IN THE MATTER OF PHILLIPS COLLEGE OF ATLANTA, Respondent. | Docket No. 91-96-SA | Student Financial Assistance Proceeding

DECISION

Appearances: Leslie H. Wiesenfelder, Esq., Dow, Lohnes Albertson for Phillips College of Atlanta.

Renee Brooker, Esq., Office of the General Counsel, for the Office of Student Financial Assistance Programs, United States Department of Education.

Before: John F. Cook, Chief Administrative Law Judge

I. PROCEDURAL BACKGROUND.

A Final Audit Determination (FAD) was issued by the Chief, Audit Review Branch, Division of Audit and Program Review, Office of Student Financial Assistance Programs (SFAP)See footnote 1 *1* of the U.S. Department of Education on September 23, 1991, to Phillips College of Atlanta (PCA or Phillips). PCA filed a request for review on November 13, 1991.

A Notice of Receipt of Request for Review and Prehearing Order was issued to the parties and the parties filed, and the tribunal granted, several motions to modify the briefing schedule. Thereafter, the parties filed briefs, exhibits, and a joint memorandum of stipulations of fact, stipulations of law, issues of fact, and issues of law. An oral argument took place on December 16, 1993.

II. ISSUES .See footnote 2 *2*

In accordance with 34 C.F.R. § 668.118 (b), is the final audit determination issued by the designated Department official supportable, in whole or in part?

1. Finding No. 1.

Was PCA ineligible to participate in the GSL Programs from July 1, 1987 to April 1, 1990?

a. Were PCA's admissions representatives actually "commissioned salespersons" who "promoted the availability" of GSLP and PLUS program loans to prospective or enrolled students, as defined by 34 C.F.R. § 682.200?

b. Can an institution be declared ineligible to participate in the GSL Programs during a previous time period under the procedures contained in 34 C.F.R. Part 668, Subpart H, which ineligibility was due to its failure to meet the statutory definition of an eligible institution, if that determination as to eligibility forms the basis for a final audit determination?

c. Under 34 C.F.R. § 668.116(e)(1), can "OTHER ED records and materials" be introduced after the 30 day period mentioned in § 668.116(e)(1)(v) if that evidence did not exist until after this 30 day period has expired?

2. Finding No. 2.

Did PCA admit students during the 1987-88 award year who did not demonstrate the ability to benefit from the program?

a. Does 34 C.F.R. § 600.11(b)(1) implicitly require that an institution must administer its ability to benefit tests according to the guidelines prescribed by the developer of the test?

b. Did PCA time students who took the Wonderlic Personnel Test (WPT) at 12 minutes?

Finding No. 3.

Did PCA admit a student during the 1987-88 award year who did not demonstrate the ability to benefit from the program in that she was allowed more time than is permitted for the administration of the WPT?

Finding No. 4.

a. Was PCA's disbursement of Pell Grant funds in two payment periods instead of three a violation of federal law?

b. Was PCA on the quarter system, or was it an institution without academic terms?

III. EXHIBITS.

A. SFAP'S EXHIBITS.

Ex. E-1. Inspector General Report on Review of Administration of Student Financial Assistance Programs at Phillips College, Atlanta Georgia, dated June, 1991. (20 pp.).

Ex. E-2. Final Audit Determination Letter, dated September 23, 1991, from Ethelene R. Hughey, Division of Audit and Program Review to Mr. Kenneth Humphrey. (10 pp.).

Ex. E-3. Request for Review of Final Audit Determination ACN 04-00018, from Leslie H. Wiesenfelder, Esq., dated November 11, 1991. (20 pp.).

Ex. E-4. Affidavit of Ronald Wesley Rhoads, former Financial Aid Director of Phillips College of Atlanta, dated November 7, 1991. (12 pp.).

Ex. E-5. Inspector General Workpapers Regarding Promotion of the Availability of the Guaranteed Student Loan Programs at PCA. (25 pp.).

Ex. E-6. Letter re fraud at Atlanta College of Medical and Dental Careers from J. Sedwick Sollers, III, Esq., King & Spaulding to Van Phillips, Office of Inspector General, dated January 27, 1992. (2 pp.).

Ex. E-7. Inspector General Workpapers Regarding Ability to Benefit Program at PCA. (13 pp.).

Ex. E-8. Inspector General Workpapers Regarding Student Financial Aid File Deficiencies, Payment Amounts and Periods. (29 pp.) .

B. RESPONDENT'S EXHIBITS.

Ex. R-1. Final Audit Determination.

Ex. R-2. OIG Draft Audit Report.

Ex. R-3. Affidavit of Ronald Wesley Rhoads.

Ex. R-4. AICS materials; excerpt from AICS Directory of Educational Institutions.

Ex. R-5. College's Ability to Benefit policies.

Ex. R-6. AICS Ability to Benefit Guidelines.

Ex. R-7. Collection of student records relating to Finding No. 2.

Ex. R-8. February 13, 1989 letter from E.F. Wonderlic & Associates, Inc. to Regional Inspector General for Audit, Atlanta Georgia; Wonderlic Personnel Test Manual.

Ex. R-9. Collection of student records relating to Finding No. 3.

Ex. R-10. Affidavit of Donovan Mack Woodside, Jr.

Ex. R-11. Affidavit of Benjamin F. McPherson.

Ex. R-12. Excerpts from OIG's workpapers.

Ex. R-13. Federal Register Notice dated February 5, 1971.

Ex. R-14. Collection of SFAP documentation relating to nonstandard term institutions.

Ex. R-15. Student records; excerpt from Phillips Colleges, Inc.'s Financial Aid Manual.

Ex. R-16. Summary list of students cleared by Phillips College of Atlanta under the ability to benefit finding and the grounds therefor.

Ex. R-17. Supplemental Declaration of Ernest C. Canellos.

Ex. R-18. Letter dated March 11, 1992 from the law firm of King & Spalding to the Regional Inspector General for Investigations, Atlanta, Georgia.

Ex. R-19. SFAP's Motion to Strike Exhibits and Limit Proceedings in the Matter of Hellenic College, Docket No. 91-77SP .

Ex. R-20. Opposition of Hellenic College to SFAP's Motion to Strike Exhibits and Limit Proceedings in the Matter of Hellenic College, Docket No. 91-77-SP.

C. RULINGS AS TO RECEIPT OF EXHIBITS IN EVIDENCE.

1. SFAP'S OBJECTIONS TO EXHIBITS.

Except as noted below, SFAP has no objection to the authenticity or admissibility of Ex. R-1-2 and R-4-14. These exhibits will be accepted into evidence.

At page 9 of its reply brief, SFAP states that "the documents that PCA submits on behalf of [[student name], [student name], [student name], and [student name]] is [sic] untimely submitted under 34 CFR 668.116 and cannot be admitted by this Tribunal." The documents

contained in Ex. R-9 were submitted with PCA's request for review and therefore were timely submitted under § 668.116(e)(1)(ii). The documents contained at Ex. R-12-8-10 and Ex. R-15-2 are "ED audit reports and audit work papers for audits performed by the United States Education Department Office of Inspector General." § 668.116(e)(1)(i). Since these documents were submitted with PCA's initial brief, they were timely submitted in accordance with § 668.116(e)(2).

SFAP suggests that this tribunal accord no weight to the affidavit of Ronald Rhoads, contained in Ex. R-3. The weight to be accorded the Rhoads affidavit will be discussed in the opinion.

SFAP objects to the admissibility of Ex. R-15, on the basis that these documents were not timely submitted by PCA. Ex. R-15-2 is an "ED audit report[] and audit work paper E] for audits performed by the United States Education Department Office of Inspector General" under § 668.116(e)(1)(i). Since this document was submitted with PCA's initial brief, it was timely submitted in accordance with § 668.116(e)(2). Both in its briefs and at the oral argument, counsel for PCA stated that Ex. R-15-5-7 "are documents from the IG work papers relating to finding number four." Tr. at 56; Resp. Initial Br. at 43 (n.20), 62-63. As such, they also were "ED audit reports and audit work papers for audits performed by the United States Education Department Office of Inspector General" under § 668.116(e)(1)(i). Since these documents were also submitted with PCA's initial brief, they were timely submitted in accordance with § 668.116(e)(2). The documents contained at Ex. R-15-1 and Ex. R-15-3-4 relate to students for whom SFAP has withdrawn any claims for liability. Therefore, these exhibits are now moot.

Additionally, SFAP objects to Ex. R-16 and the contents of the chart, on the basis that it reflects the conclusions of counsel for PCA characterizing the evidence against the College and therefore is not evidence, but merely argument. This exhibit is a summary chart of PCA's evidence and exhibit references. Ex. R-16 will be admitted into evidence.

2. RESPONDENT'S OBJECTIONS TO EXHIBITS.

PCA does not object to the authenticity or admissibility of the following SFAP Exhibits subject to the express caveats that (l) the College is not agreeing that they are admissible for the truth of the statements made therein but only as evidence that the statements were made, and (2) the College is objecting to all handwritten notations and marginalia (except signatures).

Ex. E-1-1-20
Ex. E-2-1-10
Ex. E-5-18-20
Ex. E-7-1-9
Ex. E-8-l-10

At the oral argument, SFAP replaced Ex. E-5-18-20 and E-7-69 with pages that were identical in every way, except that they did not contain the handwritten notations and marginalia. Tr. at 6-7. All of these exhibits are accepted into evidence.

PCA admits the authenticity and admissibility of the following exhibits:

Ex. E-3-1-20
Ex. E-4-1-12
Ex. E-5-3
Ex. E-5-6-9
Ex. E-5-13-15

All of these exhibits are accepted into evidence.

PCA admits to the authenticity but not the admissibility of Ex. E-5-1. Ex. E-5-1 will be accepted into evidence, but is considered to have little probative value because it is not dated.

PCA objects to the admissibility and authenticity of the handwritten notations and marginalia on the following SFAP exhibits:

Ex. E-5-12
Ex. E-5-16-17
Ex. E-7-10-13
Ex. E-8-11-15

At the oral argument, SFAP replaced Ex. E-5-12, E-5-16-17, E-710-13, E-8-12-13, and E-8-15 with pages that were identical in every way, except that they did not contain the handwritten notations and marginalia. The tribunal will accord no weight to the

handwritten notations and marginalia contained at Ex. E-8-11, 14. All of these exhibits are accepted into evidence.

