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

In the Matter of

WAUKEGAN SCHOOL OF HAIR DESIGN,

Respondent.

Docket No. 96-66-SP

Student Financial Assistance Proceeding

PRCN: 93405061

Appearances:

Thomas J. Mullen, Esq., Winfield, Illinois, for Respondent.

S. Dawn Scaniffe, 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

I. Introduction:

On March 28, 1996, the Student Financial Assistance Programs (SFAP), U.S. Department of Education (ED), issued a final program review determination in which it found that the Respondent. Waukegan School of Hair Design, had violated three provisions of Title IV of the Higher Education Act of 1965, as amended, during award years 1991/92 and 1992193. By letter of May 13, 1996, Respondent appealed one of these findings. The amount of liability involved is $9,076.

II. Issue:

Respondent contracted with a community college to administer ability-to-benefit tests to its students. The college did not comply with the test publisher's requirements that test administrators be registered with the publisher and that test results be sent to the publisher. The issue is whether Respondent violated section 484(d) of Title IV, 20 U.S.C. § 1091(d) (Supp. 1996) by having its ability-to-benefit tests given by administrators who did not comply with all of the requirements of the test publisher.

III. Conclusion:

The statutory requirement is that ability-to-benefit tests be independently administered, and, under the facts of this case, I find that the tests were independently administered. There is no statutory or regulatory requirement that test administrators register with the test publisher or send test results to the publisher. Although ED has taken the position that schools should usually comply with all requirements imposed by the test publisher, I find it inappropriate to apply such an interpretation 6f the statute to the case at hand.

IV. Discussion:

Under section 484(d) of Title IV, a student applicant without a high school diploma or its equivalent who seeks to be

eligible for assistance under Title IV must take an "independently administered examination" approved by ED demonstrating that the student has the ability to benefit from the education or training offered at the school for which the applicant is seeking admission.1 During the period covered by the program review, Respondent contracted with the College of Lake County to perform the ability-to-benefit tests for its applicants. The community college is a degree granting institution and is part of the public system of community colleges for the State of Illinois. The college has no financial interest in Respondent other than the fact that it is getting paid to administer the tests. The test in question was the Wonderlic test, and the publisher required that all test administrators register with Wonderlic and send Wonderlic all test results. The college did not comply with these requirements. SFAP determined that the failure to comply was a violation of Title IV.

SFAP argues that the statute requires that schools comply with all requirements imposed by test publishers in order for the tests to be considered independently administered. SFAP relies on a statement appearing in the Federal Register along with a list of approved ability-to-benefit tests. That statement provides as follows:

The Secretary considers an examination to be independently administered if it is administered in accordance with the procedures specified by the test publisher and by an individually or organization that has no prior fiscal interest in the institution other than an arms-length arrangement to administer the examination, except that the Secretary considers degree-granting institutions that, as of the date of this notice, have in existence established testing centers that are independent of the admissions process, to be able to independently administer examinations.

55 Fed Reg. 52160 (Dec. 19, 1990). The Respondent, on the other hand, argues that institutions granting two or four year college degrees were not required to comply with all standards imposed by the publisher. In support of this argument Respondent relies on the language of the statement quoted above, as well as a 1994 Notice of Proposed Rulemaking (NPRM) which appears to exempt degree granting colleges from the requirement of complying with publisher requirements, so long as the tests are given at a testing or assessment center. 59 Fed. Reg. 42143 (Aug. 16,1994). SFAP counters by arguing that the NPRM relied on by the Respondent was not published until 1994. and that. although it may exempt a degree-granting college from complying with publisher requirements for its own applicants, it would not apply to applicants examined for another school such as the Respondent.

The 1990 Federal Register statement relied on by SFAP represents ED's interpretation of the requirements of section 484(d) and, as such, should be given deference. However, as a statement of general policy or legislative interpretation, rather than a legislative rule, it is does not have the force and effect of law. See Davis & Pierce, Administrative Law Treatise, §§ 6.2 & 6.3 (3d ed., 1994) (discussion of distinctions and legal significance of statements of general policy, interpretive rules, and legislative rules). Participating institutions may deviate from the requirements put forth in the interpretation without necessarily being in violation of the statute but, of course, they do so at their own risk and must be prepared to vigorously defend their positions. In fact the quoted language itself does not say that if an institution deviates from the requirements of the publisher in administering its ability-to-benefit tests that it will be in violation of the statute. Instead, the interpretation is worded in the positive and states that if an institution follows the requirements of the publisher, it will be considered in compliance; the issue of whether an institution will be in violation if it deviates from those requirements is not addressed. The quoted language, in effect, creates a "safe harbor," wherein participating schools always know that they will be considered in compliance if they follow ED's interpretation.

