IN THE MATTER OF

CITY UNIVERSITY OF NEW YORK Docket No. 93-3-O
on behalf of LAGUARDIA
COMMUNITY COLLEGE

**DECISION**

Appearances: Leigh M. Manasevit, Esq., and Kristin E. Hazlitt, Esq., Brustein & Manasevit of Washington, D.C., for the city University of New York.

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

Before: Judge Richard I. Slippen.

BACKGROUND

On July 23, 1986, the Office of Student Financial Assistance Programs (SFAP), U.S. Department of Education (Department), issued a **final program review determination** finding that from July l, 1975 through June 30, 1980, the City University of New York's (CUNY) LaGuardia Community College (CUNY-LaGuardia) overawarded Basic Educational Opportunity Grant (BEOG) funds (currently known as PELL grants) to its students.See footnote 1 [1] The final determination held CUNY liable for $2,367,343. Temporary Restraining Order (TRO) Memo Ex. 10.

In a letter dated December 11, 1986, CUNY appealed the final program review determination. TRO Memo Ex. 13. Although SFAP contended that CUNY was not entitled to a formal appeal, SFAP permitted CUNY to attempt to establish, through informal means, that SFAP's calculation of liability was incorrect. In June of 1989, CUNY submitted a study that it had commissioned by the accounting firm of KPMG Peat Marwick. The accounting firm's study concluded that CUNY-LaGuardia's liability was only $397,710. TRO Memo Ex. 16.

SFAP rejected the liability conclusions of the KPMG Peat Marwick study, but did recompute CUNY's liability based on some of the data used in the study. The result of SFAP's recalculation was that CUNY's assessed liability was reduced to $1,567,570. TRO Memo Ex. 17 (September 14, 1990 letter from Molly Hockman).

On November 21, 1991, SFAP notified CUNY that it would commence collecting CUNY's $1,567,570 "debt" through administrative offset. In December, 1991, CUNY requested an oral hearing pursuant to 34 C.F.R. Part 30 on the matter of the administrative offset. An oral hearing was granted and held on February 10, 1992.See footnote 2 [2] The hearing official upheld SFAP's decision to offset S1,567,570, plus interest at the rate of 9% per annum from September 14, 1990. In addition, the hearing official permitted CUNY to propose an alterrlative repayment plan that could avoid the use of an administrative offset. However, SFAP and CUNY could not agree on an alternative repayment plan that was acceptable to both parties.

The administrative offset was set to commence on May 4, 1992 . On May 1, 1992, CUNY sought injunctive relief from the United States District Court for the Eastern District of New York. In July of 1992, the District Court ruled that CUNY was not entitled to a full evidentiary hearing under 20 U.S.C. 1094, but held that the oral hearing held on February 10, 1992, involving the administrative offset, did not provide CUNY adequate opportunity to challenge SFAP's liability determinations. The Department then informed the Court that it had discovered an informal appeal procedure that would permit CUNY to have its conce{ns reviewed by the Secretary. Accordingly, the Court, on November 18, 1992, dismissed, with prejudice, the case before it pursuant to a settlement agreement (Stipulation of Settlement), signed by both CUNY and the Department, setting out the procedures for CUNY's informal administrative appeal.

The current proceeding before this tribunal arises as a result of the Secretary's Order of June 24, 1993, captioned Desiqnation of Forum, and the Secretary's Order of January 4, 1994, permitting a full evidentiary hearing in this matter. This tribunal held an evidentiary hearing on Thursday, January 27, 1994.

For the reasons stated below, the final program review determination finding that from July 1, 1975, through June 30, 1980, CUNY-LaGuardia overawarded BEOG funds to its students is **affirmed.**

I.

According to SFAP, the issue in this case is simply whether CUNY has properly disbursed BEOG awards to its students. Consequently, the issue in this case turns on how BEOG awards are calculated under the regulations.See footnote 3 [3]

SFAP argues that the calculation of a BEOG award is determined by dividing a student's annual BEOG award by the number of terms in the institution's academic year. According to SFAP, in the BEOG calculation, the number of terms in an academic year is considered the minimuu number of terms a student must attend to be considered full-time by the institution. SFAP points out that the regulations ostensibly permit each institution to define its own academic year.See footnote 4 [4] To this extent, the parties agree that CUNY defined its academic year as consisting of four quarters, and students had to enroll in at least 24 credits in an academic year to be considered full-time students. See, e.g., Closing Argument of the City University of New York at 1 (under CUNY-LaGuardia's cooperative education program students were expected to "enroll in school year-round" for four quarters); Administrative Record (A.R.) at 001 (full time students "are required to attend all four quarters" of the academic year). Consequently, according to SFAP, CUNY-LaGuardia was required to disburse an eligible student's BEOG award in an equal amount in each quarter of CUNY-LaGuardia's four quarter academic year.