PCA objects to Ex. E-5-2, E-5-4, E-5-5, E-5-10, and E-5-ll in their entirety. These exhibits will be accepted into evidence, although the fact that they do not contain a date on their face may affect their probative value.

PCA objects to Ex. E-5-16 as irrelevant. As will be discussed in the opinion, this exhibit is relevant to the decision.
Therefore, Ex. E-5-16 is accepted into evidence.

PCA objects to Ex. E-5-21-23 and E-5-24-25. Additionally, PCA objects to Ex. E-8-16-29. At the oral argument, counsel for SFAP indicated that SFAP is withdrawing Ex. E-5-21-25 and E-8-1629. Therefore, these exhibits will not be accepted into evidence.

PCA has objected to the letter contained in Ex. E-6 on the basis that it was not timely submitted. For the reasons discussed infra in footnote 12, the tribunal agrees. Therefore, Ex. E-6 will not be accepted into evidence.

IV. FINDINGS OF FACT AND OPINION.

A. STIPULATIONS OF FACT.See footnote 3 *3*

1. The Department's Office of Inspector General for Region IV ("IG") conducted an Audit of Administration of Federal Student Financial Assistance Programs at the College. Fieldwork was conducted from July 25, 1990 through August 9, 1990. (Ex. E-15).See footnote 4 *4*

2. The Department's Division of Audit and Program Review issued a Final Audit Determination on September 23, 1991, with respect to the issues addressed in the audit. (Ex. E-2).

3. By letter dated November 12, 1991, The College appealed the Final Audit Determination and requested a hearing on the record. (Ex. E-3).

4. In Finding No. 1 of the September 23, 1991 Final Audit Determination (Ex. R-1) issued by OSFA for the 1987-88, 1988-89 and 1989-90 award years, OSFA contends that the College was ineligible to participate in the Guaranteed Student Loan and PLUS Programs from July 1, 1987 to April 1, 1990 because it employed commissioned salespersons who allegedly "promoted the availability" of Guaranteed Student Loans and PLUS Program loans (hereinafter collectively referred to as "GSLs"). (Ex. R-1-3).

5. AICS is the accrediting agency for a number of schools owned by Phillips Colleges, Inc., including Phillips College of Atlanta. (Ex. R-4-12-13).

6. The OIG workpapers state:

The [Institutional Model] application was a means to collect all of the information needed to complete the subsequent paperwork, enrollment agreement, and Federal SFA applications, including applications for Guaranteed Student Loan/Stafford loans. Phillips college has since stopped the practice of allowing Admissions Representatives to complete the Institutional Model Application.

(Ex. R-12-7).

7. OSFA does not question the College's eligibility to participate in the GSL program prior to July 1, 1987 or after April 1, 1990, but rather claims it was ineligible during the interim. (Ex. R-1-3).

8. Exhibit 6 is a January 27, 1992 letter from J. Sedwick Sollers III, Esquire, of the law

firm of King &Spalding to the OIG in Region IV, Atlanta, Georgia, in which, as counsel for Phillips Colleges, Inc. ("PCI"), PCI was "voluntarily disclos(ing) allegations of fraud at Atlanta College of Medical and Dental Schools." (Ex. E-6).

9. The Final Audit Determination states that only $24,686 of the $59,994 repayment liability is sought under Finding No. 2 because the balance of $35,258 is sought under Finding No. 1. (Ex. R-1-5).

10. OSFA has disallowed $32,702 in Title IV aid awarded to 10 students on various specified grounds. The Final Audit Determination states that only $15,093 of the $32,702 repayment liability is sought under Finding No. 3 because the balance of $17,609 is sought under finding No. 1. (Ex. R-1-6-7).

11. OSFA claimed that [student name] received $350 more in Pell Grant funds than was correct. The College does not dispute this conclusion.

12. [student name] was selected for verification; however, since the College did not obtain any documentation to verify her income, the College does not dispute OSFA's conclusion that she was overawarded $1,050. 34 C.F.R. § 668.54(b)(2).

13. The College cannot dispute the conclusion of OSFA that the disbursement of $1,692.96 to [student name] was incorrect.

14. Because the College no longer can locate the ATB test for [student name], and because his Enrollment Agreement reflecting his score is unsigned by anyone, the College cannot dispute OSFA's claim that $899 was improperly awarded to him.

15. In Finding No. 4, OSFA asserted that the College "improperly disbursed Pell Grants to students who were not fulltime students and disbursed Pell Grants in two disbursements when program regulations required three disbursements." (Ex. R-1-8).

16. In fact, in response to a question posed to OSFA's Region V as to whether a school may be allowed to retroactively formalize in writing its definition of academic year for GSL purposes and reconstruct student awards to establish that all GSL applications were certified properly (Ex. R-14-9), Region V responded on October 5, 1988 as follows:

A school may change its definition of an academic year, assuming it complies with the regulatory definition cited above. However, the new definition may not be applied retrospectively. Therefore, a school may not retrospectively calculate student awards using a new definition of academic year in order to eliminate an institutional liability.

(Ex. R-14-10).

17. Effective July 1, 1991, at the insistence of OSFA, a change to operate a three-payment system was made by all schools owned by Phillips Colleges, Inc. See Ex. R-10-3-5 and Ex. R-11.

18. Both of the catalogs OSFA uses as exhibits, i.e., the 1988 and 1989-90 catalogs, expressly refer to the College's "Mini-Quarters". See Ex. E-8-15 and E-8-13.

19. OSFA routinely provides guidance to its own employees as well as to the institutions who participate in one or more Title IV HEA programs and the general public.

20. Under Finding No. 4, the Final Audit Determination also concluded that the College "improperly disbursed Pell Grant funds to students who were not full time students. . ." (Ex. R-1-8).

21. The February 1991 Draft Audit Report states that "[t]hroughout our audit period, Phillips employed a system of using 5-week Mini-Quarters to enroll students prior to the start of regular quarters. Phillips allowed students to enroll in a 5-week Mini-Quarter in which they attended each class for 2 hours a day. The students only enrolled for two classes, totaling 8 credit hours, during the Mini-Quarter. Phillips catalog for 1988 states, 'During a Mini-Quarter, eight (8) credit hours is considered full time.'" (Ex. R-2-16).

B. OPINION AND ADDITIONAL FINDINGS OF FACT.

1. Admissions Representatives.

SFAP claims that PCA's admissions representatives were actually commissioned salespersons who promoted the availability of the Guaranteed Student Loan Programs,See footnote 5 *5* thereby rendering the College ineligible during the audit period. SFAP Initial Br. at 3-5; SFAP Reply Br. at 3-5.

PCA argues that commissioned salespersons employed by PCA at no time promoted the availability of Guaranteed Student Loans. According to the College, "promoting the availability" is a term defined by regulation. PCA claims that its commissioned salespersons were not "promoting the availability" of Guaranteed Student Loans and that Finding No. 1 is based on an

illegal and unenforceable expansion of the term "promoting the availability". In addition, PCA claims that Finding No. 1 violates both the College's right to due process and the General Education Provisions Act (GEPA). The College further contends that SFAP's finding is the equivalent of an institutional eligibility termination that can only legally be accomplished through a limitation, suspension or termination action under Subpart G. Furthermore, PCA insists that AICS standards are irrelevant to any issue in this case. Resp. Initial Br. at 3-38. PCA also argues that SFAP has misconstrued Ex. E-6 and that this exhibit is inadmissible under SFAP's stated position regarding the rules governing this proceeding. As a result, according to the College, the weight to be given the Rhoads affidavit is unaffected by Ex. E-6. Resp. Reply Br. at 5-24.

Both parties agree that the relevant regulation applicable to this finding is 34 C.F.R. § 682.200. SFAP Initial Br. at 3; SFAP Reply Br. at 3; Resp. Initial Br. at 3-4; Resp. Reply Br. at 5. During the audit years in question, the regulation stated, in pertinent part:

School:

. . . .

(3) A school that employs or uses commissioned salespersons to promote the availability of the GSLP or the PLUS Program is not eligible to participate in those programs. For this purpose

(i) A "commissioned salesperson" is one who receives compensation in any form or amount that is related to, or calculated on the basis of, student applications for enrollment, student enrollments, or student acceptances for enrollment; and

(ii) "Promote the availability" means providing prospective or enrolled students with application forms, names of eligible lenders, or other information designed to encourage persons to finance their education with a GSLP or PLUS Program loan. This term does not include providing general financial aid information to prospective or enrolled students.

34 C.F.R. § 682.200(b) (1987-1989).

The regulation states clearly that a school that uses or employs commissioned salespersons to promote the availability of the GSLP or PLUS programs is not eligible to participate in the GSLP or PLUS programs. The definition of "commissioned salesperson" is quite broad, applying to anyone who receives compensation in any form or amount that is related to or calculated on the basis of student applications for enrollment, student enrollments, or student acceptances for enrollment. The definition of "promote the availability" is similarly broad, providing several examples of prohibited conduct, but also prohibiting " providing . . . other information designed to encourage persons to finance their education with a GSLP or PLUS Program loan." Thus, other than "providing general financial aid information to prospective or enrolled students", a school cannot provide any information designed to encourage persons to finance their education with a GSLP or PLUS Program loan. This prohibited conduct includes, but is not limited to, providing prospective or enrolled students with application forms or names of eligible lenders.

The OIG audit stated as follows:

Phillips was ineligible to participate in the GSLP until April 1, 1990, because until that time their admissions representatives, who were commissioned salespersons, promoted the availability of GSLP student loans. Such promotion included completing the students'

Determination of Dependency Status and the Institutional Model Application,See footnote 6 *6* and collecting the information needed to complete prospective students' applications for Federal financial aid. Such practices were in violation of Federal regulations and accrediting agency standards. Phillips' students received over $2.8 million in SLS and GSLP funds during the period these promotion practices occurred.

