

IN THE MATTER OF MARY HOLMES COLLEGE,
Respondent.

Docket No. 94-90-SA
94-82-SA
Student Financial Assistance Proceeding

DECISION

Appearances: David J. Figuli, Esq., of Evergreen, Colorado, for the Respondent.

Denise Morelli, Esq., Office of the General Counsel, U.S. Department of Education, for
the Office of Student Financial Assistance Programs.

Before: Thomas W. Reilly, Administrative Law Judge

BACKGROUND

The Respondent, Mary Holmes College (MHC), has filed a timely notice of appeal contesting four Final Audit Determinations (FAD) issued by the U.S. Department of Education (ED), Office of Postsecondary Education, Student Financial Assistance Programs (SFAP), Audit Resolution Branch, on September 30, 1993, and March 3, 1994. The FADs cover the two-year period that ended June 30, 1985 (award year '85); the two-year period that ended June 30, 1986 (award year '86); the two-year period that ended June 30, 1990 (award year '90); and the two-year period that ended June 30, 1991 (award year '91). [See footnote 1 1/](#) It is alleged that MHC violated various provisions of Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. §1070, et seq., and that the College thereby became liable for a total of \$1,210,338.90 [See footnote 2 2/](#) in Title IV funds improperly disbursed.

ED has the burden of production in this proceeding, but the College has the burden of proving that the expenditures in issue and disallowed by the Department were proper and complied with program requirements. 34 C.F.R. 668.116(d).

As established by MHC's and ED's exhibits, [See footnote 3](#) Mary Holmes College is the only private, non-tax-supported, two-year Historically Black college in the nation. It is located in West Point, Mississippi, and was founded in the late 1800's as a religious school for black women. It has grown into a fully- accredited coeducational junior college with an average enrollment of over 400 students. The college has liberal arts programs with both academic and career vocational training. There are a variety of courses including Physics, Computer Sciences, Cosmetology, Child Development, and Head Start Skills Training.

CHRONOLOGY

On September 30, 1993, ED's Audit Resolution Branch (ARB) issued two FADs [See footnote 4](#) covering award years '85 and '86. (See ED Exs.1 & 2.) Since no liabilities were assessed for the '86 award year, SFAP is not pursuing in this proceeding the issues raised in the FAD for that period.

The '85 FAD was based upon a compliance audit conducted at the college by a CPA firm ("Auditor 1") hired by MHC, which allegedly was not submitted to ED's Office of Inspector General (OIG) until August 7, 1992. The '85 audit specified several violations of Title IV program requirements and questioned Title IV disbursements not properly documented for award year '85. Auditor 1 also found that the college failed to repay improper Title IV disbursements cited in the school's previous compliance audit. (ED Ex.4, at 29-30.) ED assessed a liability of \$125,260 for the violations alleged in the '85 FAD. (ED Ex.1, at 14.) However, ED's supplemental memorandum (Attachment A) raised that amount to \$137,176.

On September 30, 1993, ED's ARB also issued a FAD for award years '89 and '90. (ED Ex.5.) For this FAD, ED relied on a compliance audit conducted at MHC by a second audit firm ("Auditor 2"), which was submitted to ED's OIG on August 18, 1992. (ED Ex.6.) For award years '89 and '90, Auditor 2 found several violations of Title IV program requirements, for which ARB assessed a liability of \$ 207,588. (As pointed out in ED's brief, liabilities for the 1989/1990 and '91 FADs were adjusted later to reflect changes in liabilities resulting from later submission by MHC of missing documentation, and failure to submit documentation for other findings, as directed in the FADs.) [See footnote 5](#)

On March 3, 1994, another FAD was issued covering award year '91. (ED Ex.7.) This '91 FAD was based upon another compliance audit conducted at MHC by Auditor 2, and this was submitted to OIG on March 17, 1991. (ED Ex.8.) Substantial violations of Title IV program requirements were found and some were repetitive from prior award years. MHC was assessed a total liability of \$99,098 for that award year, instructed to submit additional documentation covering some of the findings, and directed to repay improper Title IV expenditures if the necessary documents could not be found. Additionally, Auditor 2 could express no opinion on the correctness of the balances reported on MHC's financial statement as to Federal Perkins Loan funds, since the school was unable to produce a student loan subsidiary ledger that could support expenditures of Perkins funds. Ultimately, the school was unable to produce the Perkins documentation, so ARB assessed a liability of \$773,165 for reimbursement of the full amount of the Perkins funds.

