IN THE MATTER OF PLATT JUNIOR COLLEGE,
Respondent.

Docket No. 90-2-SA
Student Financial Assistance Proceeding

INITIAL DECISION ON REMAND

Appearances: John W. Frankum, Esq., Frankum and Scoville, P.C., for the Respondent, Platt Junior College.

Daphna Crotty, Esq., Office of the General Counsel, U.S. Department of Education, for the Office of Student Financial Assistance.

Before: Judge John F. Cook

I. Procedural Background.

The Department of Health, Education and Welfare (HEW) conducted an audit of Student Financial Aid Programs at Platt Junior College (Platt) for the period January 1, 1970, through May 31, 1975. A report on the audit was issued on November 24, 1975. After negotiations between Platt and HEW a payment was made by Platt during August of 1978. Subsequently, jurisdiction of the matter was transferred to the United States Department of Education (ED). Nine and one-half years later the Office of Student Financial Assistance of the United States Department of Education (OSFA) issued a Final Audit Determination (March 17, 1988). On May 5, 1988, Platt filed a Request for Review of the Final Audit Determination pursuant to Section 487(b) of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. § 1094(b), and 34 C.F.R. Part 668, Subpart H.

The case was assigned to an Administrative Law Judge on loan through the Office of Personnel Management (OPM) who established a briefing schedule. The last brief was filed on September 12, 1988. Thereafter, on July 28, 1989, the judge issued a decision. Platt appealed the decision. In the decision the judge determined that OSFA's final audit determination was not subject to the defenses of waiver, statute of limitations, laches, or accord and satisfaction, and is supportable in whole.

On January 19, 1990, the Secretary of Education issued a decision remanding the case. In this regard the decision stated, in part:

While the Secretary concurs with the ALJ's findings of fact and application of law as to the defense of waiver and the exclusion of the Earle affidavit, he questions certain aspects of the findings found at Part III ("Discussion," ID, pp. 5-7).

The Secretary's decision went on to state that since the judge who issued the first decision in the case, on loan from OPM, was no longer available to ED, the case was remanded to ED's Office of Hearings and Appeals. The case was assigned to ED's Office of Administrative Law

Judges, with an order that the newly assigned judge consider four specified issues. On January 26, 1990, the case was assigned to the undersigned and on March 19, 1990, the record on remand was received from the Secretary of Education. Thereafter an order was issued to the parties to submit briefs as to the issues.

Subsequently, on July 26, 1990, a Joint Motion for Stay of Proceedings was filed by the Office of the General Counsel of the Department and a Representative of Platt. This was a result of the precipitous withdrawal of Platt's former counsel at a critical stage in the litigation and also in light of the direct discussions in which the parties were engaging relative to possible settlement. This motion was granted.

Thereafter a number of reports were filed and additional motions for stays of proceedings pending settlement discussions were filed by ED's Office of General Counsel and Platt's Representative. These motions were granted. When the Representatives of the parties did not respond to the last order to file a status report the undersigned arranged for a telephone conference in March of 1991 with those Representatives. Following such conference one final effort for settlement proved to be unsuccessful.

Consequently, despite a period of more than seven months of stays of proceedings jointly requested by the representatives of both parties, during which settlement discussions took place, the briefing schedule was resumed.

The last brief was filed by OSFA on June 25, 1991. However, although Platt did have the right to file a reply brief, none was received. Therefore an inquiry was sent to Platt's Representative on August 7, 1991, in order to ascertain whether a responsive brief had been lost in the mail. On September 13, 1991, a letter was received from Platt's Representative which did not respond to the question concerning a reply brief but discussed the initial brief. Thereafter a final communication was sent to that Representative stating that in view of the Representative's letter it would be assumed that he did not intend to file a responsive brief unless a statement to the contrary was received by September 30, 1991. None was received and therefore a decision may now be issued.

II. Status of Record.

A question arises as to what findings and determinations of the prior Administrative Law Judge set forth in the July 28, 1989, decision are still in effect in view of the Decision of the Secretary which remanded the case.

It appears that the finding of fact set forth at pp. 1-4 of that decision are in effect (and are incorporated herein by reference) since the Secretary stated that while he concurs with the "ALJ's findings of fact and application of law as to the defense of waiver and the exclusion of the Earle affidavit, he questions certain aspects of the findings found at Part III ('Discussion,') ID, pp. 5-7)."

