus Budget Reconciliation Act of 1990, to provide that the Secretary of Education shall decide which tests are to be used in determining a student's ability to benefit from programs enrolling students receiving Federal aid, and to determine the appropriate passing score for those tests.

The Department of Education Organization Act, 20 U.S.C. § 3403(b), effective from May

1980 to the present, provides as follows:

No provision of a program administered by the Secretary [of Education] or by any other officer of the Department shall be construed to authorize the Secretary or any other officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, . . . except to the extent authorized by law.

See also 20 U.S.C. § 1232a (almost identical language in Higher Education Act of 1965, as amended, except reference to accrediting agency or association is absent).

II.

On four occasions from 1987 to 1989, NACCAS published a list of nationally recognized standardized tests which cosmetology schools accredited by NACCAS could use to satisfy the NACCAS ability-to-benefit policy. Under that policy, it was the responsibility of an accredited school to select an ability-to-benefit test which met the individual needs of the school, in accordance with the criteria put forth in the policy. (*See* Respondent's Exhibits 6 and 7.) The listing of approved tests spared accredited schools the burden of having to undertake a substantive analysis of potential tests to see if they met the criteria set out in the NACCAS policy. Among the tests listed as an approved standardized test was the Comprehensive Test of Basic Skills (CTBS) published by CTB/McGraw-Hill Publishing Co. Listed as an approved industry- based test was the Milady Cosmetology Student Aptitude Test. These tests were two of

the few listed that were translated into Spanish. Most of MHI's students use Spanish as their native language, and speak little or no English. During 1987, MHI began using the Spanish version of the Milady test, but found the test deficient since the translation from English to Spanish was poor, and many of the questions used were not culturally applicable to Puerto Rico. As a result, MHI began to consider using an alternative test. (*See* Respondent's Exhibit 15 and 38, Declaration and Statement by Israel Berrios, President, MHI.)

Since the CTBS test was one of the few translated into Spanish, and since it was on the NACCAS list of approved tests, MHI gave this test serious consideration. However, there are many CTBS tests. MHI became aware of this fact when, in response to its inquiries, CTB/McGraw-Hill sent it three versions of the CTBS test which were translated into Spanish -- CTBS Level B, CTBS Level C, and CTBS Level 1. After examining the three tests, Dr. Berrios decided to use CTBS Level 1 as the most appropriate for MHI's purposes since he considered it the most difficult of the three tests sent by CTB/McGraw-Hill. Dr. Berrios subsequently consulted with a member of the staff of NACCAS, who confirmed that the test was in fact

approved by NACCAS. MHI began using the CTBS Level 1 test in March of 1988.See footnote 2 *2* (*Id.*) MHI established 70% as the passing score.

In early 1990, SFAP conducted program reviews at three of MHI's locations. In its program review reports issued on August 17, 1990, SFAP questioned MHI's use of the CTBS Level 1 test as it is designed to measure the aptitude of third and fourth grade students, although, as stated in the final audit review determination, it could be used to establish that the test taker had a comprehension level at a higher grade. MHI took the position that the CTBS Level 1 test was the best available test for its students, as it was one of the few translated adequately into Spanish, and was approved by NACCAS as meeting its ability-to-benefit policy. Although the Level 1 test was designed for third and fourth grade students, Levels B and C, the other two CTB/McGraw-Hill tests available in Spanish, were not as advanced as the Level 1 test. This explanation seemed to satisfy SFAP as, by letters of March 12, 1991, SFAP's Program Review Specialist closed out this issue. However, when the final program review reports were issued in the late summer and fall of 1991, this issue reappeared.