CUNY contends that from 1975-76 through 1979-80, CUNY LaGuardia was organized as a credit hour institution with non standard terms of equal length offering a cooperative education program for which an academic year consisted of four terms. For a student to be considered a full-time student, CUNY argues, the student had to enroll in at least 24 credits during an academic year over the course of each of the four terms offered by CUNY LaGuardia.See footnote 5 [5] See A.R. at 592. In addition, CUNY argues that despite the fact that CUNY-

LaGuardia required students to attend each of its four quarters to be considered a full-tiue student, the applicable BEOG regulations permit a CUNY-LaGuardia student, who enrolled in 8 credits for each of three terms of the academic year or 6 credits for each of four terms of the academic year, to be considered a full-time student by CUNY-LaGuardia for purposes of disbursing annual BEOG awards during the academic years at issue.See footnote 6 [6] The basis for CUNY's position is the definition of "full-time student" found in 45 C.F.R. 190.2 (1979), which provides that a full-time student is a student who is carrying a full-time academic workload wherein the course work amounts to a minimum of 24 semester hours. According to CUNY, since "a credit is a credit is a credit," the fact that a student enrolls in course work which amounts to at least 24 semester hours is sufficient to permit disbursement of a full BEOG award to an otherwise eligible student. Closing Argument of CUNY at 3. Section 190.2, according to CUNY, merely requires that a full time eligible student enroll in 24 credits in an academic year to qualify for a full BEOG award during the academic year.See footnote 7 [7]

To support its position that a full-time student may be defined as a student who only attends three quarters out of four, CUNY relies upon the definition of "academic year" found in the definitions provisions of Section 190.2, which provides, in pertinent part:

Academic year: (a) A period of time in which a full time student is expected to complete the equivalent of at least 2 semesters, 2 trimesters or 3 quarters at institutions using credit hours; or

(b) At least 900 clock hours of training for each program at institutions using clock hours.

According to CUNY, the regulatory definitions of nacademic year" and "full-time student" permitted CUNY-LaGuardia to disburse full BEOG annual awards to eligible students who enrolled in 24 credit hours over the course of only three quarters of the academic year as long as the student enrolled in at least 8 credit hours for each of the three quarters. This tribunal does not agree with CUNY's analysis.

The crucial regulations in this proceeding are those that govern the calculation of a student's BEOG award. Although the regulations defining "full-time student" and "academic year" are relevant to the issue here, the matter does not end with reference to only those regulations.See footnote 8 [8] These regulatory definitions provide only the benchmarks for performing the calculation of a BEOG annual award and these definitions, by themselves, cannot be used to determine the amount of a BEOG award.

Under the regulations pertinent to the disbursements at issue, the calculation of a BEOG award for a student for each payment period requires institutions, using quarters or other academic terms to measure progress by credit hour, to:

(l) Determine [the student's] enrollment status for the term,

(2) Based upon that enrollment status, determine his/her annual award from the Payment Schedule (full time students), or one of the Disbursement Schedules (Part-time students), as appropriate, (3) Divide the amount determined in paragraph (a)(2) of this section by the number of terms in an academic year if those terms are of equal length.

45 C.F.R. 190.64 (1979); see also 45 C.F.R. 190.75 (1974) and 45 C.F.R. 190.62 (1978).See footnote 9 [9]

Under 45 C.F.R. 190.64, the initial step in calculating a BEOG award for a specific payment period is to determine a student's enrollment status for the term the student is enrolled. Enrollment status at institutions using academic terms and measuring progress by credit hours is defined under 45 C.F.R. 190.2 as "a student's credit hour work load categorized as either full-time, three-quarter-time, or half-time." Consequently, since CUNY-LaGuardia is a credit hour institution with non-standard terms of equal length, a CUNY-LaGuardia student's enrollment status would be based upon the institution's determination of the minimum workload of a full-time student as long as the ratio of semester credit hours required per term for full-time status to 24See footnote 10 [10] is the same or greater than the ratio of one term to the number of terms in the institution's defined academic year. In other words, since the ratio of 1:4 is the same as 6:24, CUNY-LaGuardia's minimum full-time standard is six credits per term.

The second step in the calculation of a BEOG award is to determine a student's annual award from the payment schedule for full-time students or the disbursement schedules for part-time students based upon the student's enrollment status.See footnote 11 [11] The final step in determining the BEOG disbursement is to divide the annual award, determined in step two, by the number of terms in the academic year as determined by the institution assuming those terms are of equal length.