It appears also that certain parts of the prior judge's findings and determinations under Part III ("Discussion") are also still in effect, however these will be discussed in the opinion as to each of the four issues.

III. Issues.

A. The ALJ determined that the Statute of Limitations set forth at 28 U.S.C. § 2415 is inapplicable to such audit claims. If 28 U.S.C. § 2415 does not apply to the claim at hand, what, if any, Statute of Limitations is applicable? Moreover, what is the effect and application of such a provision, if any, on the requested sum in light of the five year record-keeping requirement at 34 C.F.R. § 682.610(d) and other applicable regulations?

B. Whether the doctrine of laches may be applicable to the proceeding and, if so, whether it is merited in the context here.

C. Whether OSFA's claim for $35,000.00, as devised and presented by OSFA, meets the mandates of procedural due process.

D. What effect, if any, did the payment made on or about August 9, 1978, for the non-GSL/FISL overallowances noted in OSFA's letter of May 12, 1978, have upon the current claim for additional overallowances in light of the five year recordkeeping provision found at 34 C.F.R. § 682.610(d) (formerly 45 C.F.R. § 177.62)?

IV. Opinion.

A. Statutes of Limitations.

1. Applicability of 28 U.S.C. § 2415.

The judge who issued the original decision in this case determined that the Statute of Limitations set forth in 28 U.S.C. § 2415 is inapplicable to the audit claims herein. This determination is in accordance with the court's holding in: S.E.R. Jobs for Progress. Inc. v. United States, 759 F.2d 1 (F. Cir. 1985).

In the S.E.R. case the court, at page 4, stated as follows:

SER also contends that the Government is barred from raising its claim for reimbursement by 28 U.S.C. § 2415. This statute provides in pertinent part:

. . . [E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in complaint is filed within six years after the right of action accures or one year after final decisions have been rendered in applicable administrative proceedings required by contract or law, whichever is later. . .

The court then went on to state at page 5:

The flaw in SER's argument is that the challenged action is not an "action for money damages brought by the United States," as expressly required by the statute. Instead, it is an administrative appeal by a contractor from a contracting office's decision that the contractor owes the Government the amount of certain disallowed costs. Therefore, we hold that 28 U.S.C. § 2415 is inapplicable on its face.

Thus the Federal Circuit Court held that § 2415 did not apply to an administrative appeal by a contractor from a contracting officer's decision based upon a final audit report.

Similarly an administrative proceeding involving a challenge of a Final Audit Determination by a Designated ED official that an institution has not properly utilized funds is not an "action for money damages" within the meaning of § 2415.

2. Applicability of Any Other Statute of Limitations.

The Secretary has set forth the following issue: "If 28 U.S.C. § 2415 does not apply to the claim at hand, what, if any, Statute of Limitations is applicable?" It appears that there is no other Statute of Limitations which is applicable to the claims in this case.

Aside from 28 U.S.C. § 2415, there are a number of statutes of limitations which relate to very specific types of subject matter such as "false claims", "civil fines", " guarantees of home improvement loans", etc. There is also a specific statute of limitations as to federal actions on certain student loans and grants under Title IV, Part E of the HEA (20 U.S.C. § 1091a). These are examples of statutes of limitation which were enacted by Congress to deal with very specific subjects. A study of the law has not revealed that kind of statute of limitations which would be applicable to the subject matter of this proceeding.

In this regard Platt stated at page 4 of its brief:

Platt is unaware of any expressed administrative statute of limitations in either United States Code or Code of Federal Regulations which states that ED must audit, complete its audit, assess, or collect any assessment for an alleged violation of Platt's obligations to the United States as a participating institution in the various student financial assistance programs audited.

OSFA has stated, in substance, at page 9 of its initial brief that because the HEA contains no limitations provisions as to the subject matter of this proceeding, there is no statutory bar to OSFA's action to establish its audit determination here.

OSFA in its discussion pointed out that:

This proceeding and OSFA's action in this audit is, therefore, completely different from audits under the Enforcement subchapter of the General Education Provisions Act, as amended (GEPA), (20 U.S.C. 1234 et seq.) (GEPA), which provides that no recipient of funds under an applicable program shall be liable for the return of funds which have been expended in an unauthorized manner more than five years before the recipient received written notice from the Department. 20 U.S.C. 1234a(k). The GEPA statute of limitations does not apply to this

proceeding or to OSFA's determinations in this case, since, by its own terms, the Enforcement subchapter does not apply to any programs authorized under the HEA. For purposes of the enforcement provisions of GEPA, which include GEPA's statute of limitations:

> the term "applicable program" excludes programs authorized by the Higher Education Act of 1965 [20 U.S.C. § 1001 et seq.]. . .
>
> 20 U.S.C. 1234i(2).