Acting on suggestions from ED, MHC retained another auditing/CPA firm ("Auditor 3") to review its compliance efforts for award years '90 and '91. Auditor 3 was able to locate further helpful documentation (Resp.Ex.B.), and ED readjusted downward some of the claimed liabilities in light of the new information.

DISCUSSION

The discussion and analysis of the conflicting positions of the parties will track the FAD years (award years) in chronological order.

1984-1985 (Award Year '85)

The first award year in issue is 1985, i.e., although nominally covering award years 1984-1985, the compliance audit period ended June 30, 1985. For this period, based on certain violations found by the auditor, the Department (ED) assessed a total liability of \$125,260 (raised to \$137,176 in ED's Supplemental Memorandum, as mentioned earlier). The '85 audit cited numerous violations of Title IV program requirements and alleged that certain Title IV disbursements were not properly documented. ED's Brief itemizes the particular alleged liabilities for '85 and then adds \$68,821 in liabilities from prior audit years that ED argues should be affirmed as part of this appeal. (Those prior audit amounts were never appealed by the school.) When totalled, the '85 audit items and the prior audit unappealed liabilities come to a grand total of \$137,176. (See ED's April 6, 1995, Supplemental Memorandum, chart Attachment A.)

There are two threshold problems with the liabilities grouped by ED under the '85 audit. First, I see no legal basis for including old, unappealed amounts from prior audits in this appeal decision. (\$68,821: ED Brief, at 24.) ED still has whatever enforcement and collection rights are available for unappealed assessments resulting from prior audits, and does not need a new restatement of those liabilities by this tribunal reopening and re-litigating those old unappealed prior audit amounts. Considering the due process rights of both sides, I do not see how such a re-litigation of those old prior audit amounts can properly come within the jurisdiction of this present appeal. An interesting question might be: by raising anew these old unappealed amounts from audits prior to 1984-1985, does ED open the door to the College to now offer a defense to those liabilities after the door to appeal has been closed? I do not think so. In fact, a re-litigation now would put the school into the difficult situation of trying to document things that occurred some 12-14 years ago. (The records retention requirement is only five years, 34 C.F.R. 682.610(d)(1990).) Accordingly, I simply offer no opinion on the validity of those old prior audit amounts, one way or the other. ED is simply left with whatever collection and enforcement rights it had at the time the appeal period expired for those prior audit amounts; they will not be "refreshed" by referring to them here as if to give them a more current imprimatur.

Secondly, there is an equally significant problem with the entire '85 audit that is more in the nature of a "stale complaint" question. The required compliance audit was completed by MHC's auditing firm on August 29, 1986, covering a period that ended June 30, 1985. ED claims that this audit was not submitted to ED until August 1992. (The auditing firm had gone out of business apparently without submitting the completed audit to ED, or at least ED so claims, and ED now has no record of receiving it.) It is easy to cast blame on the College for failing to somehow be aware that the completed audit had either not been sent to ED or did not arrive at ED. But SFAP is not without fault in "sitting on its hands" until July 1992 before inquiring of the College as to the "missing" '85 audit. The College promptly acted on the ED notification and transmitted a copy (a copy of their copy?) of the missing audit to ED only one month after being notified by ED (August 1992) that it had never been received. The Final Program Determination (FPD) on that '85 audit was not issued until over a year later (September 30, 1993). Query: why did ED wait over seven years before asking the College about the missing '85 audit? (The latest that audit was due to be filed at ED was March 1, 1986.)