To summarize, under the pertinent regulations, in order for CUNY-LaGuardia to properly disburse a full BEOG annual award of $1,800 to one of its eligible students, the annual award should be disbursed to the student in the amount of $450 for each quarter of the four quarter academic year that the student enrolls as a full-time student. Consequently, students who enrolled in CUNY-LaGuardia for only three quarters as full-time students were not entitled to a disbursement of S450 for the quarter for which they did not enroll. Those students qualified for only three-fourths (3/4) of a full BEOG annual award. Nor could the institution permissibly compress the annual award by disbursing a full BEOG annual award over the course of three quarters instead of four. As noted earlier, the requlations plainly provide that the calculation of a BEOG award is performed by dividing a student's annual award by the minimum number of terms in an academic year a student must attend to be considered full-time by the institution. In CUNY-LaGuardia's case, that number is four.

During the hearing before this tribunal, counsel for CUNY argued that the tribunal should consider the intent and purpose of the BEOG regulations because "to apply them literally, it would actually deprive those precise students of a full Pell grant." January 27, 1994 Tr. 23. Without evaluating whether CUNY may have a persuasive argument as a matter of policy, clearly, the language of the regulations does not support CUNY's position. Section 190.64(a) requires institutions to disburse BEOG awards in each term that a student is required to attend as a full-time student in an academic year despite the fact that a student may choose to enroll in an institution in a manner not previously contemplated by the institution. This tribunal must decline CUNY's invitation to look beyond the plain language of the regulations in deciding this case because an administrative judge has no jurisdiction to waive regulations, and must follow the

regulations as they are written. See In the matter of Gulf Coast Trades Center, Dkt. No. 89-16-S, U.S. Dep't of Education (Decision of the Secretary) (October 19, 1990) at 5.

Applying these regulations, this tribunal holds that CUNY-LaGuardia improperly disbursed full BEOG annual awards to full-time students who enrolled in only three quarters of the academic year. Whether a student enrolls in 24 credit hours of course work over the course of three quarters is irrelevant to the permissibility of awarding a full BEOG annual award to a CUNY-LaGuardia student who failed to enroll in each of four quarters of the academic year. The calculation of a BEOG disbursement requires that the annual award be divided by the minimum number of terms or quarters that a student is required to enroll in to be considered a full-time student by the institution. In other words, no CUNY-LaGuardia full-time student who failed to enroll in course work for each of four quarters of the academic year was entitled to a full BEOG annual award during the years at issue. Accordingly, SFAP's conclusion that CUNY LaGuardia improperly disbursed full BEOG annual awards to students who failed to enroll in each of four quarters of CUNY-LaGuardia's academic year is AFFIRMED.

II.

According to CVNY, even if this tribunal finds in favor of SFAP on the merits, the Department should not recover any funds from that institution because SFAP is barred from recovery by at least one of three Federal statutes of limitations. CUNY contends that the institution "was first notified of its right to appeal in a letter dated August 2, 1984," yet SFAP failed for almost 10 years from that date to enforce any right to collect a liability from CUNY. A.R. at 633.

Although CUNY argues that the August 2, 1984 letter is the formal notice of liability that is relevant to the statute of limitations issues, the institution also concedes that as for the issue involving the disbursement of BEOG awards, "on July 23, 1986, ED issued another letter to CUNY, reducing its demand of payment to $2,867,843," and in response to continued negotiations with CUNY over the proper measurement of liability, "[o]n September 14, 1990 ED . . . issued another demand for $1,567,570." A.R. at 632, 633. Despite these actions over a period of years by ED that reduced CUNY's alleged liability, it argues that the statute of limitations provision found in Section 1234a(k) of the General Educatlon Provisions Act (GEPA)See footnote 12 [12] properly applies to this proceeding, and through its application, bars SFAP's action because of the fact that the August 2, 1984 letter "was received more than five years after FY 1978 and 1979 funds were expended by CUNY." A.R. at 633.See footnote 13 [13]

CUNY also argues that although Section 1234i(2) of GEPA excludes from its coverage, programs authorized under Title IV of the Higher Education Act of 1965 (HEA),See footnote 14 [14] the Department's Office of the General Counsel opinion set forth in a May 4, 1979 internal memorandumSee footnote 15 [15] suggests that in the interest of fairness and consistency, GEPA's statute of limitations should cover Title IV programs. If it were to include Title IV programs, CUNY argues that SFAP should be bound to the statute of limitations set out in Section 1234a(k).

Finally, CUNY argues that 28 U.S.C. 2415(a) bars the instant action on grounds that Section 2415(a) bars all actions by the Federal Government for money damages founded on a contract

which are filed more than six years after the right of action accrues.See footnote 16 [16] See A.R. at 634 - 637.