OSFA's initial brief of 9.

Thus, the attorneys for both parties to this proceeding as well as the undersigned have found no statute of limitations which applies to the claims in this case.

The Secretary set forth a final question as to the subject of statutes of limitations, however that question is contingent upon the existence of a statute of limitations which would be applicable to the subject of this case. Since there is none, it appears that question is moot.

B. Laches.

In order to set the foundation for this discussion it is necessary to refer to the statement of the Secretary on this issue found in his remand decision at page 2:

> The ALJ found laches to be inapplicable in this matter. The Secretary recognizes that, traditionally, the application of laches against the government has not been favored. See, e.g., Costello v. United States, 365 U.S. 265 (1961). In more recent case law, however, the principle that Federal, State, and local governments may be estopped or subjected to the defense of laches is increasingly clear in several forums. See, e.g. S.E.R., Jobs for Progress. Inc. v. United States, 759 F.2d 1 (F. Cir. 1985); Lane v. United States, 639 F.2d 758, 761, 226 Ct. Cl. 303 (1981).
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> The basic rule now appears to be that laches may be available in certain areas. The ALJ below applied the basic test for laches cited in Costello at 282 and found the presence of (1) a lack of diligence by the party against whom the defense is asserted ["(i)n this matter ED did not pursue its claim diligently."], and (2) prejudice to the party asserting the defense [". . . reconstruction would have become impossible by reason of ED's inexcusable delay, to Petitioner's prejudice. I find this argument convincing and it is so found."].
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> Without analysis, however, the ALJ automatically adopted the case of U.S. v. Arrow Transportation Company, 658 F.2d 392, 394 (5th Cir., 1981) [". . . so long as ED was acting 'to enforce a public right or to protect the public interest' its action is not subject to the defense of laches."]. Moreover, this case was adopted without reason, despite his reference to SER' Jobs for Progress in the discussion regarding the Statute of Limitations (ID at p. 5). Therefore, in view of the ALJ's finding regarding the Statute of Limitations, and in light of the five year record-keeping requirement, I instruct the ALJ to consider whether laches may be applicable and, if so, whether it is merited here.

In view of the Secretary's statement that the basic rule now appears to be that laches may be available in certain "areas", a fundamental question then is whether there is legal precedent that the subject matter of the instant proceeding constitutes one of those "areas" where laches may be available as a defense.

The Secretary has cited the case of S.E.R. Jobs for Progress Inc. v. United States, 759 F.2d 1 (F. Cir. 1985) as an example of more recent case law setting forth the principle that the Federal government may be subjected to the defense of laches. In view of the fact that laches was determined to be applicable as a defense against the Federal government in the S.E.R. case, a pertinent question then is whether the facts of the S.E.R. case, including the subject matter, are similar to the facts of the instant case.

The answer to that question has, in the course of the recent briefing, been supplied by counsel for OSFA. In discussing the statute of limitations issue OSFA's counsel stated: "Faced with a virtually identical fact situation In S.E.R.. Jobs for Progress Inc. v. United States, 759 F.2d 1 (F. Cir. 1985) the Federal Circuit Court held that § 2415 did not apply . . . ." OSFA's initial brief at 7.

I must agree with Counsel for OSFA that the facts of the instant case are virtually identical to those of the S.E.R. case.

The S.E.R. case involved a final audit report as to a manpower services contract with the Department of Labor (DOL) issued in January 1975 which questioned over $700,000 in costs. Negotiations between DOL and the contractor ensued. According to the contractor the negotiations resulted in a settlement in April 1975 by repayment of $7,060.13 by the contractor to DOL. After negotiations were concluded nothing was heard by the contractor from DOL as to the contract until more than 6 years later when the DOL contracting officer issued an initial determination based on the 1975 audit reports, that the contractor owed over $600,000 in disallowed costs. In the interim the contractor had moved and destroyed records, including the instant contract, which the employees of S.E.R. believed had been settled or otherwise resolved.

The defense of laches was raised. The court cited the basic rule that the defense of laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. The court found that the first element had been clearly satisfied by SER. However, the court determined that the findings of fact of the Board were inadequate to determine the extent to which SER was prejudiced by the Government's inexcusable delay. Therefore the case was remanded for that determination.