Both sides seem to assume that the '85 audit was never sent by the auditors, apparently relying on ED's claim that it never received it. It is equally possible that the audit report was sent, but was misplaced, misdirected or lost at the ED end; this would not be the first time a package was either lost in the mail or misplaced at a large government agency and remained indefinitely at the wrong destination office. Ergo, it cannot be fairly assumed that this was a problem of the school's own making, nor that it was solely the school's fault that the audit report became missing and long-delayed. Other circumstances make it more probable that the '85 audit had been mailed by the audit firm to ED, and that it was misplaced at that end. Why would an audit firm: (a) promptly complete an audit on time, (b) give a copy to the school, and then (c) fail to send the original to ED for whom the audit was primarily intended? (Note that the audit was done to satisfy ED's specifications, not the school's, and that OMB Circular A-133 requires the auditor to transmit his report directly to the U.S. Dept. of Education, not to the school for its transmission to ED.) Non-availability of the original auditors with knowledge of the '85 audit now makes it impossible for the school to verify that the audit was, in fact, timely mailed to ED. I recognize that ultimately it is the school's responsibility to see that the audit is submitted to the OIG by the due date, 34 C.F.R. 668.23(c)(4), but the possibility remains that the school may have reasonably relied on the audit firm to perform this service properly and in accordance with OMB Circular A-133. But if, instead, someone on the school staff had been assigned to mail it to the OIG, due to the passage of time and almost complete turnover in administrative staff since 1985, it is now impossible to track the actual personnel then involved who might verify that this was or was not done.

The position this long delay put the College in is not totally unexpected. In view of the extensive liabilities itemized in the '85 FPD (issued September 30, 1993), the College's law firm undertook to obtain the background records concerning the audit, particularly the work papers of the auditor, so as to be able to determine the facts underlying the audit, and to defend itself against ED's charges. A request for work papers was sent to the only partner of the audit firm that could be located. His response (December 29, 1993) was that the work papers could not be located ("due to the lapse of time..."). (See Resp.Exs.R & S.) The College's law firm then sought to obtain such papers from the Department, which replied that it had "no additional information concerning the audit findings."

Thus, Mary Holmes College is placed in not only a difficult but an impossible situation. It is required to defend itself against findings relating to a nine-year-old audit concerning an audit period that ended some ten years ago, without any opportunity to see or even locate supporting documentation and work papers that are now unlocatable due to the lapse of time. During the intervening nine or ten years, the auditing firm has gone out of business, the individual partners are scattered (only one still available and he knows nothing of that audit), all the administrative personnel at the College have changed, and there have been multiple changes in the ED staff that had any connection with the original FPD. It should be noted that in every step of the process, the College acted with all due diligence regarding this audit: It promptly retained a qualified auditing firm to do the '85 audit. The audit was promptly performed. The College acted promptly as soon as notified by ED (seven years later) of the missing audit. It promptly transmitted a copy of the missing audit (presumably its own file copy). It promptly attempted to contact the old auditing firm as soon as it received the adverse '85 FPD from ED. It promptly attempted to

obtain from ED, as an alternative, whatever additional papers still might exist at ED concerning the '85 audit.

The Regulations, 34 C.F.R. 682.610(d)(1990), formerly 45 CFR 177.62(b), require record-retention for only five years. [See footnote 6](#) This obviously was designed to afford protection to both the schools and the Department. But it should not be used to cut off the due process rights of schools charged with large financial liabilities. Here, the College tried everything reasonably possible to obtain records, work papers, and supporting documentation to defend itself notwithstanding the lapse of time, but precisely because of the lapse of time it was unable to do so, in large part because of ED's seven-year inattention to a missing (but performed) compliance audit.

The Respondent College argues that there is a six-year Statute of Limitations for actions by the U.S. Government for recovery of money based on contract. 28 U.S.C. §2415. Although there are certainly contractual aspects to a school receiving Federal funds and agreeing to comply with the related Regulations, I do not find the Statute of Limitations to be applicable to this case. However, the defense of laches is another matter. [See footnote 7](#) It is interesting to note that one particular Federal Circuit Court decision is cited for both propositions: (a) that the Statute of Limitations (§2415, supra) does NOT apply, and (b) that the defense of laches MAY apply to actions by Federal agencies to recover money. In *S.E.R. Jobs for Progress, Inc. v. United States*, 759 F.2d 1 (Fed.Cir.1985) [See footnote 8](#), those two propositions were set forth, and elements for a defense of laches were described. The defense of laches requires proof of: (1) lack of diligence by the party against whom the defense is raised and (2) prejudice to the party asserting the defense. In the present case, with regard to the 1985 audit and FPD, it is apparent that both elements exist. (Although the term "laches" is not specifically used by Respondent's counsel, it is obvious that the due process, Statute of Limitations, and inequity arguments on pages 22-25 of Respondent's Brief fairly encompass that defense, and the elements are clearly present in the factual record.)