Almost simultaneously with the program review, MHI was subjected to an OIG audit covering the same period as was covered by the program review. By letter to NACCAS, dated March 24, 1990, OIG questioned MHI's use of the CTBS Level 1 test. By letter dated June 7, 1990, Carol Cataldo, Executive Director, NACCAS, in response to the OIG inquiry, took the position that MHI's use if the CTBS Level 1 rest was inappropriate. However, MHI appealed that opinion to the full NACCAS Commission, which held a hearing in this matter on January 11, 1991.See footnote 3 *3* By letter of January 16, 1991, the full Commission found MHI in full compliance with the NACCAS ability-to-benefit policy. By letter of February 2, 1991, NACCAS informed OIG of its

determination. Remaining unconvinced, on September 13, 1991, OIG issued its audit report finding that MHI's use of the CTBS Level 1 test was a violation of ED's regulations. Almost two years after the OIG report was issued, on August 2, 1994, SFAP issued its final audit determination adopting the OIG conclusion that MHI was in violation of ED's ability-to-benefit

regulations. During the course of its discussions with MHI to resolve the OIG finding, SFAP became aware of MHI's use of a passing score of 70% for the CTBS Level 1 test. In its final audit determination, SFAP also questioned the use of this passing score, as it determined that such a score measured the reading level of a fifth grade student and the math level of a sixth grade student.

III.

In response to the OIG finding, MHI argues that its use of the CTBS Level 1 test was approved by NACCAS, and that, as a result, it was in full compliance with the law since, under 20 U.S.C. § 1091(d) and 34 C.F.R. § 600.11, the determination of whether its ability-to-benefit test was adequate was in the exclusive jurisdiction of the accrediting agency. SFAP argues, on the other hand, that under the statutes and regulations, MHI must demonstrate that the CTBS Level 1 test measured the capability of its students to benefit from the MHI training program; that, based on "common sense," a test designed to measure the reading and math levels of third and fourth grade students could not be used to measure whether students participating in the MHI "postsecondary program" could benefit from that program.

SFAP's reliance on "common sense" reminds me of the free advice often circulated among trial attorneys -- If your case is strong, argue the facts and the law; if your case is weak, argue the law; if you don't have a case, pound the table. Citing "common sense" in support of your case is like pounding the table -- it makes a lot of noise, and gets attention, but there's no substance. Under the plain meaning of 20 U.S.C. § 1091(d) in effect during the period covered by the review, it was the clear responsibility of the accrediting agency, NACCAS, to establish the criteria and standards to be used in determining what ability-to-benefit test was appropriate. And, to substitute the SFAP and OIG opinion for that of NACCAS and MHI would be the exercise of direction and control over NACCAS and MHI in clear violation of 20 U.S.C. §§ 1232a and 3403(b).See footnote 4 *4*

In its January 16, 1991, letter to MHI, the Chief Executive Officer of NACCAS stated as follows:

[T]he Commission has reached the conclusion *that MHI had not violated NACCAS's ability to benefit policy* when it used the CTBS, Level 1 test during the stated [February 1988 through July 1990] period. The evidence proffered by MHI in its pleadings and oral testimony persuaded the Commission that the school had acted responsibly and in good faith in attempting to comply with the NACCAS ability to benefit policy. Furthermore, the Commission found that MHI's decision to use the CTBS, Level 1 test was predicated on a good faith reading of the documents articulating the Commission's ability to benefit policy.

* * *

For the reasons set out above, NACCAS will forthwith advise the Inspector General of the United States Department of Education that NACCAS has made a final determination that *MHI did not act in contravention of the Commission's ability to benefit policy by using the CTBS, Level 1 test* during the stated period. [Italics and underlining added.]

By focusing on the "good faith in attempting" language underlined in the quotation above, SFAP contends that the letter did not actually approve MHI's use of the CTBS Level 1 test. Such arguments give lawyers a bad name. The clear meaning of the entire letter, read in total context, is that MHI acted in good faith and followed a reasonable course of action in using the CTBS Level 1 test. SFAP's focus on the "good faith attempt" language ignores the other two sentences in the letter where NACCAS specifically states that MHI was not in violation of the NACCAS ability-to-benefit policy. (*See also* Respondent's Exhibit 40, letter dated February 5, 1991, from Mark Gross, Chief Executive Officer, NACCAS, to John D'Angelo, Assistant Regional Inspector General, Region II, N.Y.) See footnote 5 *5*