Before remanding the case the court discussed the law concerning the defense of laches as applied to the government. The court recognized the traditional rule that the government is not subject to the defense of laches in enforcing public rights[See footnote 1 *1*] but went on to state that the courts have not been unanimous in this holding.[See footnote 2 *2*] The court pointed out that in recent cases the courts have stated that some relaxation of the traditional rule against the application of laches may be developing, and implied that exceptions to the rule might be approved in certain cases. The court in S.E.R. cited the case of Lane v. United States 639 F.2d

758, 226 Ct. Cl. 303 (1981) wherein the court held that an equitable counterclaim of the government was barred by laches.

Since the court in the S.E.R. case had ruled in favor of the contractor as to the issue of delay and had remanded the case to decide the issue of prejudice, it is clear that the court had therefore recognized the laches defense as being applicable to the facts of that case and that this then constituted an exception to the traditional rule that the government is not subject to the defense of laches in enforcing its rights.

Since the fact situation in the instant case (as stated by OSFA's counsel) is virtually identical to the facts in the S.E.R. case; and since in the S.E.R. case laches was determined to be applicable as a defense against the Federal Government; it must follow that laches is also available as a defense against OSFA in the instant case.

OSFA in discussing the S.E.R. case stated that the court declined to rule on laches and remanded the case for a factual determination of whether or not the auditee had been prejudiced. The court, however, in reaching that point had therefore determined that laches was basically applicable to that fact situation, since the only issue remaining was whether the auditee had actually been prejudiced.See footnote 3 *3*

OSFA in its reply brief states that it seeks to protect a public interest by establishing the validity of its determination against the recipient of Federal funds which improperly expended portions of those funds contrary to Federal requirements. However, since the facts here are "virtually identical" to the facts of the S.E.R. case, the rights and interests which the Government was seeking to protect in that case were no less public than they are in the instant case.

In reality the only way that OSFA can avoid the effect of the ruling in the S.E.R. case is to have it reversed.

There is therefore clear legal precedent that the defense of laches is applicable and merited under the circumstances of this case.

Prejudice.

OSFA enters into a lengthy discussion in its brief as to the question of prejudice. However this is a moot issue. The Secretary in his remand decision has already recognized the findings of the prior judge in this case as to the issues of delay and prejudice as follows:

The ALJ below applied the basis test for laches cited in Costello at 282 and found the presence of (1) a lack of diligence by the party against whom the defense is asserted ["(i)n this matter ED did not pursue its claim diligently."], and (2) prejudice to the party asserting the defense [". . . reconstruction would have become impossible by reason of ED's inexcusable delay, to Petitioner's prejudice. I find this argument convincing and it is so found."].See footnote 4 *4*

Authority to Grant Equitable Relief

OSFA has argued that an administrative law judge does not have authority to grant equitable relief in the instant type of proceeding and therefore that the defense of laches may not be considered by an administrative law judge.

OSFA in raising this issue in reality is directly challenging the power of the Secretary since it is the Secretary who, at length, in his remand decision discussed the issue of the applicability of the defense of laches to the facts in this case, and instructed the administrative law judge "to consider whether laches may be applicable and, if so, whether it is merited here." If the Secretary considered that he did not have authority to entertain an equitable defense and that in turn he could not instruct the administrative law judge, who is then acting on behalf of the Secretary, to also consider an equitable defense, then the issue would never have been set forth in the remand decision. However it was, and the fact is that the Secretary does have the power to consider equitable defenses. In fact not only has the Secretary in the past considered equitable defenses, but the courts have provided authority for this power and the Secretary in turn has remanded cases in the past to the Department's Education Appeal Board (EAB), (which stands in much the same status as an administrative law judge) to also consider equitable defenses.

In making this argument, OSFA has cited at page 16 of its initial brief four prior decisions of the EAB wherein the EAB took the position that it could not consider equitable relief. These cases, however, preceded the recent cases wherein the EAB applied equitable relief, which decisions later became the final decisions of the Department of Education.See footnote 5 *5*

The New York decision resulted from a remand by the United States Court of Appeals for the Second Circuit dated November 21, 1988, which required the Secretary to consider an issue as to an offset to a refund claim. In the New York decision, at page 4, the EAB stated: "Thus, we find that EDGAR regulations do not constitute a barrier to the equitable offset of $530,195 . . . ." (emphasis added).