I find that the defense of laches applies to the 1985 audit (conducted by the now out-of-business audit firm whose records cannot be found). Accordingly, I will not affirm ED's assessed liabilities for the 1984-1985 award year, as to do so now would be inequitable, unfair, and unjust to the College, and unwarranted in view of the present absence of records and the inability of the Respondent to now fairly defend itself. [See footnote 9](#) (I note that the succeeding 1985-1986 audit resulted in assessing no liabilities against the College.) Thus, \$137,176 will be deducted from SFAP's assessed liabilities now claimed under the '85 audit for the reasons set forth above. This figure includes the \$68,821 in prior audit liabilities which had never been appealed, for which the Department retains whatever collection remedies still exist.

1989-1990 (Award Year '90)

On September 30, 1993, SFAP's ARB issued a Final Audit Determination (FAD) for 1989-1990. For this FAD, the Department relied on a compliance audit conducted by a second audit firm, Bruno and Tervalon ("Auditor 2"). Several violations of Title IV program requirements were found, and SFAP assessed an initial liability of \$207,588. [See footnote 10](#) This figure was later adjusted downward to \$166,722.90 per ED Ex. 5, at 14; see also ED Supplemental

Memorandum, Attachment A, 89/90 FAD chart. However, MHC was directed to submit missing documentation to SFAP, and if such documentation was not submitted, to repay Title IV expenditures questioned by Auditor 2. Such further documentation was never supplied, except in the case of two high school transcripts in issue.

More specifically, for this award year SFAP made ten categories of charges, each supported by sufficient evidence in the documentary record:

(1) that MHC disbursed improper Supplemental Loans for Students (SLS) to 19 dependent undergraduate students [See footnote 11](#) to the extent of \$32,010, which claim was finally reduced to a liability of \$7372 (ED Brief, at 16-18; ED Ex. 5,6,10; Finding 1);

(2) that MHC made Title IV overawards to ten students (awards in excess of needs) [See footnote 12](#) which resulted in an assessed liability of \$5189, which was reduced to a liability of \$2682 based upon a later audit, accepted by ED, showing that only one student ([student name]) received an overpayment (ED Brief, at 9-10; ED Ex. 5,6,10; Finding 3);

(3) that MHC maintained insufficient documentary verification of students' Title IV eligibility for financial aid (19 students) resulting in assessed liability of \$66,057 (ED Brief, at 10-12; ED Ex. 5,6,10; Finding 5), but see note below relating to deceased student resulting in a deduction of \$2,607.96 from an original assessed liability of \$66,057 [See footnote 13](#) yielding a balance of \$63,449.04 on this item;

(4) that MHC made improper Title IV disbursements to 16 students not maintaining satisfactory academic progress, [See footnote 14](#) for which the assessment was later reduced from a liability of \$51,342 to \$39,119.94, based upon Auditor 3's finding that four of the students cited actually were maintaining satisfactory progress (ED Brief, at 18-19; ED Ex. 5,6,10; Finding 6);

(5) that MHC failed to obtain financial aid transcripts (FAT) for three students [See footnote 15](#), for which the assessment was later reduced from a liability of \$9613 to \$5972.96, based upon Auditor 3's later verification that MHC had obtained an FAT for one of the cited three students [Hollister] (ED Brief, at 19-20; ED Ex. 5,6,10; Finding 7);

(6) that MHC failed to maintain copies of loan applications or other documentation submitted to lenders for Federal Family Education Loans (FFEL) [See footnote 16](#) involving three students, for which the assessment was later reduced from a liability of \$6486 to \$4071, based upon Auditor 3's verification that a loan application for one of those students (Hilton) is in that student's file (ED Brief, at 13-15; ED Ex. 5,6,10; Findings 10, 11);

(7) that MHC improperly disbursed Title IV funds to six students who did not meet Title IV eligibility requirements (high school diploma or equivalent or an "ability-to-benefit" [ATB] test) [See footnote 17](#) leading to assessed liabilities of \$32,435, but with its Supplemental Memorandum, MHC submitted copies of four transcripts (only two of which match those questioned by SFAP), clearly showing that those students graduated from high school, thus mandating a reduction in assessed liabilities to \$27,918 [See footnote 18](#) for the remaining four

students without documented eligibility (ED Brief, at 20-22; ED Ex. 5,6,10,10-15A; Finding 14; and MHC's April 19, 1995 Supplemental Memorandum, at 2, Attachment "A");