In response to CUNY's positions on the applicability of a statute of limitations barring SFAP's action, a letter, dated December 20, 1991, was issued by the Acting Deputy Assistant Secretary for Student Financial Assistance, which stated, in relevant part:

I have determined, in consultation with the Office of the General Counsel, that the arguments put forward by CUNY in its December 18, 1990 letter from Robert E. Diaz, General Counsel and Vice Chancellor for Legal Affairs of CUNY, and the arguments put forth in your letter of December 12, 1991, are not persuasive in support of that contention.

A.R. at 643. Consequently, the Acting Deputy Assistant Secretary found CUNY's arguments, that either 20 U.S.C. 1234a(k), 28 U.S.C. 2415(a), or 28 U.S.C. 2415(b) barred SFAP's action, to be without merit.

In addition, as a result of an informal administrative offset proceeding pursuant to 34 C.F.R. Part 30 held on February 10, 1992, the presiding official answered each of CUNY's arguments on the statute of limitations issue. In that decision, the presiding official rejected CUNY's position that SFAP's action was time-barred by Sections 1234a(k), 2415(a) or 2415(b). Although this tribunal is reviewing CUNY's statute of limitations arguments de novo, it should be noted that CUNY's statute of limitations arguments have been reviewed twice already and that the presiding official's decision in the administrative offset proceeding included a thorough and comprehensive review of the statute of limitations issue. In that decision, the presiding official noted that:

[Section 2415(a)] only bars the Government's assertion of a particular remedy, the filing of a complaint in a lawsuit. It does not extinguish the underlying existing claim, nor does it bar other enforcement actions available to the Government after the six-year period, including administrative offsets.

A.R. at 888.

Assuming, without deciding, that SFAP's riqht of recovery in this proceeding is based on contract theory,See footnote 17 [17] it is clear from the plain language of Section 2415(a) that this provision only bars actions brought by the Federal Government by the filing of complaint in a lawsuit for money damages. Section 2415(a) provides:

. . . every 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 law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later . . . .

In this proceeding, SFAP is seeking to collect an alleged debt owed to it by CUNY through a regulatory administrative offset and not through a lawsuit for money damages. Moreover, the statute specifically permits the Federal Government to initiate an action for money damages in a

court of law within one year **after** "final decisions have been rendered in applicable administrative proceedings required by contract or law, whichever is later." It is clear that the very fact that this proceeding is before this tribunal is sufficient evidence that a final agency decision has not been issued. Additionally, prior decisions have addressed the preclusion of the application of Section 2415 to Department of Education actions. In In the Matter of Platt Junior Colleae, Dkt. No. 90-2-SA, U.S. Dep't of Education (Nov. 21, 1991), the administrative law judge held that "an administrative proceeding involving a challenge to a Final Audit Determination by a Designated ED official that an institution has not properly utilized funds is not an 'action for money damaqes' within the meaning of 2415." Id. at 5; see also, S.E.R. Jobs for Proqress, Inc. v. United States, 759 F.2d 1 (Fed. Cir. 1985) tholding that an administrative appeal of a preliminary agency decision to recover misspent funds is inapplicable to 28 U.S.C. 2415 on its face). Consequently, the statute of limitations found in Section 2415(a) is inapplicable to SFAP's action.See footnote 18 [18]

As for CUNY's argument that Section 1234a(k) also bars SFAP's action, the presiding official's decision in the administrative offset proceedinq concluded that because the BEOG program was authorized by the ffigher Education Act of 1965 (HEA), GEPA's statute of limitations provision, 20 U.S.C. 1234a(k), is specifically excluded by 20 U.S.C. 1234i(2). See A.R. at 891. This tribunal agrees with that conclusion.

Indeed, even CUNY concedes that GEPA excludes from its coverage, programs authorized by HEA, which includes the BEOG program. Despite this view, CUNY insists that SFAP should be bound by an internal memorandum produced by the Department's Office of the General Counsel that suggests, according to CUNY, that in the interests of fairness, HEA programs should come within the ambit of GEPA's statute of limitations since the HEA, itself, does not have a statute of limitations provision. See A.R. at 774 - 779; In the Matter of Platt Junior Colleqe, supra, at 6 (recognizing that the HEA does not contain a statute of limitations).

The memorandum, however, does not address HEA programs specifically. In fact, the memorandum merely concludes that grant programs which "are not specifically covered by GEPA['s]" statute of limitations provision should be applied to GEPA in the interests of fairness and consistency. A.R. at 779. The memorandum does not conclude, as CUNY argues, that programs which are explicitly excluded from GEPA's coverage should nonetheless be applied to GEPA. More importantly, even if the memorandum had made the conclusions presented by CUNY, this tribunal sits without jurisdiction to ignore or waive the requirements of a statute administered by the Department.See footnote 19 [19] The plain language of Section 1234i(2) excludes HEA programs from the coverage of GEPA's statute of limitations provision. Consequently, this tribunal cannot apply Section 1234a(k) to SFAP's action in this case. Accordingly, SFAP is not barred by the statutes of limitations presented by CUNY from seeking to obtain relief on the basis of CUNY's improper disbursements of BEOG awards during the academic years at issue in this Proceeding.See footnote 20 [20]

III.