In that decision the EAB reviewed three prior court cases involving the Department of Education and, after discussing one of them, stated: "Thus as recently as one year ago, a federal appellate court required that the Secretary and EAB implement concepts of reasonableness and equity in the appellate review of final audit determinations of federal educational grants. . . . This EAB Panel is persuaded that it is the intention of federal appellate courts reviewing the Secretary's decisions to inject the doctrine of fairness, including application of equitable offset or credit . . . ." Appeal of the State of New York, Id. at 6 (emphasis added). The Secretary of Education then permitted the decision to become the final decision of the Department on August 29, 1989.

The Florida decision considered a similar issue. At page 46 of that decision the EAB, after referring to the case of Bennett v. Kentucky Department of Education, 470 U.S. 656 (1985), stated: "That case, however, is relevant in that the Secretary's action therein, as affirmed by the Supreme Court, applied equitable considerations in determining the amount to be repaid by the State." (emphasis added). Later in that decision the EAB referred to the case of Fort Valley College v. Bennett, 853 F.2d 862 (11th Cir., 1988) and stated: "Fort Valley held that the Court of Appeals, in reviewing a final EAB order under 20 USCA § 1234a(e), has no authority to impose equitable adjustments on the recovery ordered by the EAB and the Secretary. 853 F.2d at 868.

However, the conclusion that the Court of Appeals has no warrant to consider equities in such cases does not mean that equities cannot be considered by the EAB and the Secretary in making their own decisions."See footnote 6 *6*

Consolidated Appeals of the Florida Department of Education Id. at 49 (emphasis added).

The Secretary of Education then permitted the Florida decision to become the final decision of the Department on September 10, 1990.

Therefore, the Secretary of Education and the EAB have applied equitable relief in determinations involving Education Department Audits and this activity has been in accordance with the determinations of the Courts. The administrative law judges exercised authority similar to that exercised by the EAB and act in the same relationship to the Secretary when the Secretary remands a case with instruction to consider equitable relief such as laches.

Therefore, OSFA's argument that the administrative law judges have no authority to grant equitable relief is without foundation. However, apart from this, the fact remains, as stated previously, that the Secretary of Education has, in his remand order, specifically instructed the administrative law judge to consider the equitable defense of laches. Thus there is no foundation for the administrative law judge to take the position which OSFA advocates as to the authority to consider and grant equitable relief.

Five Year Record-Keeping Requirement

The Secretary in his remand order has referred to the five year record-keeping requirement [45 C.F.R. § 177.62 (b)See footnote 7 *7* in relation to the issue as to whether laches may be applicable or merited here.

It is considered that the five year record-keeping requirement is an issue which could be taken into consideration in reaching a determination as to whether an inexcusable delay has occurred or whether Platt has been prejudiced by OSFA's inexcusable delay. Since both of those issues have already been determined in Platt's favor by the prior judge, such that they are not open for consideration by the undersigned, it is considered that further discussion as to that record-keeping requirement would not be of any effect upon the outcome of this case.

In summary, it is apparent that the S.E.R. case is clear authority for the principle that laches is applicable as a defense against the government under the circumstances that exist in the instant case.

None of the cases cited by OSFA, which held that the government was not subject to the defense of laches, involved fact situations similar to the instant case. The S.E.R. case is the only one involving facts and relationships which are similar.

Distinction of Present Case from Cases Holding the Government Exempt from Laches.

A number of the cases holding the Government exempt from laches state that the reason for exempting the Government from the defense of laches "is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers."

Platt has properly pointed out in its brief before the Secretary (p. 26) that the instant case does not involve negligence of public officers. Platt stated in that brief, in part: "Rather, as ED concedes, its delay as well as its failure to notify Platt that the audit was to be kept open, is the result of a deliberate strategy to advance its interest in litigation against LTV." Respondent's Brief on Appeal at 26.

In connection with that point the decision by the prior administrative law judge stated as follows at page 3:

Meanwhile, the matters of LTV Education System. Inc. v. Secretary of Education and of Secretary of Education v. LTV Corporation and Vouqht Corporation et al. were pending in the United States District Court for the Northern District of Texas, Dallas Division (Civil Action No. 3-80-0125R) before the Honorable Jerry Buchmayer. Those actions referred to violations not by the Petitioner, but by the Petitioner's prior owners, and others, and pertained to fraudulent banking practices involving lenders of federally granted student loans. In connection with the investigation of defendants LTV et al., and in order to protect and improve its litigative positions in the District Court actions against parties other than Petitioner, ED's Office of Inspector General advised ED's Office of Student Financial Assistance not to resolve the audit. Whether this was before or after Petitioner had paid the sum demanded on NDSL, SEOG and BEOG deficiencies is not reported.