(8) that MHC had insufficient and inaccurate College Work- Study (CWS) program records, with some instances of student work being unrecorded, pay being computed incorrectly, three students being underpaid and ten overpaid, and mathematically incorrect time-sheets, leading to total questioned costs and assessed liabilities of \$612 (ED Brief, at 24, n.20; ED Ex. 5,6; Finding 22);

(9) that MHC improperly transferred an excessive amount of its CWS program funds to the Supplemental Educational Opportunity Grant (SEOG) program, exceeding the allowable amount by \$2,774 (admitted by MHC), thereby incurring a liability in that amount (ED Brief, at 24, n.20; ED Ex. 5 & 6; Finding 23); and

(10) that MHC, for one student out of fifty tested, continued to disburse Title IV assistance to that student, who had been admitted on an ability-to-benefit (ATB) basis, after the one-year limitation period expired without the student obtaining a GED diploma as required by Title IV regulations, [See footnote 19](#) thereby incurring a liability of \$5627 (ED Brief, at 22; ED Ex. 5,6,10; Finding 29). Further documentation supplied by MHC (transcripts) negated further liabilities that had been listed under this same Finding in the auditor's report.

After factoring in the Tribunal's disallowances of certain ED claimed liabilities (set forth in items numbered 3 and 7 above), the total remaining liability to be assessed MHC pursuant to the 89/90 FAD becomes \$153,970.94, rather than the \$161,095.90 claimed in the amended ED Attachment "A" chart (April 6, 1995, Supplemental Memorandum, amendment April 24, 1995).

It should be noted that since the subject audit, MHC has implemented new procedures designed to ensure that many of the cited violations will not recur.

1990-1991 (Award Year '91)

On March 3, 1994, SFAP issued a Final Audit Determination (FAD) for 1990-1991. The '91 FAD was based on a compliance audit by Auditor 2 (ED Ex. 7), whose report was submitted to the OIG on March 17, 1991 (ED Ex. 8). Substantial violations of Title IV program requirements were found, many of the same reported in prior audits. For those violations, MHC was assessed liabilities totalling \$99,098. MHC was also directed to submit additional documentation for some findings, and if not produced, to repay other improper Title IV expenditures. Nothing additional has been supplied.

In addition to the '91 FAD specific findings, the FAD noted that MHC was unable to produce a student loan subsidiary ledger [See footnote 20](#) tracking Perkins Loan expenditures. The Department had assessed a liability of \$773,165 for MHC's inability to verify its Perkins expenditures for award year '91. In view of this large liability and reading into ED's allegations the possibility that such a ledger could be found if MHC were given a further opportunity to do so, the Judge included this item in the March 30, 1995, telephone conference with counsel. MHC had not referred to this large item at all in its appeal or in its Brief, but on the chance that this was due to inadvertence and in the interest of compiling a complete record, the Judge offered a

"second bite of the apple" during the telephone conference, surmising that should such ledger be located, this might permit the wholesale deduction of \$773,165 from the total of MHC's assessed liabilities. Counsel for MHC expressly indicated, during that telephone call, that, indeed, such a ledger existed and had already been sent to ED, but without informing the Judge or SFAP counsel. However, when ED counsel finally obtained and reviewed the missing ledger it contained so many deficiencies that SFAP still could not withdraw its claim for the full \$773,165 in Perkins funds.

In SFAP's Supplemental Memorandum (replying to the conference call items), SFAP argues that the document submitted, in addition to being late, "does not meet the guidelines set forth in the FAD," and that the "initial compliance audit did not meet Department guidelines with regard to the school's Perkins expenditures because Auditor 2 could not express an opinion as to the accuracy of the loan balances due to the inadequacies in the school's subsidiary ledger." (ED Supplemental Memorandum, at 3, & Attachmt."B"; ED Ex.8, at 1; and ED Brief, at 4-5, 16.) "Since MHC was unable to produce documentation verifying its Perkins expenditures for award year 1991, the Department assessed liability of \$773,165 for the full amount of these expenditures." (ED Brief, at 4-5, 16; see also ED Supplemental Memorandum, at 2- 4.)