. . .

Promotion of the availability of the GSLP by commissioned admission representatives invalidated Phillips' eligibility to participate in the GSLP. Because Phillips was not eligible to participate, its students were not eligible to receive $623,384 in SLS and $2,218,985 in GSLP loans guaranteed for the period July 1, 1987 through September 30, 1989. In addition, the respective loans the students received were not eligible for the applicable interest and special allowance paid by ED.

Ex. E-1-7-8 (footnote added).

However, PCA argues that institutional eligibility cannot be adjudicated under the procedures contained in 34 C.F.R., Part 668, Subpart H, and can be adjudicated only under the procedures contained in Subpart G of that same part. The tribunal must disagree. 34 C.F.R. § 668.111(c)(1) states, in pertinent part, as follows:

(c) This subpart [Subpart H] does not apply to proceedings governed by Subpart G of this part or to a determination that

(1) An institution fails to meet the applicable statutory definition set forth in sections 435, 481, or 1201 of the HEA, except to the extent that such a determination forms the basis of a final audit determination or a final program review determination;

34 C.F.R. § 668.111(c)(1) (emphasis added).

Section 435 of the HEA is contained in the U.S. Code at 20 U.S.C. § 1085. That statute defines the term "eligible institution" and, among other things, states the following:

Subject to subsection (n), the term "eligible institution" means

(A) an institution of higher education;

(B) a vocational school; or

(C) with respect to students who are nationals of the United States, an institution outside the United States which is comparable to an institution

of higher education or to a vocational school and which has been approved by the Secretary for the purpose of this part,

except that such term does not include any such institution or school which employs or uses commissioned salesmen to promote the availability of any loan program described in section 1078(a)(1). 1078-1, or 1078-2 of this title at that institution or school.

20 U.S.C. § 1085(a)(1) (1988) (emphasis added).See footnote 7 *7* 20 U.S.C. §§ 1078(a)(1), 1078-1, and 1078-2 describe the GSLP and PLUS programs.

Therefore, under 34 C.F.R. § 668.111(c)(1), Subpart H does not apply to a determination that an institution fails to meet the statutory definition of an eligible institution set forth in 2G U.S.C. § 1085, except to the extent that such a determination forms the basis of a final audit determination. Conversely, Subpart H does apply to a final audit determination that an institution fails to meet the statutory definition of an eligible institution because it employs or uses commissioned salesmen to promote the availability of GSLP or PLUS program loans. Such is the case here, since that determination as to eligibility forms the basis for the final audit determination in Finding No. 1.

In making this determination, no action is being taken such as is contemplated in a termination proceeding under Subpart G. Rather it is a determination of eligibility only for the purpose of deciding whether or not the institution validly participated in GSL, PLUS, and SLS Programs and thereby has an audit liability.

As a result, Subpart H is properly applicable to this case, and PCA has the ultimate burden of proving that the disallowed expenditures were proper or that the institution complied with program requirements.See footnote 8 *8* In accordance with 20 U.S.C. § 1085, the College must demonstrate that it did not employ or use commissioned salesmen to promote the availability of GSLP or PLUS program loans.

In a February 20, 1990 memorandum to presidents and directors of AICS-Accredited

[Phillips] CollegesSee footnote 9 *9* , Mr. James McEllhiney, Director of Academic Affairs, Phillips Colleges, Inc., stated that "it has been determined that two steps of the current One-Stop Shopping process are clearly in violation of the AICS Accreditation Criteria." Ex. E-5-16.See footnote 10 *10* Mr. McEllhiney then advised the presidents and directors:

Two changes must be made in the One-Stop Shopping process:

1. Admissions representatives may no longer participate in the completion of the model aid application and the gathering of financial data used to determine financial aid awards.

2. Admissions representatives may no longer report back the results of the preliminary award determination to the prospective student.

Ex. E-5-16 (emphasis in original). This memorandum demonstrates that, at least until February 20, 1990, admissions representatives at Phillips Colleges were participating in the completion of the model aid application, gathering financial data in order to determine financial aid awards, and reporting the results of the preliminary award determination back to prospective students.

Regarding the AICS Accreditation Criteria that Mr. McEllhiney had stated that Phillips Colleges were in violation of, he continued:

The elements of the Accreditation Criteria which impact these activities are those which prohibit "an employee who receives a commission and/or an employee who is also involved in recruiting . . . from collection of data needed to make the (financial aid) determination."

Ex. E-5-16. This language suggests that Phillips Colleges admission representatives were receiving commissions, although the "and/or" language indicates that they were at least involved in recruiting. In any event, they were performing at least one of these roles while also collecting data needed to make the financial aid determination.

Mr. McEllhiney further stated:

We are not suggesting that gathering model application data and determining a preliminary financial aid award be discontinued. This is an integral part of our successful One-Stop Shopping procedure. Rather, we are saying that gathering the model application data and communicating the Preliminary financial aid award must be done by a salaried employee (with no commission or bonuses based on enrollments) who is not directly involved in recruiting.

Ex. E-5-16 (emphasis added). This statement indicates that commissioned salespersons were, in fact, gathering the model application data and communicating the preliminary financial aid award to prospective students. All of these statements were contained in an internal memorandum of Phillips Colleges, Inc.

Other exhibits contained in Ex. E-5 confirm the statements made in the McEllhiney memorandum as well as the descriptions contained in the OIG audit and the FAD. The statements in the November 6, 1987 Financial Aid Manual for Phillips Colleges, Inc. reveal that admissions representatives completed application forms for prospective students. For example, within the section entitled "Enrollment Procedures", the Financial Aid Manual stated:

In conversations prior to the student's initial interview with the Admissions Office, the Admissions Representative requests that the prospective student bring certain relevant items (tax forms. W-2's, etc.) which are essential to the calculation of eligibility for federal financial aid.

During the admissions interview, the prospective student is assisted in completing the Institutional Model Application by the Admission Representatives. This application and related documents collect all the information needed to complete the subsequent paperwork, enrollment agreement, and federal aid applications.

While the prospective student is in the testing process, the Admissions Representative gives the Financial Aid Office the completed paperwork. The Financial Aid Office then computes the student's eligibility for federal financial aid and prepares a tentative method by which the student can meet the cost of tuition and books. This method includes any federal funds for which the student is eligible and/or interest free installment payments to the college.

The Admissions Representative then obtains the results of the testing. At this point a final determination of the student's program can be made and the method by which the student can pay for the pro-tram may be presented. The enrollment agreement and the requests for transcripts are signed at this time. All completed forms are then given to the financial aid office.

While the Admissions Representative is concluding this portion of the interview, the Financial Aid Office is completing the necessary paperwork in preparation for financial counseling.

Ex. E-5-12 (emphasis added). The charts defining the responsibilities of the admissions representatives and the financial aid office, contained at Ex. E-5-14-15, further confirm that the commissioned admissions representatives were intricately involved in the promotion of the availability of GSLP and PLUS program loans.

This procedure employed by Phillips Colleges such as PCA was in direct violation of the prohibition in § 682.200 against using commissioned salespersons to promote the availability of GSLP and PLUS program loans. As the evidence discussed supra indicated, the College used commissioned salespersons, which were called "admissions representatives". See Ex. E-5-16. Moreover, these commissioned salespersons promoted the availability of GSLP program loans by providing prospective students with application forms. Ex. E-5-16; Ex. E-5-12-15; Ex. E-5-7-9.See footnote 11 *11*

It appears evident that the commissioned salespersons were doing much more to promote the availability of GSLP program loans than simply "providing general financial aid information to prospective or enrolled students", as allowed by 34 C.F.R. § 682.200, although the boundary between this permissible activity and all other prohibited activities is not entirely clear. Nonetheless, there can be little doubt, on this record, that PCA was violating the explicit prohibition in § 682.200 against providing prospective students with application forms. In addition, many of the activities of PCA's Admissions Representatives appear "designed to encourage persons to finance their education with a GSLP or PLUS Program loan." § 682.200 ("the Admissions Representative requests that the prospective student bring certain relevant items (tax forms, W-2's, etc.) which are essential to the calculation of eligibility for federal financial aid"; "The Admissions Representative then obtains the results of the testing. At this point a final determination of the student's program can be made and the method by which the student can pay for the program may be presented"). Ex. E-5-1215. See also Ex. E-5-16; Ex. E-5-7-9. These activities go well beyond the permissible activity of "providing general financial aid information to prospective or enrolled students". PCA was impermissibly providing specific financial aid information to prospective students.

PCA, which has the ultimate burden of persuasion in this Subpart H proceeding, has offered only the affidavit of Mr. Ronald Wesley Rhoads to refute the evidence offered by SFAP. Ex. R-3-1-8; Ex. E-4-1-8. Although the tribunal rejects, on procedural grounds, SFAP's attempt

to discredit Mr. Rhoads,See footnote 12 *12* the tribunal does not find this affidavit to be persuasive because it

conflicts with all of the other evidence relating to this finding. In the affidavit, Mr. Rhoads states as follows:

I have carefully reviewed the September 23, 1991 letter to Kenneth Humphrey, President of the College, and specifically the finding related to commissioned sales persons. Given my role as an Admissions Representative of the College, my roles later as its Financial Aid Director and Director of Student Services, and my personal knowledge of the College's policies, I can and do state that during the entirety of the time covered by the audit conducted by the Office of Inspector General of the U.S. Department of Education, the College's Admissions Representatives did not provide prospective or enrolled students with application forms, names of eligible lenders or other information designed to Encourage prospective students to finance their education with a Guaranteed Student loan or PLUS Program loan.

Ex. R-3-4; Ex. E-4-4.

Mr. Rhoads further stated:

The Admissions Representative did not then or at any time give the student any financial aid application forms to fill out. . . . Admissions Representatives could and would say only that financial aid was available to those who qualified and that it was the Financial Aid Office which would determine who was qualified and for what.

Ex. R-3-6; Ex. E-4-6.

These statements directly contradict the evidence outlined supra and contained in the College's own corporate policy statements and internal memoranda. Moreover, despite the voluminous nature of PCA's submissions, the College has provided no affidavits or evidence whatsoever other than the affidavit supplied by Mr. Rhoads. Therefore, PCA has not satisfied its burden of persuasion on this issue.