C. Procedural Due Process.

The Secretary in his remand decision has set forth the third issue as follows:

Referring to ED's claim for $35,000, the ALJ below noted that "it is arguable that the estimated sum demanded is arbitrary, rather than 'reasonable'." (ID at p. 6) I instruct the ALJ to consider whether the claim, as devised and presented by ED, meets the mandates of procedural due process.

"The Fifth AmendmentSee footnote 8 *8* commands the federal government that 'no person shall be . . . deprived of life, liberty, or property without due process of law . . . ."See footnote 9 *9*

Procedural due process requires that there be a notice and opportunity to be heard. The following comments appear in the treatise entitled Administrative Law and Practice:

In Goldberg,See footnote 10 *10* the Supreme Court stated that timely and adequate notice is a basic principle of due process. Notice must be given in a timely fashion and in a manner reasonably calculated to inform the citizen of the proposed action . . . . Even in formal adjudication only notice pleading is required . . . .See footnote 11 *11*

OSFA's counsel has stated at pages 24-25 of its initial brief that: "we consider the reference to 'due process' as directing consideration of whether OSFA devised and presented its audit finding in a manner that complied with those statutes and regulations that prescribed the conduct of audits, the auditee's response, and the resolution and appeal rights for that audit."

OSFA then sets forth a statement of various steps that took place in this case from 1975 until August 1978. OSFA then refers to a letter of August 19, 1987 - (Apparently OSFA actually is referring to the letter of November 19, 1987) and the March 17, 1988, Final Audit Determination and stated at pages 26-27 of its initial brief:

The March 17, 1988, Final Audit Determination letter established Platt's liability in the amount of $35,000 as a result of the named FISL program deficiencies . . . . In the August [November] 19th letter OSFA had outlined the findings and deficiencies at issue for which the $35,000 was being disallowed. OSFA specifically referenced those descriptions in its March 17th letter. These explanations were, in turn, based upon the findings contained in the 1975 audit report . . . .

In its March 17, 1988, letter, OSFA stated the following in pertinent part:

Considering the condition of the FISL records at the time of the audit, the College presumably will have difficulty discerning which refunds have been repaid, how late refunds were remitted to lenders, etc. . . Due to difficulties associated with determining an accurate liability figure, we will require one of two allowable options: for the institution to repay $35,000 to the Federal Government to satisfy an estimated liability figure, or the College may choose to reconstruct records in attempts to determine an accurate liability figure as described below. . . .

Then OSFA argues at pages 28-29 of its initial brief as follows:

Clearly, OSFA's Final Audit Determination letter notified Platt of: (1) the matters of fact and law underlying the audit findings which formed the basis for OSFA's claim and for which additional detailed information was contained in the audit report to which Platt had responded, (2) Platt's rights to appeal OSFA's determination to the Secretary, and (3) the time frames which had to be met in the event that Platt wished to appeal OSFA's determination. . . .

In this case, OSFA provided Platt with adequate notice since the facts and legal bases underlying OSFA's claim were presented in detail in the audit report, the August [November] 19, 1987, letter to Platt, and the March 17, 1988, Final Audit Determination letter.

Platt however, argues that there is no basis for the $35,000 claimed liability, that the grounds for a computation of this amount were not given [OSFA at no time divulged the basis for its "estimate"] and that there is no authority in statute or regulation for OSFA to make its "estimate" and declare it to be a liability of Platt.

Platt goes on to argue:

It is the very manner in which ED presented its notice to Platt in 1987 with no communication for nine years, with no opportunity to review ED's procedures, with no explanation of the calculations, followed by the same absence of justification or reconciliation before the ALJ that evidences the denial of due process to Platt.

Respondent's Brief on Remand at 16.

In view of the fact that the law under which this proceeding is authorized calls for a hearing on the record,See footnote 12 *12* the proceeding must comply with the provisions of the Administrative Procedure Act (APA) pertaining to administrative adjudications. Section 554 (b)(3) requires that persons entitled to notice of an agency hearing shall be informed, amongst other things, of the matters of fact and law asserted.