ED also points out that the school was given an alternative to repaying the full Perkins liabilities, i.e., reconstruct all Perkins documents and then obtain a reaudit of the fund activities during that award year. (ED Supplemental Memorandum, at 3.) The school was directed to send any such reaudit to the OIG in Dallas for review to ensure compliance. ED maintains that the document recently submitted to counsel for SFAP was never sent to OIG for review, but beyond this the document is not in compliance with Title IV auditing requirements. Also, the document shows that a review of all Perkins documents and files was not performed, as directed in the FAD. The auditor reviewed only a sample and then noted the liabilities found in just those files. [See footnote 21](#) In its Supplemental Memorandum, MHC argues that the "FAD did not require that all Perkins Loans files be reviewed by the auditor" and asserts that "an audit by principle and by regulation requires only a sampling of subject files." This is generally true. However, after an initial audit has disclosed significant discrepancies, the reaudit requested can be more painstaking in its demand for greater detail.

For this award year, as in the previous one discussed, SFAP made ten categories of charges, each supported by substantial evidence in the record. The first charge (undocumented Perkins Loan expenditures) has been discussed above. The remaining nine come under the following headings:

(2) that MHC failed to make required refunds [See footnote 22](#) with regard to 17 students in the total amount of \$34,903. (ED Brief, at 23-24; ED Ex.7, at 5; Ex.8, at 66; Ex.12, at 2-3; Finding 4.) MHC contends that under its refund policy students are entitled to refunds only if they withdraw in the first two weeks of a school term. But this argument ignores the impact of the school's high default rate, ED Ex.14;

(3) that MHC failed to obtain required eligibility documenta- tion for three students, resulting in an assessed liability of \$7,498 (ED Brief, at 20-22; ED Ex.7, at 6; Ex.8, at 69; Ex.10, at 1a-b; Finding 7);

(4) that MHC improperly disbursed Title IV funds (Stafford Loan/SLS Loans in one installment) in violation of 34 C.F.R. 682.207, thereby incurring "questioned costs" of \$2,415. (ED Brief, at 24; ED Ex.7, at 8; Finding 9.) However, the FAD expressly did not require reimbursement; it just issued an admonition to the school to review the pertinent section of the regulation to ensure compliance in the future. Accordingly, the assessed amount should be deducted from the liabilities enumerated under this FAD;

(5) that MHC failed to obtain student aid reports (SAR) for Pell fund recipients, as required by the regulations, [See footnote 23](#) thus incurring a liability of \$18,269 (ED Brief, at 22-23; ED Ex.7, at 10; Ex.8, at 75; Ex.10, at 8a-b; Finding 12);

(6) that MHC failed to maintain loan applications for three students who received FFEL loans, as required by Title IV regulations, [See footnote 24](#) thereby incurring a liability of \$4923 (ED Brief, at 13-15; ED Ex.7, at 11; Ex.8, at 77; Ex.10, at 7a-b; Finding 14);

(7) that MHC failed to obtain financial aid transcripts (FAT) from prior postsecondary institutions regarding four students cited in the '91 FAD; however, SFAP accepted Auditor 3's certification that FATs had been obtained for all four of those students, in accordance with regulations. [See footnote 25](#) Accordingly, there is no liability assessed on this item for the '91 FAD (ED Brief, at 20; ED Ex.8, at 80; Ex.10, at 7a-b; Ex.7, at 12-13; Finding 16);

(8) that MHC awarded financial aid to nine students (out of 61 reviewed) even though they were not achieving satisfactory academic progress, in violation of Title IV regulations, [See footnote 26](#) thereby incurring a liability of \$1420 (ED Ex.7, at 13-14; Finding 17);

(9) that MHC failed to obtain adequate documentation to support the eligibility of fifteen students selected for verification by the Department, as required by Title IV regulations, [See footnote 27](#) thereby incurring a liability of \$55,579 (ED Brief, at 10-12; ED Ex.7, at 15; Finding 18); [See footnote 28](#)

(10) that MHC improperly disbursed SLS loan funds to two dependent undergraduate students in violation of Title IV regulations, [See footnote 29](#) thus incurring a liability of \$4,268 (ED Brief, at 16-17; ED Ex.7, at 17; Ex.8, at 84; Ex.10, at 3a-b; Finding 20).