PCA also argues that Finding 1 is based upon an illegal and unenforceable expansion of the term "promoting the availability". The College cites SFAP's February 1991 Draft Audit Report, where SFAP states:

The 1987-88 "Questions and Answers" published by the Region IV Office of Student Financial Assistance (OSFA) expanded the definition of "promote the availability." The OSFA stated, "We have determined that this prohibition extends to providing need analysis documents to students and to assisting students or their families in completing those forms."

Ex. R-2-8. PCA then notes that the OIG workpapers referred to this "expanded" definition of "promoting the availability" as the basis of Finding 1. These workpapers stated as follows:

DOCUMENTATION OF THE PROMOTION OF THE AVAILABILITY OF THE GSLP CRITERIA VIOLATED BY PHILLIPS COLLEGE

PURPOSE: To display the criteria concerning the promotion of the availability of the GSLP that was violated by Phillips College

SOURCE: 1987-1988 Questions and Answers published by the Region IV Office of Student Financial Assistance pages 48 and 49

SCOPE: Obtained the pertinent Questions and Answers from Cannon Myers, Program Specialist, via John Moore ED OIG Auditor

CONCLUSION: According to Region IV, OSFA promotion of the availability of the GSLP includes providing needs analysis documents to students and to assisting students or their families in completing those forms. Phillips' admission representatives violated this criteria by completing the Institutional Model Application and Determination of Dependency Status, therefore making Phillips College ineligible to participate in the GSLP. The admissions representatives also violated accrediting agency criteria.

Ex. R-12-1.

As stated earlier, the tribunal agrees that § 682.200 could have been drafted better. The regulation states that the only permissible activity for commissioned salespersons is to "provid[e] general financial aid information to prospective or enrolled students." It is not entirely clear as to what constitutes "providing general financial aid information". Certainly, informing prospective students that financial aid is available would be allowed. How much more, if anything, that these commissioned salespersons can do, without constituting "promoting the availability" of GSLP program loans, is questionable. Nevertheless, the regulation is very explicit in its prohibition of certain activities. One of these expressly prohibited activities is "providing prospective or enrolled students with application forms." This prohibition uses the words "application forms" and does not limit itself to any specific types of federal application forms. The plain language of the regulation prohibits "providing prospective or enrolled students with application forms." This applies to any application forms. The evidence discussed supra illustrates that PCA was violating this express prohibition. In addition, the intent of the regulation is evident in its catchall prohibition against providing "other information designed to encourage persons to finance their education with a GSLP or PLUS Program loan."

Thus, while the line between permissible "providing general financial aid information" and all other prohibited activities is unclear, it is clear that the activities of PCA's commissioned salespersons in collecting tax forms, W-2s, and other documents necessary to collect all the information needed to complete the subsequent paperwork, enrollment agreement, and federal aid applications; completing the Independent Model Application; and presenting "the method by

which the student can pay for the program", violated the prohibition against promoting the availability of GSLP and PLUS program loans contained in § 682.200. See Ex. E-5-12-15; Ex. E-5-16; Ex. E-5-7-9. The College cannot argue that these activities constituted "providing general financial aid information."See footnote 13 *13* In other words, while the regulation may contain a grey area, the activities of PCA's commissioned salespersons were well within the sphere of prohibited activities.

This finding does not depend upon any "expanded" definition of the phrase "promoting the availability", but rests solely upon the language of § 682.200. The tribunal must make the ultimate determination as to whether the activities of PCA's commissioned salespersons violated the prohibition against "promoting the availability" found in § 682.200. Therefore, whether or not SFAP "expanded" the definition of the regulation is irrelevant, because the tribunal holds that Finding 1 is based upon the plain language of the regulation, as written, and that PCA has violated that regulation, as written.See footnote 14 *14* Accordingly, the College's due process and GEPA arguments

concerning the "secret" and "unpublished" nature of the prohibitions contained in § 682.200 are rejected.

In conclusion, PCA has not satisfied its burden of persuasion on this issue. Therefore, the tribunal upholds Finding 1 of the FAD. PCA violated 34 C.F.R. § 682.200 because its commissioned salespersons promoted the availability of GSLP and PLUS program loans.

The FAD requests PCA to refund $2,842,369 to lenders as follows: $2,218,985 in GSLP loans and $623,384 in SLS loans. The method and calculations used by SFAP to determine these amounts are contained at Ex. E-5-18-20. PCA must refund these amounts as requested in the FAD less credits as described in the Order set forth in Section VII of this decision, infra. PCA also must determine the improper loan amount from October 1, 1989 to April 1, 1990 and refund this amount to lenders as well. The College also must refund to the Department of Education all interest and special allowance paid on these loans.

2. Ability-to-benefit tests.

SFAP argues that PCA violated the ability-to-benefit regulations. SFAP Initial Br. at 5-6; SFAP Reply Br. at 5-7.

PCA claims that it appropriately determined the ability of its students to benefit from the program in which the students enrolled. PCA argues that SFAP has created categories of deficiencies that do not exist in the statute or regulations and are both legally and factually unsupported. Resp. Initial Br. at 38-49; Resp. Reply Br. at 24-25.

34 C.F.R. Part 600 contains regulations concerning institutional eligibility under the Higher Education Act of 1965, as amended (HEA). This includes the HEA, Title IV programs. § 600.2 stated that an "eligible institution" includes:

(a) An institution of higher education, as defined in § 600.4;

(b) A proprietary institution of higher education. as defined in § 600.5;

(c) A postsecondary vocational institution, as defined in § 600.6; and

(d) A vocational school, as defined in § 600.7.

34 C.F.R. § 600.2 (1988-1989) (emphasis added).See footnote 15 *15* Therefore, in order to be an "eligible institution" an institution must be one of these types of schools and satisfy the requirements of the regulation referred to for that particular type of institution.

During the audit period, PCA was a proprietary institution of higher education.See footnote 16 *16* The definition of a proprietary institution of higher education is contained in § 600.5. § 600.5(b) stated as follows:

(1) A proprietary institution that admits as regular students persons who do not have a high school diploma or its recognized equivalent and who are beyond the age of compulsory school attendance in the State in which the institution is located, shall consistently apply standards and procedures for determining, in accordance with § 600.11, whether these students have the ability to benefit from the education or training it offers.

(2) An institution must be able to demonstrate, upon request of the Secretary. that each regular student that it admitted who did not have a high school diploma or its recognized equivalent satisfied the institution's standards under paragraph (b)(1) of this section.

34 C.F.R. § 600.5(b) (1988-1989) (emphasis added).See footnote 17 *17* Therefore, a proprietary institution that

admits ability-to-benefit students must comply with the standards and procedures contained in § 600.11 and must be able to demonstrate to the Secretary that it has done so for each ability-to-benefit student that it has admitted.

§ 600.11 requires institutions that admit as regular students persons who do not have a high school diploma or its equivalent to determine, at the time of admission, whether those students have the ability to benefit from the education or training that the institution offers. Institutions can determine this in one of three ways, to wit:

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

(2) Determining that the person has the capability to successfully complete a GED preparation program by the end of the first year of the course of study or prior to the student's certification or graduation from the program of study, whichever is earlier) or

(3) Placing the person, after counseling or failure to meet the institution's admission's [sic] testing requirement, in an institutionally prescribed program or course of remedial or developmental education not to exceed one academic year or its equivalent.

34 C.F.R. § 600.11(b)(1)-(3) (1988-1989).See footnote 18 *18*

Accordingly, proprietary institutions can satisfy the ability-to-benefit requirements in any of three different ways. Nonetheless, whichever method the institution chooses, it "must be able to demonstrate, upon request of the Secretary, that each regular student that it admitted who did not have a high school diploma or its recognized equivalent satisfied the institution's [ability-to-benefit] standards . . . ." § 600.5(b)(2).

Since PCA chose to administer an ability-to-benefit test to students who did not have a high school diploma or its equivalentSee footnote 19 *19* , the College must comply with the requirements of § 600.11(b)(1) by administering to these students "a nationally recognized, standardized, or industry developed test, subject to 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 . . ." PCA's accrediting agency, AICS, stated the following in a 1988 memorandum entitled "Ability-To-Benefit Update and Clarifications":

27. How do the AICS Standards for admitting ability-tobenefit students fit into the Federal requirements for ATB students?

A. The AICS Standards mandate that an institution admitting students who do not have a high school diploma or equivalent must demonstrate the student's ability to benefit from the training offered by the institution. "Such ability-to-benefit determination shall include, as a minimum, the administration of a validated test and academic and career advising."

Ex. R-6-4 (emphasis added). Through the use of the word "validated", AICS requires member institutions to administer their ability to benefit tests in accordance with the standards prescribed by the test's developer.See footnote 20 *20*

Therefore, the tribunal must determine whether PCA complied with § 600.11(b)(1) by administering its ability-to-benefit tests in accordance with the standards prescribed by the test's developer.

The auditors stated as follows:

In all, we found 32 students who did not demonstrate the ability to benefit from the institution's education or training program. Some ability to benefit tests had multiple types of deficiencies, and the deficiencies included:

-- No ability to benefit tests in file, (7) instances

-- Tests in file had two types of markings on the answers; erasures showed changes to correct answers, (5) instances

-- Tests in file were not standardized, i.e., the WPT or the P.A.R. test; and did not meet the requirements of the regulations, (3) instances

-- Enrollment Agreements stated that students took 15 minutes to take the WPT, a

12 minute test, (6) instances

-- Students did not make the minimum passing score of "10" on the WPT, (6) instances

-- Students attempted many more questions than the average attempted during a 12 minute test; students took more than 12 minutes to complete the test, (5) instances

-- A test was improperly graded to give a passing score, (1) instance

-- Students achieved only the minimum WPT score of "10"; a score that was too low to show ability to benefit according to the test publisher, (2) instances

Ex. E-1-9-10.

SFAP lists these 32 students at Ex. E-7-1-3. In response, PCA has created a chart with the names of these 32 students, the alleged deficiencies, the reasons for which the College believes it has "cleared" 24 of these students, and the exhibits documenting these reasons. Ex. R-16.