Another issue raised by CUNY is that this tribunal should, in the interests of justice, bar SFAP from recovering against CUNY as a result of the application of the doctrine of laches. According to CUNY:

the Department has shown a complete lack of diligence and has been wholly culpable for the sluggish rate at which this matter has progressed. It has taken the Department almost twelve years from the date it initially reviewed LaGuardia to finally issue a determination in this matter.

Second, CUNY will be unduly prejudiced if it is required to defend itself against a claim which resulted from expenditures made as much as 17 years ago. Memories of witnesses regarding significant events have faded, other witnesses have moved and cannot be located, and one important witness has died.

Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction Exhibits (Points and Authorities) Vol. II, Ex. 31 at 31, 33. To support its position, CUNY relies on In the Matter of Platt Junior Colleae, supra, wherein the administrative law judge held that the doctrine of laches is available as a defense to a SFAP action as a matter of law. Consequently, this tribunal recognizes, because of the holding in In the Matter of Platt Junior Colleqe, that CUNY may permissibly raise the defense of the doctrine of laches in this proceeding.See footnote 21 [21] Accordingly, the issue before this tribunal is whether the circumstances of this case warrant granting CUNY relief under the doctrine of laches.

The doctrine of laches is based upon the maxim that "equity aids the vigilant and not those who slumber on their rights."See footnote 22 [22] Under the doctrine, two elements must be established: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.See footnote 23 [23] This tribunal holds that neither prong of this two-part test is established by CUNY.See footnote 24 [24]

The presiding official's decision in the administrative offset proceeding rejected CUNY's argument that it should be granted relief under the doctrine of laches. In that decision, the presiding official determined that:

[i]n reviewing the history of this claim as detailed earlier on pages 5 through 7 of this decision, I find that from 1984 through 1990, each time that OSFA asserted a claim for funds against CUNY vis a vis LaGuardia, OSFA allowed CUNY, at CUNY's request, to provide additional information to reduce LaGuardia's liability rather than requiring CUNY to repay that liability. Further, as a result of CUNY availing itself of those opportunities, OSFA reduced LaGuardia's liability from over $3,000,000 to $1,567,570, a 50 percent reduction. Accordingly, I find that there was no inexcusable delay in OSFA's asserting its claim against LaGuardia, and that CUNY was not prejudiced by any delay in the assertion of the claim. In fact, CUNY benefitted from the delay.

A.R. at 893. In addition, the presiding official found that the central issue in the case, whether BEOG awards were improperly disbursed, did not depend upon the credibility of witness testimony for its resolution, and therefore, CUNY was not prejudiced in its defense. Id.

In applying the first prong of the doctrine of laches, the tribunal finds that the circumstances of this case simply do not show that SFAP pursued its claim against CUNY through neglect or omission. To the contrary, although the number of years intervening between the time SFAP first issued its program review report of CUNY-LaGuardia in 1980, and the date, June 24, 1993, in which the Secretary granted CUNY a full evidentiary hearing covers some 13 years, throughout that time the record shows that both parties negotiated with each other in order to mutually agree on what corrective action, if any, CUNY-LaGuardia should undertake as a result of the 1980 program review. In a letter dated August 2, 1984, for example, a SFAP official informs the chancellor of CUNY that:

[as you may know, over three years have elapsed since this office transmitted our report on the administration of Title IV federal student assistance programs at the City University of New York (CUNY) to the Chancellor's office at CUNY. Since that date we have awaited CUNY's responses to the recommendations and requirements contained in that report.

Points and Authorities Vol. I, Ex. 9 at 1. CUNY, in response to the letter, ackcnowledges that three years is a long time for SFAP to wait for CUNY's responses, but asks for more time nonetheless. CUNY states:

We agree that three years is a lengthy period of time to resolve the issues in a program review, but substantial progress has been made toward the full resolution of all the issues.

Points and Authorities Vol. I, Ex. 10 at 1. Again, in 1986, CUNY requests additional time to in which to respond to SFAP's program review determination. CUNY states:

Due to the complexities of the issues raised in this program review and the magnitude of potential liability, we request additional time in which to prepare a full appeal.