After deducting the \$2415 liability discussed in item 4 above, the total assessed liabilities for the '91 FAD become \$900,025 instead of the \$902,440 calculated on the ED Attachment "A" chart (as amended April 24, 1995).

FINDINGS AND CONCLUSIONS

After reviewing the briefs and documents of record, it appears that SFAP has produced sufficient evidence to establish that the charged violations of Title IV did occur and that the assessed liabilities listed above were fair, reasonable and justified, with the exceptions and deductions noted in the foregoing discussion, and that MHC failed to carry its burden of proving that the expenditures questioned or disallowed were proper and complied with program requirements.

Summarizing the appropriate assessed liabilities found herein, the entire '85 FAD assessment has been deducted (\$137,176) based upon the staleness of SFAP's complaint and the defense of laches. Of the final total of \$161,095.90 demanded based on the 89/90 FAD, a net of \$153,970.94 was found to be appropriate. Of the final total of \$902,440 demanded based on the '91 FAD, a net of \$900,025 was found to be appropriate. The assessed liabilities affirmed here come to a grand total of \$1,053,995.94.

ORDER

Mary Holmes College is ordered to repay to the United States Department of Education the sum of \$1,053,995.94.

Thomas W. Reilly
Administrative Law Judge
Issued: May 3, 1995.
Washington, D.C.

S E R V I C E L I S T

A copy of the attached INITIAL DECISION was sent to the following by Certified Mail, Return Receipt Requested, on the 3rd day of May 1995:

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*Footnote: 1/ The four award years correspond to the following Audit Control Numbers
(ACN): ACN 04-26040 for 1985,
ACN 04-26041 for 1986,
ACN 04-21347 for 1990,*

ACN 04-26546H for 1991.

(ED's Brief also referred to Award Year '89 [1988- 1989] but since there were no specific allegations relating to it in the Brief, it will not be discussed herein.)

Footnote: 2 2/ ED's original Brief specified a different figure (\$1,200,264.80), but a supplemental memorandum with corrected Brief pages and additional documentation changed the amount to the larger figure. The additional memorandum and documentation had been requested by the Judge in a telephone conference with both counsel on March 30, 1995.

Footnote: 3 MHC Ex.A, at 22-23, 36-38; ED Ex.8 at 8-19.

Respondent's exhibits are lettered "A" through "U", with additional exhibits appended to the April 19, 1995 Supplemental Memorandum designated Attachments "A" and "B." ED's original exhibits are numbered "1" through "14," and the additional exhibits appended to the April 6, 1995 Supplemental Memorandum are tabbed Attachments "A" thru "C."

Footnote: 4 Although SFAP's Briefs and memoranda use the acronym "FAP" throughout, MHC's documents consistently refer to "FPD" (Final Program Determination), the term used by ED's Audit Resolution Branch (ARB) in its correspondence with the school.

Footnote: 5 For details, see page 3, n.6, and page 24, n.20, of SFAP's Brief. See also explanation on page 1 of SFAP's April 6, 1995 Supplemental Memorandum with attached corrected Brief pages 10, 21, 22, and 25, as well as chart for '85 FAD (Attachmt.A).

Footnote: 6 For an ED decision in which it was held 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 a school has been prejudiced thereby, see *In Re Platt Junior College*, Dkt.No. 90-2-SA, U.S. Department of Education (ALJ Decision on Remand, October 31, 1991; final decis. of Secretary November 21, 1991), at 13.

Footnote: 7 For a discussion of both Statute of Limitations and laches in an ED context, see *Platt Junior College*, *supra*, at 4-13.

Footnote: 8 The S.E.R. case involved a final audit report for 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 whereby the contractor repaid \$7,060.13 to DOL. Nothing was heard from DOL until more than six years later when the DOL contracting officer issued an initial determination based on 1975 audit reports asserting that the contractor was liable for over \$600,000 in disallowed costs. In the interim the contractor had moved and destroyed records, including the subject contract, which S.E.R employees believed had been settled and completely resolved. The court found that the first element of laches existed (see discussion above), but remanded for a finding on the second element, i.e., to determine the extent to which SER had been prejudiced by the Government's inexcusable delay. (See also *Lane v. U.S.*, 639 F.2d 758, 226 Ct.Cl.303 (1981).)

Footnote: 9 On the question of whether ALJ's have the authority to grant equitable relief, see the discussion in Pratt Junior College, supra, at 11-13.