SFAP further argues that, even if NACCAS approved MHI's use of the CTBS Level 1 test, it never approved of its choice of passing score. Neither CTB/McGraw-Hill nor NACCAS adopted or recommended a passing score. By default, that decision was left to MHI. Once again, 20 U.S.C. §§ 1232a and 3403(b) would prevent SFAP or OIG from substituting their judgements for an appropriate passing score for that of MHI. In *In Re Health Care Training Institute,* Docket No. 92-124-SP, U.S. Dep't of Educ. (Nov. 4, 1993) , certified by Secretary (Nov. 8, 1994), the accrediting institution delegated the decision concerning the establishment of a passing score on an ability-to-benefit test to its member institutions. The institution in question established a passing score lower than that recommended by the publisher. The administrative law judge determined that the language of 20 U.S.C. § 1091 (d)(3)(A) is "clear and unambiguous"; Congress directed that accrediting agencies establish the criteria to determine whether a student applicant possesses the necessary ability to benefit from a training program, and that directive extends to the establishment of cutoff scores. To paraphrase the judge, SFAP may have a legitimate concern; however, the source of the concern is with NACCAS, not MHI. While "common sense" may dictate that MHI's selection of the CTBS Level 1 test was inappropriate, and that its selection of a passing score compounded the problem, "its action was, nonetheless performed in conformance with the procedures adopted by its accrediting agency pursuant to 20 U.S.C. § 1091(d)(3)(A) and 34 C.F.R. § 668.7(b)." *Id.* at 4-5.See footnote 6 *6*

In support of its "common sense" argument, SFAP notes that the CTBS Level 1 test was developed to test the reading and math levels of third and fourth grade students, and cannot possibly be used for MHI's "postsecondary" program. SFAP's attorney seems to suggest that the fact that a program is "postsecondary" creates some intellectual expectations from participating students. However, an institution of postsecondary vocational education qualifies for Federal student aid simply if it admits students who are beyond the age of compulsory education and has the ability to benefit from the training offered as established by 34 C.F.R. § 600.11. *See* 34 C.F.R. §§ 600.2 and 600.6 (1989). Although in effect arguing that OIG and SFAP have the authority under the guise of an audit to second guess the decision of MHI and NACCAS that the use of the CTBS Level 1 test was appropriate, SFAP makes no attempt to define the proper ability-to-benefit standards for a school of cosmetology. In addition, it should be noted, that the other test used by MHI in 1987, and which no one from ED questioned, had some severe translation problems, and did not conform with established professional standards for industry-

developed tests. (*See* Respondent's Exhibit 35, Analysis of Cosmetology Student Aptitude Test and The CTBS Espanol, by Gabriel Cirino Gerena, Ph.D., pp. 3-4.) Although the CTBS Level 1 test was designed to measure the reading and math skills of third and fourth grade students, there

was some evidence that it could be adequate for admissions purposes to cosmetology programs for Spanish-speaking students. *Id.* at 6-7.

In conclusion, not only did MHI act in full conformity with appropriate legal standards which applied at the time, but also in a totally reasonable manner, given the lack of ability-to- benefit tests available in Spanish, given the problems it was having with the Milady test, and given that NACCAS listed the CTBS test as one which met its standards.

FINDINGS AND CONCLUSIONS

1. MHI has been accredited by NACCAS since 1980. NACCAS is a nationally- recognized accrediting agency for schools of cosmetology approved by the Secretary of Education.

2. From July 1, 1987, until March 1988, MHI used the Milady Cosmetology Student Aptitude Test to measure the ability of its student applicants to benefit from its training program. The test was approved during this period by NACCAS as satisfying its criteria for an approved ability-to-benefit test.

3. From March 1, 1988, to June 30, 1990, MHI used the CTBS Level 1, Espanol, test to measure the ability of its student applicants to benefit from its training program in cosmetology. MHI's use of this test was approved as meeting its criteria for use as an approved ability-to-benefit test.

4. MHI was in full compliance with 20 U.S.C. § 1091(d) and 34 C.F.R. §§ 600.11 and 600.7(b) (1989) during the 1987-88, 1988-89, and 1989-90 award years.

ORDER

ORDERED, that the finding by SFAP in its final audit report of August 23, 1994, concerning Respondent's use of the CTBS Level 1 test is vacated.