However, through its December 10, 1993 letter and its statements at the oral argument, SFAP has withdrawn all claims of liability against PCA for the following fifteen students: [student name], [student name], [student name], [student name], [student name], [student name], [student name], [student name], [student name], [student name], [student name], [student name], [student name], and [student name]. Tr. at 5-6.

Moreover, at the oral argument, PCA conceded liabilities for seven students as follows:

Student	Total SFA	Pell
[student name]	$4515	2100
[student name]	1066	1050
[student name]	8495	2200
[student name]	954	954
[student name]	1917	1050
[student name]	1008	0
[student name]	4515	2100
	$9454	

Tr. at 7-9, 44.

Therefore, the only students in Finding No. 2 that remain in dispute are the following: [student name], [student name], [student name], [student name], [student name], [student name], [student name], [student name], [student name], and [student name]. In its December 10, 1993 letter,

SFAP indicated that the issue as to students [student name], [student name], [student name], and [student name] was whether or not these students were given 15 minutes to take a 12 minute test. In that same letter, SFAP indicated that the issue as to students [student name], [student name],

[student name], [student name],See footnote 21 *21* [student name], and [student name] was whether or not these students were given unlimited time to take a 12 minute test. In addition, at the oral argument, the parties stated that the sole remaining issue relating to these ten students is whether or not PCA allowed them excess time (either 15 minutes or an unlimited amount of time) to take the Wonderlic Personnel Test (WPT). Tr. at 59-60, 87-89.

The auditors stated as follows:

Phillips also allowed students 15 minutes to take the 12 minute test. According to Wonderlic & Associates, "A school could elect to administer the WPT on a 15 minute basis, but this would require them to develop an entirely new set of normative and distribution statistics. In any event, careless attention to the discipline of uniform test administration will invalidate the test results."

Ex. E-1-10. At the oral argument, counsel for both parties agreed that the record contains no documents, other than the OIG charts and the FAD, indicating that PCA students were allowed 15 minutes to take the WPT. Tr. at 50-53.

In a February 13, 1989 letter from Eliot R. Long, Vice President, E.F. Wonderlic Personnel Test, Inc. (Wonderlic), to M. Bruce Nestlehutt of OIG, Wonderlic discusses timing of the WPT as follows:

Administering the WPT on an un-timed basis is appropriate in certain cases. Directions for un-timed administration and scoring are provided in the Manual. Un-timed administration is appropriate, for example, when the applicant has dyslexia or other disabilities preventing fluid working of the test items. Un-timed administration is only an approximate of the timed score and should be limited to special circumstances.

. . .

Valid test score/criterion relationships depend on standardized test administration and scoring procedures. This means that all individuals take the same test (or separate forms of the same test), under the same conditions, and that it be scored in the same manner. A school could elect to administer the WPT on a 15 minute basis, but this would require them to develop an entirely new set of normative and distribution statistics. In any event, careless attention to the discipline of uniform test administration will invalidate the test

results.

We would expect that instances of students answering all 50 questions would arise from their guessing at the answers. In studies where we have administered tests on an un-timed basis, we find most modest ability individuals "giving up" well before they complete all the test items. If the school test administrator is encouraging students to complete all test items by guessing at

them during the timed 12 minute period, this will most likely result in lower test scores. The time spent guessing at the later items on the test would be more profitably used working on the earlier items. The WPT is not very susceptible to guessing.

. . .

The adult population average is 29 items attempted and 21 answered correctly. The difference, 29 minus 21 or 8 items incorrect, include [sic] both incorrect answers and items left blank interspersed among answered items. A higher number of incorrect items usually indicates guessing, which, as mentioned above, usually works to the disadvantage of the test taker.

Ex. E-7-11-12 (emphasis added).

This evidence indicates that in order to be valid, the WPT normally should be administered with a 12 minute time limit. However, the test can be administered using a longer time limit, or even on an untimed basis, under certain narrowly-defined circumstances. If the test is given with a longer time limit or no time limit at all, the results must be considered only an approximate of and less reliable than the results obtained from administering the test with a 12 minute time limit. Moreover, the school must develop an entirely new set of normative and distributive characteristics. When the test is administered with the standard 12 minute time limit, some test takers may be able to answer all 50 questions by guessing at some of them. Nonetheless, the average adult will attempt to answer 29 questions.

Here, there is no evidence in the record indicating that any of PCA's students who took the WPT suffered from dyslexia or other disabilities that prevented fluid working of the test items. Nor is there any evidence that the College developed its own set of normative and distributive characteristics and used such in its appraisal of the test results.

In order to prove that the College administered the WPT with the 12 minute time limit, PCA offers the affidavit of Ronald Wesley Rhoads. Mr. Rhoads states:

6. On more or less a daily basis during the period when the Wonderlic Test was the test being used at the College, I personally observed that test being given to prospective students at the College.

7. Each and every time I observed the Wonderlic Test being given, the tests were timed, and the students' tests were collected at the end of the 12 minutes allotted for the test. To my knowledge, the College never administered the Wonderlic Test on an untimed basis.

8. I am aware that the Office of Inspector General ("OIG") of the U.S. Department of Education has questioned whether several students were allowed 15 minutes to take their tests based on notations made-on the Enrollment Agreements for those students. In each of those instances the Admissions Representative was Ethel Hodge, who I knew personally. I do not believe that those references can be construed to mean what the OIG has construed them to mean for two reasons. The first reason is because Ms. Hodge did not administer those tests herself. The

second reason is because, as I have stated, to my knowledge, the College never administered the Wonderlic Test so as to permit a student more than 12 minutes.

Ex. R-3-2-3; Ex. E-4-2-3.See footnote 22 *22*

SFAP also notes that several of these students answered as many as 43, 47, 48, 49, or 50 questions, implying that this is evidence that these students were given excess time to complete the exam. Ex. E-7-1-2. As noted previously, the average adult attempts to answer 29 questions on the WPT. Since the number of questions answered by these students is somewhat higher than would be expected among the average adult population, this suggests the possibility that they were not timed at 12 minutes. Nonetheless, the significance of these numbers is inconclusive because SFAP has not provided evidence indicating that an unusually high number of PCA students who took the WPT attempted such large numbers of questions or that PCA students on average attempted a significantly higher number of questions on the WPT than 29, the average for the adult population generally. As discussed supra, Wonderlic has stated that "We would expect that instances of students answering all 50 questions would arise from their guessing at the answers." Ex. E-7-11. The evidence suggests the possibility that some students were not timed, but does not appear strong enough to support a finding to that effect, especially in light of the Rhoads affidavit.

Based upon all of the evidence, the tribunal finds that PCA has satisfied its burden of persuasion as to the issue of whether or not it administered the WPT within the 12 minute time limit. Accordingly, there is no liability for SFA funds disbursed to the ten students that remain in issue under Finding No. 2.

The total amount of Title IV funds disbursed to the seven students whom PCA could not demonstrate that it had properly admitted under the ability to benefit regulations is $22,470. However, both the OIG audit and the FAD indicated that a portion of the funds sought under Finding No. 2 had already been included in Finding No. 1. Ex. E-l-11; E-2-5; R-1-5. Since Finding 1 required PCA to return SLS and GSLP funds disbursed during the period from July 1, 1987 through September 30, 1989, and to determine and refund the amount of GSLP loans disbursed from October 1, 1989 to April 1, 1990, the FAD subtracted these amounts from the

total amount sought under Finding 2. Ex. E-1-8, E-1-11, E-2-3, E-2-5.See footnote 23 *23* Therefore, as relates to the seven students under Finding No. 2 for whom PCA has conceded liability, the tribunal will deduct the amount of SLS and GSLP funds from the amounts of Title IV funds that are listed at Ex. E-7-1-3 as having been disbursed to those students. The sum of the remaining amounts is $9,454.See footnote 24 *24* Accordingly, the tribunal concludes that PCA's total liability under Finding No. 2 is $9,454.

3. Documentation for SFA disbursements.

SFAP argues that PCA's student aid files contained deficiencies in support for awards. SFAP Initial Br. at 7-8; SFAP Reply Br. at 7-9.

PCA responds that Finding No. 3 is legally and factually unsupported. Resp. Initial Br. at 49-55; Resp. Reply Br. at 25.

The auditors stated as follows:

Phillips improperly disbursed Title IV SFA benefits both to students who were not eligible, and through error and failure to comply with ED and accrediting agency criteria. We noted deficiencies in the files of 10 students, from a statistical sample of 32 from 1,796 students, that should have precluded disbursing SFA to these students. The 10 students received a total of $32,702 in SFA that was improperly disbursed.

Ex. E-1-12. The auditors and the FAD required PCA to refund $15,093 for these 10 students, noting that the remaining $17,609 of the $32,702 in questioned costs for these students had already been requested under Finding 1.

Initially, the tribunal notes that PCA has conceded liability for four of these ten students. Specifically:

OSFA claimed that [student name] received $350 more in Pell Grant funds than was correct. The College does not dispute this conclusion. Stip. of Fact No. 11.

[student name] was selected for verification; however, since the College did not obtain any documentation to verify her income, the College does not dispute OSFA's conclusion that she was overawarded $1,050. 34 C.F.R. § 668.54(b)(2). Stip. of Fact No. 12.

The College cannot dispute the conclusion of OSFA that the disbursement of $1,692.96 to [student name] was incorrect. Stip. of Fact No. 13.

Because the College no longer can locate the ATB test for [student name], and because his Enrollment Agreement reflecting his score is unsigned by anyone, the College cannot dispute OSFA's claim that $899 was improperly awarded to him. Stip. of Fact No. 14.

PCA also discusses these four students at pages 51-54 of its initial brief. See also Tr. at 9-10.

In addition, through its December 10, 1993 letter to counsel for PCA, which was submitted to the tribunal at the oral argument, SFAP has withdrawn all claims against PCA for the following five students: [student name], [student name], [student name], [student name], and [student name]. Tr. at 5-6, 9 - 1 1 .