Footnote: 10 With ED's detailed recalculation of the 1990 FAD assessed liabilities set forth in the chart (Attachment "A" of the April 6, 1995 Supplemental Memorandum), ED has adjusted downward the total '90 claimed liability to \$166,722.90.

Footnote: 11 See 34 C.F.R. 682.201(a)(3).

Footnote: 12 See 34 C.F.R. 674.14, 675.14, 676.14.

Footnote: 13 See 34 C.F.R. 668.54, 668.56, 668.57. Also note that the listed liability of \$66,057 includes an amount for a student ([student name]) who is deceased (MHC Brief, at 16), and from whom it was impossible to obtain further supporting documentation. Accordingly, an equitable offset of \$2607.96 (ED Ex.10-16A) for that student would appear to be appropriate and should be deducted, thus leaving a balance of \$63,449.04 as a liability under Finding 5 of the 89/90 FAD.

Footnote: 14 See 34 C.F.R. 668.7(a)(5).

Footnote: 15 Title IV regulations require an institution to determine whether a student, who has attended another postsecondary institution, has previously received aid under any Title IV programs by obtaining a financial aid transcript from that institution. 34 C.F.R. 668.19(a)(2).

Footnote: 16 See 34 C.F.R. 682.610(b).

Footnote: 17 See 34 C.F.R. 600.6, 668.7. I note that MHC makes the point in its Brief (at 18) and again in its April 19, 1995 Supplemental Memorandum that "the current auditor confirms the high school transcripts for 4 of the 6 students cited in the audit report are in the files of the College." However, the position of ED is that a transcript is not necessarily proof of graduation. Two of the four transcripts supplied by MHC with its Supplemental Memorandum correspond to students listed in the audit report (ED Ex.10-15A), and they clearly show that both students graduated. Accordingly, this is the basis for adjustment of this item.

Footnote: 18 See ED Ex.10-15A wherein "Questioned Costs" for two students then lacking transcripts are listed:

[student name] -- \$3142.

[student name] -- +1375.

Total: \$4517.

Orig. Finding 14 ED Assessed Liability: \$32,435.

Less allowance for 2 student transcripts: -4,517.

Net Liability to be Assessed: \$27,918.

Footnote: 19 34 C.F.R. 668.7(b)(2).

[Footnote: 20](#) Perkins Loan regulations require schools to maintain general and subsidiary ledgers identifying each program transaction. 34 C.F.R. 674.19(b), see also 34 C.F.R. 668.116(d).

[Footnote: 21](#) The auditor reported that he had examined the loan records by selecting every 38th name on the subsidiary ledger and tracing the original loan amount to the supporting documentation in the borrower's loan files. "These testing procedures disclosed that the original loan amount reported ... agreed with the amounts stated on supporting documents in the borrower's file except for the following:" (eight named exceptions). The auditor's ultimate conclusion was that "the original amounts reported on the subsidiary ledger appear to be in general agreement with the original loan amounts stated on supporting documents in the borrower's loan file." (Emphasis added.) (Letter from auditor to Dr. Potts, dated July 6, 1994, part of MHC's Attachment "B" to the April 19, 1995 Supplemental Memorandum.)

[Footnote: 22](#) Students who withdraw from school prior to completion are entitled to a refund of unearned tuition. 34 C.F.R. 682.606. The refund due either the student or the lender is based on the school's published refund policy. 34 C.F.R. 682.606(a). But schools with cohort default rates over thirty percent must use a pro rata refund policy. 34 C.F.R. 682.606(b)(2).

[Footnote: 23](#) 34 C.F.R. 690.61, 690.2.

[Footnote: 24](#) 34 C.F.R. 682.610(b).

[Footnote: 25](#) 34 C.F.R. 668.19.

[Footnote: 26](#) 34 C.F.R. 668.14, 668.7(c).

[Footnote: 27](#) 34 C.F.R. 668.53 thru .58.

[Footnote: 28](#) MHC maintains that it should not be liable for such funds because it recently initiated efforts to obtain the necessary documentation from students, and MHC also suggests that the Department, itself, should obtain such information from other Government agencies (IRS, etc.).

Those arguments are rejected as being without merit.

[Footnote: 29](#) 34 C.F.R. 682.201(a)(3).