Under the circumstances of this case, I find that the Respondent was in compliance with the requirements of section 484(d) that its ability-to-benefit tests be independently administered, even though the test administrators did not comply with the requirements of the test publisher that they be registered with the publisher and that the test results be sent to the publisher. It is unclear what purpose these requirements serve and may have nothing to do with whether the testis independently administered. Indeed, in this case there can be little doubt that the tests were independently administered. Students applying for Respondent's program without a high school diploma were sent to the community college for testing. The community college has no ties with the Respondent other than a contract to perform these services. Under both the 1990 interpretive statement and the 1994 NPRM, it appears that degree-granting colleges are not required to follow publisher recommendations. Such an exemption appears to be a recognition by SFAP that degree-granting colleges are capable of independently administering their own ability-to-benefit tests. If such institutions can independently administer their own tests, a portion, they should be able to independently administer the test for another institution with which they have no affiliation.2

SFAP cites In re Indiana Barber/Stylist College, Docket No. 94-11- 1-SP, U.S. Dept. of Educ. (March 23, 1995), certified by Secretary (Aug. 25, 1995), in support of its position. In Indiana the judge, quoting from In re Long Beach College of Business, Docket No. 92-132-SP,U.S. Dept. of Educ. (July 14, 1994), certified by Secretary (May 15, 1995), at 4, stated that"[p]revious decisions of this tribunal have held that 'when an institution chooses to use the Wonderlic exam... this choice necessarily encompasses all of the procedures prescribed by Wonderlic." Slip op. at 6. As a general matter, I agree with that quotation. As indicated above, compliance with all of the procedural requirements imposed by a test publisher will provide a school with an assurance that SFAP will consider it in compliance. However, as in this case, there will be circumstances where failure to comply with publisher requirements will not put a school out of compliance with section 434(d). In Long Beach the judge recognized that such circumstances may exist, since he qualified the sentence quoted in Indiana as follows: "I find that without comprehensive evidence supporting the use of different procedures, [the respondent]must defer to the scoring guidelines established by Wonderlic." Thus, the judge in Long Beach recognized that there may be exceptions to the general interpretive rule that section 484(d)requires that participating schools follow the requirements of the test publisher. In Long Beach the school used a passing score lower than that recommended by the publisher. The judge held that the guidelines established by the publisher for scoring the exam was a component of them exam, and a deviation from the recommended passing score could be viewed as giving an exam other than that approved by the Secretary. The Indiana decision also cited In re Phillips College of Atlanta, Docket No. 91-96-SA, U.S. Dept. of Educ. (Feb. 28, 1994), at 28, n.20, in support of the general position that institutions are required to administer ability-to-benefit tests in accordance with the standards established by the publisher. However, the case provides very little in the way of substantive guidance for the case at hand, in that the problems identified in Phillips dealt with such deficiencies as missing tests and the admission of students who had not obtained passing scores.

SFAP also argues that, when the Secretary approves a test as satisfying the ability-to-benefit requirement of section 484(d), such approval necessarily involves all of the procedural components imposed by the test publisher. SFAP cites In re Salt Lake Community College, Docket No. 94-92-SP, U.S. Dept. of Educ. (March 1, 1995), certified by secretary (Aug. 15,1995), and In re Cerritos Community College, Docket No. 94-107-SP, U.S. Dept. of Educ. (Jan. 3, 1995), in support of this argument. However, neither of these cases provide much guidance since the circumstances of these cases were so different from the case before me. In both of these cases, the Secretary, when approving the tests in question, made it clear that approval involved the use of all parts of a test when the test had more than one part. In both of these cases, the participating institution used only one part of a multi-part test. In both cases the judge held that the use of only one part of a multi-part test did not constitute the use of a test approved by the Secretary.

In the case before me, the test used was approved by the Secretary. There is no allegation or suggestion by SFAP that the Respondent in any way altered the test or used a passing score other than that recommended by the publisher. Indeed, there is no allegation or suggestion that the test, as administered through the community college, was not independently administered; the only allegation is that the Respondent did not follow all of the procedures recommended by the publisher and that, ergo, it is in violation of the statute. As stated above, there is no support for this position other than the interpretive statement appearing in the Federal Register in 1990. In conclusion, I find that Respondent is not liable as alleged by SFAP.

Frank K Krueger, Jr.
Administrative Judge

Dated: August 29, 1996

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested to the following:

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1 Prior to 1991, there was no requirement that the ability-to-benefit test be independently administered. The regulations have never been modified to reflect the 1991 statutory change. See 34 C.F.R. ? 668.7(b) (1995).

2 The obvious purpose of requiring that ability-to-benefit tests be independently administered is to remove any temptation on the part of participating institutions to admit unqualified students in order to collect their tuition. Respondent's arrangement with a public community college probably accomplishes this purpose more effectively than having the school contract with its own independent administrators. Perhaps SFAP should be encouraging such arrangements.