Date:September 19, 1995 Frank K. Krueger, Jr.
Administrative Judge

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 As part of its appeal of this determination, Respondent requested a "formal evidentiary, on-the-record, oral presentation" hearing. Although 34 C.F.R. Subpart H, which establishes the procedures governing audit appeals under the Federal student financial aid programs, does not provide for an evidentiary hearing, 34 C.F.R. § 668.116(g)(1) does provide that the hearing official may schedule oral argument if necessary to clarify the issues and the positions of the parties as put forth in their written submissions. The written record in this proceeding is thorough, and oral argument is not necessary to understand the issues and the positions of the parties.*

Footnote: 2 *2 Both SFAP and OIG assumed that MHI used the CTBS Level 1 test during the entire period covered by the audit. However, as Dr. Berrios's Declaration notes, the Milady Test was used throughout 1987. This clarification is made in a number of documents submitted by MHI to both SFAP and OIG during the course of the audit review. Both offices have essentially ignored this clarification. Given the unrebutted statements made by MHI that it did not use the CTBS Level 1 test until March 1988, I find no basis for SFAP's and OIG's refusal to accept MHI's assertions as fact.*

Footnote: 3 *3 SFAP suggests that NACCAS allowed this "appeal" in response to a lawsuit initiated by MHI after the Executive Director informed OIG of her position. Although MHI did initiate a lawsuit against NACCAS challenging Ms. Cataldo's position, and the case was stayed while the "appeal" to the full Commission was taken (see Respondent's Exhibits 28-30), the procedure of appearing before the full Commission to determine whether an institution was complying with NACCAS's ability-to-benefit policy was in accordance with established NACCAS policy. (See Respondent's Exhibits 31 and 42, letters dated November 30, 1990, and August 20, 1991, respectively, from Mark Gross, Chief Executive Officer, NACCAS, to John D'Angelo, Assistant Regional Inspector General for Audit, Region II, N.Y.)*

Footnote: 4 *4 Under In Re Webster Career College, Inc., Docket No. 91-39-SP, U.S. Dep't of Educ. (Decision of the Secretary, July 23, 1993), it was determined that ED has the authority to second guess an accrediting agency in matters dealing with the length of an academic year, as Congress has specifically delegated the authority to the Secretary under the Higher Education Act of 1965, as amended, to define an academic year. See 20 U.S.C. § 1088(d). Since the case at hand does not deal with such a specific grant of statutory authority to the Secretary, Webster is inapposite.*

Footnote: 5 *5 One could argue with some credibility that NACCAS did not have all of the necessary evidence before it when it reached its decision concerning MHI's use of the CTBS Level 1 test. While the MHI appeal was pending before the full NACCAS Commission, ED published a proposed list of approved ability-to-benefit tests pursuant to the Omnibus Budget Reconciliation Act vesting this authority in the Secretary of Education. See 55 Fed. Reg. 52160 (Dec.19, 1990). To add to the confusion which apparently existed during this period as to which test an institution could use, a CTBS Level "I" test appeared on the list. MHI argued to NACCAS that this was the CTBS Level 1 test that it had been using. Upon inquiry from NACCAS, CTB/McGraw-Hill, the publisher of the CTBS tests, stated that there was no Level I test. Efforts by NACCAS to get clarification from ED proved fruitless. It was only after NACCAS issued its decision concerning MHI's use of the Level 1 test that ED clarified the problem as being a typographical error, and the correct test was CTBS Level 4. However, even if NACCAS relied totally on ED's listing of the Level I test as approval of the Level 1 test, it was still, at the time in question, the legal responsibility of NACCAS to determine whether MHI was in conformance with its ability-to-benefit policy, not SFAP's or OIG's.*

Footnote: 6 *6 But cf. In Re Long Beach College of Business, Docket No. 92-132-SP , U.S. Dep't of Educ. at 3-4 (July 14, 1994), certified by Secretary (May 15, 1995) (judge suggests that the passing score established by the school was so inconsistent with the publisher's guidelines as to amount to a different test).*