In C.H. Koch, Jr., Administrative Law and Practice, Vol 1 at Section 5.5 (1985) we find a discussion as to "Pleading and Formal Notice - Adequate Pleading by the Agency," as relates to the APA as follows: "The APA supplies some minimum notice requirements. These include, 'legal authority and jurisdiction,' and 'matters of fact and law.' . . ."

The Attorney General's ManualSee footnote 13 *13* then states, as to notice, that: "It is not required to set forth evidentiary facts or legal arguments. All that is necessary is to advise the parties of the legal and factual issues involved."

Also in C.H. Koch, Jr., supra, Section 7.24B, 1990 Pocket Part, the following comment is made as to the content of a notice:

Content. The content of the notice will vary with the interest but at a minimum the agency must give notice of the reasons for the proposed deprivate so that the private party may respond. It has long been established that due process requires notice reasonably calculated, under all circumstances, to inform the private party of the nature of the government action so as to allow an opportunity to challenge the action. Notice that enumerated the charges against the employee was found to be adequate. The notice should also adequately inform the person of his procedural rights and how to exercise them. (footnotes omitted).

It is considered that the notice requirements of due process have been meet here in what is set out in the Final Audit Determination of March 17, 1988, as supported by the letter of November 19, 1987, and the Audit Report of November 24, 1975. As stated above, in order to comply with the notice requirements of the APA, it is sufficient if the parties to the proceeding have notice as to the legal and factual issues involved. It is not necessary to set forth evidentiary facts or legal arguments.

D. Non-GSL/FISL Overallowance Payments Made in 1978.

As relates to the fourth issue the Secretary has stated the question as follows: "What effect, if any, did the payment made on or about August 9, 1978, for the non-GSL/FISL overallowances noted in ED's letter of May 12, 1978, have upon the current claim for additional overallowances

in light of the five year recordkeeping provision found at 20 C.F.R. 682.610(d)?"See footnote 14 *14*

The May 12, 1978, letter sent by an official of OSFA to Platt stated that it would serve as a confirmation of the meeting with OSFA officials and Platt's director of financial aid to discuss the resolution of the audit. It went on to state, amongst other things, that the due date for a reimbursement of $27,115 would be extended to August 1, 1978, and that this would provide additional time to obtain information concerning four students. The letter also provided that if the information as to the students was not obtained by the deadline then reimbursement of the entire $27,115 would be required.

This was composed of $10,798 for the N.D.S.L., $6,691 for the S.E.O.G., and $9,626 for the B.E.O.G. The letter concluded with the statement that OSFA would follow-up the GSL program portion of the audit report and advise Platt of any additional information that might be required.

Following that letter, on August 9, 1978, Platt sent a letter to OSFA stating that all monies due had been refunded with the exception of the amounts attributable to four students; and that the required information would be filed later. A request was also made that OSFA verify by letter that the audit had been resolved, after the student information was filed.

Then on October 2, 1978, Platt sent a letter to OSFA setting forth the breakdown of amounts of money refunded by date under the three programs mentioned in the letter of May 12, 1978, along with copies of the cancelled checks and information concerning the four students mentioned previously. The total actually paid amounted to approximately $23,000.

It can be seen that the combination of the correspondence reviewed above does not present an unequivocal showing that a complete resolution of the NDSL, SEOG, and BEOG program issues took place in 1978. As an example, the letter of May 12, 1978, does not actually conclude that a resolution of the NDSL, SEOG, and BEOG program issues was accomplished even though it does state that the resolution of the audit was discussed and it does set forth specific amounts of money which were required to be paid at that time.

The request by Platt that OSFA verify by letter that the audit had been resolved was never fulfilled by OSFA. That being the case, then it cannot be said that the non GSL/FISL overallowance payments made between June and October 1978, had any effect upon the more current claim for additional overallowances. (This is aside from the claim of laches.)

In addition, since it cannot be said that the payments made in 1978 on NDSL, SEOG, and BEOG programs had an effect upon the current claim for additional overallowances, the five year record-keeping provision in 34 C.F.R. § 682.610(d) [45 C.F.R. § 177.62(b)] actually would not be of significance as to this issue.

V. CONCLUSIONS OF LAW.

A. OSFA's final audit determination is not subject to the defenses of waiver, statute of limitations, or accord and satisfaction.

B. OSFA's final audit determination is subject to the defense of laches, and, in view of the findings of fact made by the prior administrative law judge, which are now effective, such defense is merited in the contex here.