Therefore, the only student in issue under Finding No. 3 is [student name]. Tr. at 5-6, 9-11.

SFAP claims that PCA improperly disbursed $1,008 in Title IV funds to student [student name]. The auditors based this claim on a number of reasons, including that [student name]'s ATB test contained two types of markings, was incorrectly graded, and reveals that the student attempted 47 questions, indicating that excess time was given. Ex. E-8-1, 4. The auditors also alleged that [student name] claimed zero income for 1986, yet PCA did not attempt to verify this,

despite the fact that she was not claimed by her parents as a dependent. The auditors challenged [student name]'s claiming her unborn child on her Pell Grant application in October 1987 as a dependent. Ex. E-8-4.

However, at the oral argument, counsel for SFAP indicated that its claim against the funds disbursed to [student name] has been narrowed to the sole issue of whether or not excess time was given on the WPT, because the student attempted to answer 47 questions. Tr. at 58-61, 88-89. The tribunal rejects the argument that [student name] was given excess time based on the number of questions she attempted for the same reasons that this argument was rejected in the discussion as to Finding 2.

Therefore, SFAP's challenges relating to this student must fail. Accordingly, PCA is not required to refund the challenged Title IV funds disbursed to [student name].

The total amount of Title IV funds disbursed to the four students for whom PCA has conceded liability is $3,991.96. Again, however, both the OIG audit and the FAD indicated that a portion of the funds sought under Finding No. 3 had already been included in Finding No. 1. Ex. E-1-14; E-2-7; R-1-7. Since Finding 1 required PCA to return SLS and GSLP funds disbursed during the period from July 1, 1987 through September 30, 1989, and to determine and refund the amount of GSLP loans disbursed from October 1, 1989 to April 1, 1990, the FAD subtracted these amounts from the total amount sought under Finding 3. Ex. E-1-8, E-1-14, E-2-3, E-2-7. Therefore, as relates to the four students under Finding No. 3 for whom PCA has conceded liability, the tribunal will deduct the amount of SLS and GSLP funds from the amounts of Title IV funds that are listed at Ex. E-8-1-5 as having been improperly disbursed to those students. The sum of the remaining amounts is $1,400.See footnote 25 *25* Accordingly, the tribunal concludes that PCA's total liability under Finding No. 3 is $1,400.

4. Calculation and payments of Pell Grants.

a. Payment periods.

SFAP alleges that the audit determination shows that PCA used incorrect payment periods for Pell Grants. SFAP Initial Br. at 8; SFAP Reply Br. at 9-12.

PCA claims that as a non-standard term institution, it was entitled to disburse Title IV funds in two equal payments during the audit period. The College asserts that it violated no statute or regulation and is entitled to be treated by SFAP as SFAP treated other similarly situated schools. PCA further contends that it has improperly been denied the "safe harbour" of SFAP's policies. According to PCA, any liability that the College may have as a result of its payment periods must be limited. Resp. Initial Br. at 55-74. Resp. Reply Br. at 25-29.

34 C.F.R. § 690.3(a) applies to the Pell Grant program and, during the relevant years, stated in pertinent part:

(a) Payment period for an institution that has academic terms:

(1) Except as noted in paragraph (a)(2) of this section, for an eligible program that uses semesters, trimesters, quarters or other academic terms, the payment period is the semester, trimester, quarter or other academic term.

34 C.F.R. § 690.3(a) (1987-1989).See footnote 26 *26*

34 C.F.R. § 690.63 also pertains to the Pell Grant program. During the years covered by the audit, it stated, in pertinent part:

(a) At an institution using semesters, trimesters, quarters, or other academic terms and measuring progress by credit hours, a student's Pell Grant for each payment period is calculated by

(1) Determining his or her enrollment status for the term;

(2) Based upon that enrollment status, determining his or her annual award from the Payment Schedule (full-time students), or one of the Disbursement Schedules (part-time students), as appropriate; and

(3)(i) Dividing the amount determined in paragraph (a)(2) of this section by the number of terms in the academic year unless the terms of an institution are not of equal length; or

(ii) If the terms of an institution are not of equal length, multiplying the amount determined in paragraph (a)(2) of this section by the following fraction:

The length of the term in question
The length of the academic year

34 C.F.R. § 690.63(a) (1987-l989).

During the years in issue, for institutions that measured academic progress in credit hours and used a semester, trimester, or quarter system, an academic year was defined as "A period of time in which a full-time student is expected to complete the equivalent of at least two semesters, two trimesters, or three quarters . . . ." 34 C.F.R. § 690.2(a); 34 C.F.R. § 668.2 (19871989). Based upon these regulations, an institution that was on the quarter system would be required to disburse Pell Grant payments three times a year. An institution that maintained, for example, six terms of unequal length during its academic year would be required to disburse Pell Grant payments six times a year. § 690.63(a)(3)(ii).

§ 690.3(a) applies to institutions that have "academic terms". The contents of this

regulation make it clear that examples of "academic terms" include semesters, trimesters, and quarters. Nonetheless, the regulation also allows for "other academic terms" in addition to semesters, trimesters, and quarters.

34 C.F.R. § 690.2 contains general definitions used in Part 690. Unfortunately, the phrase "academic terms" is nowhere defined. Black's Law Dictionary defines the word "term" as "A fixed period; period of determined or prescribed duration. A specified period of time; e.g. term of lease, court session, sentence. . . . " BLACK'S LAW DICTIONARY 1318 (5th ed. 1979).

During the years covered by the audit in question, § 690.3(b) was entitled "Payment period for an institution that does not have academic terms". That section then defined the payment period for students whose educational program is equal to, greater than, or less than one academic year.

The parties have both acknowledged the fact that PCA adhered to the regulations governing schools without academic terms. See SFAP Reply Br. at 11; Resp. Initial Br. at 55. The issue, however, is whether PCA correctly adhered to the regulations governing schools without academic terms, or whether in fact the College had academic terms and thus should have adhered to the regulations governing programs that have academic terms. Put another way, the tribunal must determine whether or not PCA had academic terms. The regulations make no distinction between "standard" and "non-standard" academic terms. An institution with academic terms, even if non-standard, would still come under the purview of § 690.3(a), since that section describes the "Payment period for an institution that has academic terms" and applies to "other academic terms's in addition to semesters, trimesters, and quarters. This reading is bolstered by the fact that § 690.3(b) is entitled, and thus applies only to, "institution[s] that [do] not have academic terms" .See footnote 27 *27* Accordingly, the only issue is whether or not the institution had academic terms. See 34 C.F.R. § 690.3.

The parties have submitted numerous exhibits on this issue, including Ex. E-8-12-15, which indicates that PCA's catalog stated that PCA was on the quarter system. PCA has submitted its 1987-88 Financial Aid Manual, which states that the colleges of the Phillips College system measure progress without standard academic terms. Ex. R-15-5-7. PCA has also submitted a 1979 internal Department memorandum discussing a Phillips College school whose catalog mentioned quarters, even though the school claimed that it did not have standard

academic terms. The memorandum stated that if the school does not have regular terms, it should adhere to the regulation governing non-term schools, even though it publicizes in its catalog that it does have quarters. Ex. R-10-12. Additionally, PCA has submitted various correspondence between the Department and other schools during the past decade. Ex. R-14.

On June 4, 1993, Judge Ernest C. Canellos of the U.S. Department of Education issued an initial decision in In the Matter of Edmondson Junior College, Docket No. 93-7-SP, U.S. Dep't of Education (Decision, June 4, 1993). As counsel for both PCA and SFAP agreed at the oral argument, the issue involved in Finding No. 4 of the instant case is essentially the same issue that was involved in the Edmondson case. Tr. at 116, 127.See footnote 28 *28* Edmondson Junior College was also owned by Phillips Colleges, Inc. (PCI), the parent company of PCA. Edmondson's catalog indicated that the school had sessions divided into terms, but Edmondson disbursed Title IV funds as a non-term school; the same is true for PCA in the instant case. After discussing the 1979 memorandum contained in Ex. R-10-12, the school's academic calendar and mini-terms, and PCI's 1988 Financial Aid Manual contained in Ex. R-15-5, Judge Canellos held that Edmondson was free to choose whether it should be treated as a term or non-term school,

that Edmondson chose to be treated as a non-term school, and that Edmondson's listing of course start times in its catalog did not alter the school's intention to practice as a non-term school. In reaching this decision, Judge Canellos also noted that there was "no . . . proof that Edmondson purposely deceived the public or unjustly benefitted from its use of the word 'term' in its catalog. "Edmondson at 4. He also noted that by disbursing Title IV funds in two disbursements instead of three, Edmondson may have saved federal money in some instances, an argument that PCA has also raised in the present case.

The decision in Edmondson Junior College is not binding precedent in the instant case. However, given the fact that counsel for both parties have acknowledged the essential similarity between Edmondson and Finding No. 4 of the instant case, and as a result of the reasoning in the Edmondson case, the tribunal will follow the result in Edmondson.See footnote 29 *29*

Accordingly, the tribunal finds that PCA has no repayment liability under the portion of Finding 4 relating to the disbursement of Pell Grant funds in two payments instead of three, and that PCA is not required to review the files of the 1290 students who dropped out during the audit period.

b. Full-time students.

In its briefs, SFAP contended that PCA disbursed Pell grants to students who were not full time students. SFAP Reply Br. at 12.

PCA responded that the College did not disburse any Pell Grant funds to students who were not full time students. Resp. Initial Br. at 74-76; Resp. Reply Br. at 25-26.

At the oral argument, counsel for SFAP indicated that SFAP is withdrawing this portion of Finding No. 4. Tr. at 78-79. Accordingly, the tribunal finds that PCA has no repayment liability under the portion of Finding 4 relating to the disbursement of Pell Grants to students who enrolled in PCA's Mini-Quarters.

V. DETERMINATIONS AS TO THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The College and SFAP have filed briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VI. CONCLUSIONS OF LAW.

In accordance with 34 C.F.R. § 668.118(b), the final audit determination issued by the designated Department official is supportable, in part.