Points and Authorities Vol. I, Ex. 12 at 1. Between June 1989 and November 1991, the parties conducted further negotiations that resulted in a substantial reduction in the claim SFAP was seeking to enforce. On November 21, 1991, SFAP notified CUNY that it would be collecting the S1,567,570 "debt" through administrative offset. In December of 1991, CUNY requested an oral hearing pursuant to 34 C.F.R. Part 30 on the matter of the administrative offset. An oral hearing was granted and held on February 10, 1992. The hearing official upheld SFAP's decision to offset $1,567,570 plus interest at the rate of 9% per annum from September 14, 1990. Additionally, the hearing official permitted CUNY to propose an alternative repayment plan that could avoid the use of an administrative offset. However, SFAP and CUNY could not agree on an alternative repayment plan.

The administrative offset was set to commence on May 4, 1992. On May 1, 1992, CUNY sought injunctive relief from the United States District Court for the Eastern District of New York. In July of 1992, the District Court ruled that the scope of the oral hearing held on February 10, 1992, involving the administrative offset was too restrictive and ordered the Department to provide CUNY with an informal hearing. On November 18, 1992, the Court dismissed, with prejudice, the case before it after CUNY and the Department agreed to a settlement.

It is evident to this tribunal that after a review of the procedural history of this matter, CUNY has not established that this case supports its conclusion that SFAP's conduct caused unreasonable or unexplained delay in it asserting its claim against CUNY. Whether SFAP used good judgment in permitting CUNY to reassert its appeals in the manner that occurred here is a question that is outside the scope of the doctrine of laches. The application of the doctrine of laches is limited here to evaluating whether, under circumstances permitting due diligence, SFAP pursued its claim in a neglectful manner for an unreasonable and unexplained length of time to the detriment or prejudice of the party against whom the claim should have been asserted. CUNY has also not established that the lapse of time operated to prejudice its defense. Indeed, as the record reveals, the lapse of time in this case was due in part to CUNY's own conduct. More importantly, the issues before this tribunal are largely those for which the aid of witness testimony is not required. Notably, the factual issues set out in the District Court sanctioned settlement agreement (also referred to as the Stipulation of Settlement) could be resolved with the use of documentary evidence.See footnote 25 [25] Accordingly, the circumstances of this case do not warrant granting CUNY relief under the doctrine of laches.

IV .

Finally, according to CUNY, the imposition of liability upon institutions for improperly dis'bursed BEOG awards may only occur where it is shown that the disbursement clearly violated an established regulation. In addition, CUNY argues that SFAP must seek recovery from the student first before it attempts to recover improper BEOG disbursements from the institution. See January 27, 1994 Tr. at 28. To support its argument, CUNY relies upon 45 C.F.R. 190.77 (1974) and 45 C.F.R. 190.80 (1979) which require, inter alia, institutions to make reasonable efforts to obtain BEOG overpayments from the student, but precludes SFAP from imposing liability upon an institution for BEOG overpayments unless the regulations clearly indicate that the BEOG disbursement was improper.

The answer to CUNY's argument is that, as this tribunal has held in this decision, the regulations governing the calculation of BEOG awards clearly provide that the calculation of a BEOG award is arrived at by dividing a student's annual award by the minimum number of terms in an academic year a student must attend to be considered full-tlme by the institution. At CUNY-LaGuardia students were expected to enroll in each of the four quarters of the institution's four quarter academic year. Consequently, as this tribunal has found, disbursing full BEOG awards to students who enrolled in only three quarters of the academic year clearly violated the regulations governing the calculation of BEOG awards. Accordingly, even under CUNY's reading of Sections 190.77 and 190.80, SFAP may permissibly impose Liability upon CUNY for its improper BEOG disbursements since those disbursements clearly violated BEOG program regulations.

ORDER

Based on the foregoing findings of fact and conclusions of law, the City University of New York on behalf of LaGuardia Community College is hereby found liable for the repayment of the sum of $1,567,570 to the United States Department of Education.

Richard I. Slippen
Administrative Judge

Issued: March 30, 1994
Washington, D.C.

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SERVICE

A copy of the attached document was sent to the following:

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Footnote: 1 [1] *l/Title IV of the Higher Education Act of 1965, as amended, Pub. L. No. 89-329, 79 Stat. 1219 (HEA) (to be codified as amended at 20 U.S.C. 1070 et seq.) authorized the BEOG program. The BEOG program is the predecessor student grant program for the current Pell grant program. The BEOG disbursements at issue occurred throughout five years beginning in the 1975-76 academic year up to and including the 1979-80 academic year.*

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Footnote: 2 [2] *2In February 1992, CUNY filed an application for review under the HEA, 20 U.S.C. 1094. SFAP rejected this application as improper.*

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Footnote: 3 [3] *3Although CUNY states the issue differently, this tribunal holds that SFAP has framed the issue correctly and consistent with the record in this case. According to CUNY:*