C. OSFA's claim meets the mandates of procedural due process.

D. Aside from the defense of laches, Platt's payment made on or about August 9, 1978, for the non-GSL/FISL overallowances noted in OSFA's letter of May 12, 1978, has no effect upon the current claim for additional overallowances.

E. In view of the defense of laches which is merited in this case, the final audit determination issued by the Chief of the Audit Review Branch of OSFA is not supportable.

VI. ORDER.

As a result of the Secretary's decision remanding this case for reconsideration and based on the foregoing findings of fact and conclusions of law, IT IS ORDERED that: the final audit determination requiring Platt to repay $35,000 to the U.S. Department of Education be vacated.

John F. Cook
Administrative Law Judge

Dated: October 31, 1991
Washington, D.C.

Footnote: 1 *1 Costello v. United States, 365 U.S. 265 (1961), (denaturalization proceeding); United States v. Summerlin, 310 U.S. 414, 416 (1940), (claim of U.S. under National Housing Act); Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938), (right of U.S. to bank deposit assigned by foreign government); United States v. California, 332 U.S. 19, 40 (1947), (interests in public lands); United States v. Popovich, 820 F.2d 134, 136 (5th Cir. 1987), (issuance of patent); United States v. Arrow Transportation Co., 658 F.2d 392, 394 (5th Cir. 1981), (obstruction to navigation).*

Footnote: 2 *2 Clearfield Trust Co. v. United States, 318 U.S. 363, 369 (1943), EEOC v. American National Bank, 420 F.Supp. 181, 183-85 (E.D. Va. 1976)*

Footnote: 3 *3 OSFA in its reply brief recognized this point in stating: "[T]hose courts that have recognized the laches defense as being applicable against the Federal Government have only reached the issues of delay and prejudice once they had ruled in favor of the party invoking the laches defense on the threshold matter of whether or not the case involved Government protection of a public interest."*

OSFA reply brief at 13.

Footnote: 4 *4 A more complete statement of the findings of the prior judge in this case as to this issue are as follows:*

The next issue is whether ED's actions constituted a prejudice to Petitioner. As noted, Petitioner was required to provide documentation which both parties knew did not exist, or to reconstruct the information from other sources. Petitioner argues that school records which might have provided assistance had been disposed of over the extended period of time in the absence of any notification that they would be required for more than the five-year retention period of 34 C.F.R. § 682.610; that students from whom information might be requested had long since scattered (and, though not in their argument, that there was no requirement on individual students to retain the information required for anything near the 13 year period); and that school personnel had scattered. Therefore, they argue, reconstruction would have become impossible by reason of ED's inexcusable delay, to Petitioner's prejudice. I find this argument to be convincing and it is so found.

Footnote: 5 *5 Consolidated Appeal of the Florida Department of Education, EAB Docket Nos. 29(293)88, 33(297)88, Final Decision September 10, 1990; Appeal of the State of New York, EAB Docket No. 26(226)86, Final Decision August 29, 1989.*

Footnote: 6 *6 OSFA has referred to the case of Bennett v. New Jersey, 470 U.S. 632 (1985) in connection with its argument that an administrative law judge has no authority to grant equitable relief. That case has no bearing upon the powers of an administrative law judge since it refers only to the limitations placed upon a reviewing court when it reviews a determination by the Secretary of Education. This case does not discuss any limitations as to the authority of the Secretary or of the administrative law judges who, when they take any action, are actually acting on behalf of the Secretary.*

Footnote: 7 *7 Presently contained in 34 C.F.R. § 682.610(d).*

Footnote: 8 *8 U.S. Const., Amend. V.*

Footnote: 9 *9 C.H. Koch, Jr., Administrative Law and Practice, Vol.1., Sect. 7.1. (1985).*

Footnote: 10 *10 Goldberq v. Kelly, 397 U.S. 254 (1970).*

Footnote: 11 *11 C.H. Koch, Jr., Administrative Law and Practice, Vol. 1, Sect. 7.24. (1985).*

Footnote: 12 *12 20 U.S.C. 1094(b)*

Footnote: 13 *13 T.C. Clark, Attorney General's Manual on the Administrative Procedure Act, Part IV, Sect. 5(a) (1947).*

Footnote: 14 *14 The regulation reference should be 34 C.F.R. § 682.610(d). However, the prior reference for the regulation was 45 C.F.R. § 177.62(b).*