1. Finding No. 1.

PCA was ineligible to participate in the GSL Programs from July 1, 1987 to April 1, 1990.

a. PCA's admissions representatives were actually "commissioned salespersons" who "promoted the availability" of GSLP and PLUS program loans to prospective or enrolled students, as defined by 34 C.F.R. § 682.200.

b. An institution can be declared ineligible to participate in the GSL Programs during a previous time period under the procedures contained in 34 C.F.R. Part 668, Subpart H, which ineligibility was due to its failure to meet the statutory definition of an eligible institution, if that determination as to eligibility forms the basis for a final audit determination.

c. Under 34 C.F.R. § 668.116(e)(1), "other ED records and materials" cannot be introduced after the 30 day period mentioned in § 668.116(e)(1)(v) even if that evidence did not exist until after this 30 day period has expired.

2. Finding No. 2.

a. 34 C.F.R. § 600.11(b)(1) implicitly requires that an institution must administer its ability to benefit tests according to the guidelines prescribed by the developer of the test.

b. As to the timing of the tests, PCA properly administered the Wonderlic Personnel Test (WPT) within the 12 minute time limit.

c. However, PCA conceded liability as to seven other students for whom there was a requirement to demonstrate an ability to benefit from the program.

Finding No. 3.

a. As to the timing of the WPT, PCA properly administered the WPT within the 12 minute time limit.

b. However, PCA conceded liability as to four other students for whom there was a requirement to demonstrate an ability to benefit from the program.

Finding No. 4.

a. PCA's disbursement of Pell Grant funds in two payment periods instead of three was not a violation of federal law.

b. PCA was an institution without academic terms.

VII. ORDER.

Based on the foregoing findings of fact and conclusions of law, and all the proceedings had herein, it is hereby:

ORDERED, That, as relates to Finding No. 1, PCA shall immediately and in the manner provided by law reimburse applicable GSL/SLS lenders in the amount of $2,842,369 ($2,218,985 GSL and $623,384 SLS) less amounts repaid by students, amounts already refunded by PCA, and amounts in cases where loans were not ever paid out. These amounts shall be arrived at by cooperative action between the parties.

ORDERED, That, the case is remanded to SFAP, with the provision that PCA and SFAP shall cooperate and endeavor to determine:

l) the amount of SLS and GSLP funds for the period October 1, 1989-April 1, 1990.

2) any amounts of loans repaid by students as to all loans from July 1, 1987-September 30, 1989 and October 1, 1989 April 1, 1990.

3) any amounts of loans refunded by PCA for those periods.

4) any amounts of loans that were never paid out as to the same periods.

ORDERED, That, based upon these amounts, PCA shall reimburse GSL and SLS lenders an additional amount for the period October 1, 1989-April 1, 1990, less the amounts that should be credited to PCA for amounts repaid by students, amounts already refunded by PCA, and amounts in cases where loans were not ever paid out.

ORDERED, That, if the parties are unable to mutually agree to the correct figures as referred to above, they may request a rehearing as to these issues.

ORDERED, That, as relates to Finding No. 2, PCA shall immediately and in the manner provided for by law refund to the Department $9,454 in erroneous Pell Grant awards.

ORDERED, That, as relates to Finding No. 3, PCA shall immediately and in the manner provided for by law refund to the Department $1,400 in erroneous Pell Grant awards.

John F. Cook
Chief Administrative Law Judge

Issued: February 28, 1994

Washington, D.C.

Footnote: 1 *1 SFAP was formerly known as OSFA.*

Footnote: 2 *2 At the oral argument, the parties made several agreements. SFAP submitted to the tribunal a December 10, 1993 letter (Appendix A to this decision) to counsel for PCA in which SFAP had agreed to withdraw any claims for liability against PCA for fifteen students that had been included in Finding No. 2. Tr. at 5-6. SFAP also agreed to withdraw any claims for liability against PCA for five students that had been included in Finding No. 3. Tr. at 5-6, 9-11.*

Furthermore, at the oral argument, PCA conceded liability for seven students that had been included in Finding No. 2. Tr. at 7-9, 44. Additionally, PCA reiterated the fact that it has conceded liability for four students that had been included in Finding No. 3. Tr. at 9-10.

Finally, SFAP narrowed the scope of some issues and withdrew other claims at the oral argument. Tr. at 58-61, 78-79, 87-89. All of these are specifically discussed infra.

Footnote: 3 *3 This part of the findings of fact is based upon the stipulations contained in the Joint Statement filed by the parties.*

Footnote: 4 *4 All exhibits submitted by the College, as the Respondent, have the prefix "R". All exhibits submitted by SFAP have the prefix "E".*

Footnote: 5 *5 The Guaranteed Student Loan Program (GSLP) is now known as the Robert T. Stafford Student Loan Program. See 20 U.S.C. § 1071(c).*

Footnote: 6 *6 As PCA noted at the oral argument, this form is actually entitled "Independent Model Application". Tr. at 21; Ex. E-5-7-9.*

Footnote: 7 *7 20 U.S.C. § 1094, upon which PCA relies, also refers to the definition of "eligible institution" contained in 20 U.S.C. § 1085(a). See 20 U.S.C. § 1094(d) (1988).*

Footnote: 8 *8 Under 34 C.F.R. § 668.116 (d3, the institution requesting the review in a Subpart H proceeding (here, PCA) has the burden of proving that the disallowed expenditures were proper or that the institution complied with program requirements. For further discussion, see In the Matter of Berk Trade and Business School, Docket No. 91-5-SP, U.S. Dep't of Education (December 10, 1992) (Decision), aff'd by the Secretary (March 19, 1993); In The Matter of Kentucky Polytechnic Institute, Docket No. 89-56-S, U.S. Dep't of Education (April 27, 1990) (Order); In The Matter of Sinclair Community College, Docket No. 89-21-S, U.S. Dep't of Education (May 31, 1991) (Decision).*

Footnote: 9 *9 AICS is the Association of Independent Colleges and Schools. Ex. R-4. AICS is the accrediting agency for a number of schools owned by Phillips Colleges, Inc., including Phillips College of Atlanta. Joint Stip. of Fact No. 5.*

Footnote: 10 *10 PCA's argument at pages 35-38 of its initial brief that AICS standards are irrelevant to any issue in this case is inapposite. These exhibits are useful not in determining whether or not PCA or other Phillips Colleges were complying with the requirements of AICS or some other accrediting body, but because they contain Phillips Colleges' own descriptions of the*

One-Stop Shopping policy involving the use of commissioned salespersons who promoted the availability of GSLP program loans. Therefore, these exhibits are highly relevant to the determination of Finding l, PCA's arguments notwithstanding.

Footnote: 11 *11 PCA's argument in its Reply Brief that these were not application forms flies in the face of the College's own internal documents ("During the admissions interview, the prospective student is assisted in completing the Institutional [Independent! Model Application by the Admissions Representative. This application and related documents collect all the information needed to complete the subsequent paperwork. enrollment agreement, and federal aid applications." Ex. E-5-12 (emphasis added); see also Ex. E-5-16; Ex. E-5-7-9. These exhibits illustrate that this application form was used to "collect all the information needed to complete the subsequent paperwork, enrollment agreement, and federal aid applications." In effect, students used PCA's Institutional [Independent] Model Application to apply for federal financial assistance.*

Footnote: 12 *12*
SFAP has attempted to impeach the credibility of Mr. Rhoads by introducing a January 27, 1992 letter from Mr. J. Sedwick Sollers III of the law firm of King & Spaulding to the OIG Regional Inspector General for Investigations in Atlanta, Georgia. This letter was attached to SFAP's Initial Brief, and labelled Ex. E-6. Both were received by the tribunal on May 11, 1992.

34 C.F.R. § 668.116(e) governs the submission of evidence in a Subpart H hearing. That regulation states as follows:

(e)(1) A party may submit as evidence to the administrative law judge only materials within one or more of the following categories:

(i) ED audit reports and audit work papers for audits performed by the United States Education Department Office of Inspector General.

(ii) Institutional audit work papers, records, and other materials, if the institution provide [sic] those work papers, records, or materials to ED no later than the date by which it was required to file its request for review in accordance with § 668.113.

(iii) ED program review reports and work papers for program reviews.

(iv) Institutional records and other materials provided to ED in response to a program review, if the records or materials were provided to ED by the institution no later than the date by which it was required to file its request for review in accordance with § 668.113.

(v) Other ED records and materials if the records and materials were provided to the administrative law judge no later than 30 days after the institution's filing of its request for review.

34 C.F.R. § 668.116(e)(1) (emphasis added). § 668.116(f) states, inter alia, that "The administrative law judge shall accept only evidence that is both admissible and timely under the terms of paragraph (e) of this section, and relevant and material to the appeal. . . ."

The Sollers letter submitted by SFAP does not fit under any of the first four categories of evidence described in § 668.116(e)(1). It does qualify as an "[o]ther ED record [or] material" under 668.116(e)(1)(v). However, that regulation plainly states that such evidence is admissible only if it was provided to the administrative law judge no later than 30 days after the institution's filing of its request for review. The regulation allows for no exceptions.

Here, PCA filed its request for review on November 13, 1991. The Sollers letter was not provided to the administrative law judge until May 11, 1992. This is well outside the 30 day

period allowed in § 668.116(e)(1)(v). As stated above, the regulation allows for no exceptions. Accordingly, the tribunal cannot admit Ex. E-6 into evidence, nor can the tribunal consider this letter in any way.

Footnote: 13 *13 The legislative history and quote from the Commissioner of Education cited by PCA in its Reply Brief bolster this viewpoint. The legislative history states, in pertinent part:*

[T]he prohibition applies only to those institutions utilizing commissioned salesmen who promote student loans. The Committee does not wish to restrict normal and ethical recruiting practices by educational institutions. The restriction on promotion of loans is intended to elimination [sic] active promotion, not simply the listing of loan availability in a catalogue or providing appropriate information and counseling to a student regarding available student aid programs.