> *the only single issue before this tribunal today is whether LaGuardia has to give back money that it gave to students for full-time students when the students did full-time studies . . . in acceptable enrollment patterns, but that those enrollment patterns should be held not to be acceptable at LaGuardia because LaGuardia didn't anticipate that those enrollment patterns would come.*

*January 27, 1994 Tr. 26. However, the pivotal issue in this case is not whether CUNY-LaGuardia should be penalized for its alleged failure to anticipate that the enrollment patterns of its students would depart from the enrollment pattern the institution set out as its defined academic year, but whether, assuming that shifting enrollment patterns did occur, CUNY-*

*LaGuardia nonetheless improperly disbursed BEOG awards to its students during the years at issue.*

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*Footnote: 4* [4] *4The institution's accrediting agency and state licensing agency may limit this discretion, but the Federal government ostensibly does not.*

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*Footnote: 5* [5] *5According to CUNY, the institution designed its cooperative program so that students would attend*

*out of the four quarters of a year, for three quarters as typical standard matriculating students and [would] take what would be considered a full-time course load of study, and in the fourth quarter, . . . [the student would] be out in the world of work performing an internship which would be for college credit. That internship was not to carry the same amount of credits that a student studying in what was considered to be a full-time study program was -- would be to earn.*

*January 27, 1994 Tr. 18.*

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*Footnote: 6* [6] *6Indeed, CUNYIs position was made an assumption of the KPMG Peat Marwick study which was conducted on behalf of CUNY. As CUNY notes:*
*Peat Marwick considered a student who enrolled in twenty-four credits during an award year to be enrolled on a full-time basis for the entire year, regardless of how the credits were distributed across academic periods within the year, and therefore entitled to a full Pell Grant for the year.*

*A.R. at 541 - 542. As a consequence, the KPMG Peat Marwick findings may have significantly under-reported the actual number and amount of improper BEOG disbursements made by CUNY-LaGuardia. Nonetheless, even under CUNY's analysis, KPMG Peat Marwick determined that CUNY was liable for $397,710 in improper disbursements of BEOG funds. Closing Argument of The City University of New York at 4. In addition, KPMG Peat Marwick arrived at its lia})ility determination by offsetting CUNY's liability by over $238,000 due to what the firm referred to as BEOG "underawards." See February 23, 1994, Deposition of Daniel Hamlin at 52; A.R. at 268 (KPMG Peat Marwick City University of New York LaGuardia Community College, Findings and Response to the Department of Education's Determination Related to Pell Grant Disbursement for Fiscal Years 1976 through 1980 at Page V.6) Consequently, notwithstanding the questionable assumptions of the KPMG Peat Marwick study, the study concluded that CUNY-LaGuardia improperly disbursed at least $635,000 in BEOG funds during the years at issue. Id.*

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*Footnote: 7* [7] *7Daniel Hamlin, a CUNY expert witness and partner of the KPMG Peat Marwick accounting firm, stated in his deposition that:*
*[t]he federal regulations, and this is paraphrasing - I think this is pretty close -- basically says that you need 12 semester hours or 12 quarter hours per term, period, and over an academic year a total of 24 semester hours and 36 -- it was 36 quarter hours. So that's what the federal regulations say.*

*February 23, 1994 Deposition of Daniel Hamlin at 37.*

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Footnote: 8 [8] *8Under 45 C.F.R. 190.2 (1978), although the phrase "School year" is used instead of "Academic year," the definitions of the two phrases do not differ in any relevant aspect. Unless otherwise noted, citations to Title 45 of the Code of Federal Regulations are to the 1979 edition.*

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Footnote: 9 [9] *9The regulations governing the calculation of BEOG payments during the years at issue may be found at 45 C.F.R. 190.75 (1974) and 45 C.F.R. 190.62 (1978) for fiscal years 1975 through 1979 and 45 C.F.R. 190.64 for fiscal year 1980. Although the codification of the regulations changed between 1974 and 1980, the substance of the regulations was not changed in any relevant aspect.*

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Footnote: 10 [10] *10Under 45 C.F.R. 190.2, a full-time student is defined as an enrolled student who is carrying a full-time academic work load as determined by the institution, however, institutions using credit hours to measure progress must have a full-time standard that equals or exceeds 24 semester hours per academic year.*

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Footnote: 11 [11] *llFor example, under 45 C.F.R. 190.62, for the 1979-80 award year, an eligible student in a full-time enrollment status with an expected family contribution of "0" on the Student Eligibility Report (SER) was entitled to a full S1,800 BEOG annual award.*

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Footnote: 12 [12] *12 Pub. L. No. 91-230, 84 Stat. lG4, 512 (1970) (to be codified as amended at 20 U.S.C. 1221 et seq.*