S. Rep. No. 94-888, 94th Cong., 2d Sess. 28 (1976). See also Resp. Reply Brief at 9. This language is in harmony with the statement in § 682.200 that "This term ['promote the availability'] does not include providing general financial aid information . . . ." Thus, the statement by the Commissioner of Education that "The provision to a prospective student of a brochure covering all Title IV Federal aid programs is permissible" is also in harmony with the language of § 682.200. See 44 Fed. Reg. 53,903-53,904 (Sept. 17, 1979). See also Resp. Reply Brief at 24. Neither the language of the regulation, the legislative history, nor the Commissioner's statement can be construed to authorize commissioned salespersons to collect tax forms, W-2s, and other documents necessary to collect all the information needed to complete the subsequent paperwork, enrollment agreement, and federal aid applications; provide the Independent Model Application for students to use to effectively apply for federal financial aid; and then present the method by which the student can pay for the program.

Footnote: 14 *14 It should be noted that Finding 1 does not contain any reference to the 1987-1988 "Questions and Answers".*

It should further be noted that the activities that PCA claims constitute part of SFAP's "expanded" definition of § 682.200 are also prohibited by the plain language of the regulation itself. The regulation explicitly prohibits "providing prospective or enrolled students with application forms", such as the model financial aid applications used by PCA's commissioned salespersons. "Explaining financial aid awards to students" is a closer question, although it

appears to constitute more than "providing general financial aid information" and would thus be prohibited as well. Therefore, SFAP's statement in the 1987-88 Questions and Answers that the regulation prohibits providing need analysis documents to students and assisting students or their families in completing those forms appears to be a reasonable interpretation of the regulation, rather than an expansion of it.

In any event, there can be little doubt that the regulation prohibits providing the very specific financial aid information (including individual financial aid calculations for each student) that PCA's commissioned salespersons provided to prospective students.

Footnote: 15 *15 In 1987, similar language was contained in 34 C.F.R. § 668.1. That regulation stated:*

(a) This part establishes general rules that apply to an institution that participates in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA program).

(b) As used in this part, an "institution" includes

. . .

(2) A proprietary institution of higher education as defined in § 668.4;

34 C.F.R. § 668.1 (1987).

Footnote: 16 *16 Although the parties have not stipulated to this fact, it does not appear to be in dispute. Therefore, the tribunal finds that during the time of the audit period, PCA was a proprietary institution of higher education, as defined by 34 C.F.R. § 600.5 (a) (1988-1989). In 1987, this regulation appeared as 34 C.F.R. § 668.4 (a).*

Footnote: 17 *17 In 1987, similar language was contained in 34 C.F.R. § 668.4(c). However, instead of referring to § 600.11, this regulation required institutions to "develop and consistently apply*

standards for determining whether these students have the ability to benefit . . . ."

Nonetheless, the 1986 amendments to the HEA made the language now found in § 600.11 effective as of July 1, 1987.

The Higher Education Amendments of 1986 added the ability to benefit requirement as a student eligibility criterion for continued aid. Section 407 stated:

(a) AMENDMENT--Part G of title IV of the Act (as redesignated by section 406) is amended to read as follows:

. . .

(b) EFFECTIVE DATES--(1) Sections 483(e) and 484(d) of the Act as amended by this section shall apply to student assistance awards for periods of enrollment beginning on or after July 1. 1987.

HEA § 407 (emphasis added).

Section 484(d), as amended, stated as follows:

(d) ABILITY TO BENEFIT--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

(1) receive the general education diploma prior to the student's certification or graduation from the program of study, or by the end of the first year of the course of study, whichever is earlier;

(2) be counseled prior to admission and be enrolled in and successfully complete the institutionally prescribed program of remedial or developmental education not to exceed one academic year or its equivalent; or

(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; and

(B) with respect to applicants who are unable to satisfy the institution's admissions testing requirements specified in subparagraph (A), be enrolled in and successfully complete an institutionally prescribed program or course of remedial or developmental education not to exceed one academic year or its equivalent.

HEA § 484(d) (emphasis added).

HEA § 481(b) defined "proprietary institutions of higher education" and stated, in pertinent part:

Such term also includes a proprietary educational institution in any State which, in lieu of the requirement in clause (1) of section 1201(a), admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located and who

have the ability to benefit (as determined by the institution under section 484(d)) from the training offered by the institution. . . .

HEA § 481(b) (emphasis added).

Therefore, the ability to benefit requirements for proprietary institutions of higher education embodied in the regulations at 34 C.F.R. §§ 600.2, 600.5(b) and 600.11, from 1988-1989, were effective as of the 1987-88 award year

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Footnote: 18 *18 § 668.7(b) also contains these requirements for ability-to-benefit students. The ability to benefit requirements now found in §§ 600.11 and 668.7(b) became effective as of the 198788*

award year. See supra note 17.

Footnote: 19 *19 Again, this fact is not stipulated to by the parties, even though it does not appear to be in dispute. Therefore, it must be the subject of a finding by this tribunal. Accordingly, the tribunal finds that PCA did administer an ability-to-benefit test to students who did not have a high school diploma or its equivalent. The parties' arguments and the exhibits support this finding. For example, PCA discusses its passing score on the Wonderlic Personnel Test (WPT) in its briefs (see Resp. Initial Brief at 41) and argues extensively concerning the College's administration of the ability-to-benefit tests, particularly the WPT. Resp. Initial Br. at 41-46. SFAP also argues extensively concerning the College's administration of its ability-to-benefit test. See SFAP Initial Br. at 5-6; SFAP Reply Br. at 5-7.*

Footnote: 20 *20 Moreover, implicit in the regulatory language is the requirement that this test must be administered in accordance with the standards prescribed by the test's developer, PCA's arguments to the contrary notwithstanding. PCA argues at pages 4-5 of its Initial Brief that "OSFA has created categories of deficiencies that do not exist in the statute or regulations and are*

both legally and factually unsupported." The College goes on to state:
Neither 34 C.F.R. § 600.11 (1988) nor any other regulation or statute refers to the categories of deficiencies which form the basis of Finding No. 1. For instance, no Title IV statute or regulation contains a category of violation based on what the Office of Inspector General ("OIG") auditor self-servingly describes as "Testing Irregularities," whatever that means. Nor is it a violation of any statute or regulation for a student to erase an answer in order to correct a mistake or because the student changed his or her mind.

Resp. Initial Br. at 39 (footnote omitted).

Nevertheless, a regulation requiring an institution to administer "a nationally recognized, standardized, or industry developed test, subject to 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" (see § 600.11(b)(1)) would be rendered meaningless if the institution did not have to administer its ability-to-benefit tests according to the guidelines prescribed by the developer of the test. The test would not "measure the applicant's aptitude to successfully complete the educational program for which the student has applied". Therefore, it is an inherent requirement of § 600.11(b)(1) that PCA must administer its ability-to-benefit tests according to the guidelines prescribed by the developer of the test. See Lauqhlin v. Riddle Aviation Co., 205 F. 2d 948, 949 (5th Cir. 1953) ("The implications and intendments of a statute are as effective as the express provisions.") See also Harnischfeger Corp. v. U.S. Environmental Protection Agency, 515 F. Supp. 1310, 1314 (E.D. Wis. 1981), and Rucker v. Wabash R.R. Co., 418 F.2d 146, 149 (7th Cir. 1969) for the principle that an administrative regulation, like a statute, is subject to the normal rules of statutory construction.

Footnote: 21 21 SFAP alleges that [student name] may have been given excess time to complete the WPT because he attempted 47 questions. Ex. E-7-2. Although PCA's chart at Ex. R-16 does not appear to challenge this finding, at the oral argument, counsel for PCA indicated that the "x" under the "Test Missing" column and the blank space under the "Reason" column in the chart was an error, because the College had mistakenly believed that SFAP was claiming that the test for this student was missing. Counsel for PCA indicated that the College is challenging the OIG's finding that this student was given excess time to complete the WPT because of the number of questions that he attempted to answer. Tr. at 41-43.

Footnote: 22 22 See discussion under Finding 1 (commissioned salespersons) regarding SFAP's challenge to the affidavit of Mr. Rhoads.

Footnote: 23 23 This can be confirmed by adding up the GSL and SLS liabilities listed at Ex. E-7-1-3. This sum equals $35,258.43, which is the amount that SFAP stated had been included in the recommendation for Finding No. 1.

Footnote: 24 24 The seven students and the amounts of Title IV funds, exclusive of SLS and GSLP funds, improperly disbursed to those students, are listed below:

[student name]	*$2,100*
[student name]	*1,050*
[student name]	*2,200*
[student name]	*954*
[student name]	*1,050*
[student name]	*0*
[student name]	*2,100*
TOTAL	*$9,454*

Footnote: 25 25 The four students and the amounts of Title IV funds, exclusive of SLS and GSLP funds, improperly disbursed to those students, are listed below:

[student name] $ 350
[student name] 1,050
[student name] 0
[student name] 0
TOTAL $1,400

Footnote: 26 *26 § 690.3(a)(2) applied to institutions that used semesters, trimesters, quarters or other academic terms and measured progress in clock hours. However, PCA did not measure progress in clock hours; the College measured progress in quarter hours. PCA's catalog stated: "Credit is granted in quarter hours. A quarter hour of credit is given for a minimum of 20 hours of laboratory instruction, or a minimum of 30 hours externship practice." Ex. E-8-13. Therefore, if PCA was governed by § 690.3(a), as SFAP contends, then PCA would have been compelled to follow § 690.3(a)(1).*

Footnote: 27 *27 § 690.3(b) states, in pertinent part, as follows:*

(b) Payment period for an eligible program that does not have academic terms: (1) For a student whose educational program is one academic year

(I) The first payment period is the period of time in which the student completes the first half of his or her academic year (in credit or clock hours); and

(ii) The second payment period is the period of time in which the student completes the second half of that academic year.

Footnote: 28 *28 At the oral argument, counsel for SFAP stated, "[Y]ou will not see me argue before you that this case is much different than Edmondson, because it is very much like the Edmondson case." Tr. at 116. Counsel for PCA later stated that "I agree with Ms. Brooker [counsel for SFAP] that this case is a lot like Edmondson . . ." Tr. at 127.*

Footnote: 29 *29 The tribunal notes that the Edmondson case has been appealed and is currently pending before the Secretary of Education.*