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Footnote: 13 [13] *13GEPA creates a right of action for the Federal Government to impose liability upon a recipient of Federal funds, if the recipient spends the Federal funds contrary to law. Bell v. New Jersey, 461 U.S. 773, 784 (1983). Section 1234a(k) limits the Federal Government's right to impose liability upon recipients of Federal funds to those funds received by the recipient within five years before the written notice of liability is received by the recipient of the Federal funds. Section 1234a(k) provides:*

*No recipient under an applicable program shall be liable to return funds which were expended in a manner not authorized by law more than 5 years before the recipient received written notice of a preliminary departmental decision.*

*20 U.S.C. 1234a(k).*

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Footnote: 14 [14] *14 Pub. L. No. 89-329, 79 Stat. 1219, as amended (to be codified as amended at 20 U.S.C. 1070 et seq. and 42 U.S.C. 2751 et seq.).*

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Footnote: 15 [15] *15See A.R. at 774 - 779*

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Footnote: 16 [16] l6Similarly, CUNY argues that 28 U.S.C. 2415(b) bars allactions brought by the Federal Government based on tort wherein the action is filed more than six years after the right of action accrues.

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Footnote: 17 [17] 17Cf. In the Matter of Macomb Community College, Dkt. No. 91-80-SP, United States Dep't of Education (June 28, 1993) (holding that in a recovery of funds action, SFAP's request for relief is most appropriately based on a debt incurred as a result of a breach of contract).

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Footnote: 18 [18] l8Similarly, Section 2415(b) is also inapplicable to SFAP's action. Section 2415(b), which bars an action by the Federal Government filed in court three years or more after the right of action accrues and "whicA is founded upon a tort," has no application to this case because of the precedent established by S.E.R. Jobs For Proqress. Inc., In the Matter of Platt Junior Colleqe, and In the Matter of Macomb Communitv Colleqe, suPra, in which the administrative law judge determined "tort law is not the appropriate legal basis for the recovery of funds" by SFAP because "tort requires [SFAP] to show a duty on the part of the school which was intentionally or negligently breached. Whereas, recovery [of funds] under contract theory merely requires proof of the contract and a breach of one of the terms by the institution." Id. at 5 n.15.

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Footnote: 19 [19] 19It is axiomatic that an internal agency document cannot nullify the plain language of a statute.

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Footnote: 20 [20] 20CUNY's arguments that 31 U.S.C. 3716(c) and New York's own state statute of limitations also bar SFAP's action are equally unavailing. Section 3716(c) does not apply to states or the instrumentalities of a state or local government. See 31 U.S.C. 3701(c); cf. 34 C.F.R. 30.20(b) (1). Both parties concede that CUNY is an instrumentality of state and local government. See, e.g., Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction Exhibits Vol. II, Ex. 18 at 11. Consequently, Section 3716(c) plainly does not apply to SFAP.

In addition, it is axiomatic that the Federal Government is not subject to state statutes of limitations unless Congress explicitly provides for such in plain and clear statutory language. United States v. John Hancock Mutual Life Ins., 364 U.S. 301, 308-309 (1960). The HEA neither provides a statute of limitations nor evidences Congress' intent that the Federal Government be subject to state statutes of limitations.

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Footnote: 21 [21] 2lDespite SFAP's contention that "[i t is hornbook law that the United States is not subject to the defense of laches in enforcing its rights," this tribunal is constrained to follow the final decision of the Department permittlng Respondents to raise the defense of the doctrine of laches. SFAP Informal Appeal to the Secretary Br. at 52.

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Footnote: 22 [22] 22BLACK'S LAW DICTIONARY 787 (Sth ed. 1979).

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Footnote: 23 [23] 23In the Matter of Platt Junior Colleqe, supra, at 8.

Footnote: 24 [24] *24The doctrine of laches is, of course, an affirmative defense for which CUNY bears the burden of persuasion.*

Footnote: 25 [25] *25Paragraph 5 of the Stipulation of Settlement, which sets forth the basis for CUNY's appeal, states in relevant part:*

*5. If CUNY's appeal is limited to the following issues, the maximum Pell Grant liability at issue will be $1,567,570.00, the amount set forth in the September 14, 1990 letter from Molly Hockman, the Director of OSFA's Division of Audit and program Review:*

*a) Whether LaGuardia's academic year for the period in question consisted of four academic quarters or three academic quarters;*

*b) Whether a full-time student attending LaGuardia for the period in question was a student who took six semester hours per quarter or eight semester hours per quarter;*

*c) Whether a student who completed 24 semester hours in three quarters at LaGuardia for the period in question was overpaid if LaGuardia paid that student a Pell Grant award for a complete academic year; and /or*

*d) Any other issue raised below that is not covered under paragraph 6 of this stipulation.*