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

In the Matter of **Docket No. 98-12-SP**

**OIC VOCATIONAL INSTITUTE**, Student Financial Assistance Proceeding
Respondent.

PRCN: 199640513314

Appearances:

William J. Kakish, Esq., Chicago, Illinois, for OIC Vocational Institute.

Jennifer L. Woodward, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Student Financial Assistance Programs.

Before:

Judge Richard I. Slippen

## DECISION

On December 1, 1997, the Office of Student Financial Assistance Programs (SFAP) of the U.S. Department of Education (Department) issued a final program review determination (FPRD) finding that OIC Vocational Institute (OIC) violated several regulations pursuant to Title IV of the Higher Education Act of 1965, as amended (HEA). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq*. In September 1996, SFAP conducted a program review of OIC for the award years 1994-95 and 1995-96. In this program review, SFAP found 26 areas of non- compliance. As a result, SFAP required OIC to conduct a full file review for award years 1990- 91 through 1995-96. On January 19, 1998, OIC filed a written request for review of the FPRD. OIC appeals findings 1-5, 7, 10, 12, 15, 24, and 26 of the FPRD. Specifically, OIC requests dismissal of certain monetary liabilities assessed under findings 1, 2, 7 and 10, equitable relief of all liabilities assessed within the FPRD for award years prior to 1995-96, and the closing of findings 3-5, 24, and 26.See footnote 1[1]

## FINDING 1

Finding 1 of the FPRD found that OIC awarded Title IV funds to students who were enrolled in ineligible programs. Liability was assessed on two separate grounds. First, the Department assessed liability for students enrolled in programs that did not meet the definition of an eligible program. *See* 34 C.F.R. § 668.8 (1994). OIC does not contest the first part of the finding, and this tribunal finds that the determination of ineligibility is correct. To participate in the Federal Pell Grant program, a program must be a minimum of 600 clock hours, 16 semester of trimester hours, or 24 quarter hours of instruction offered during a minimum of 15 weeks. *See* 34 C.F.R. § 668.8(d) (1994). Short-term programs may qualify for participation in the Federal Stafford or Direct Loan program if the program provides at least 300 but less than 600 clock hours of instruction over a minimum of 10 weeks. *See* 34 C.F.R. § 668.8 (d)(1994). The Certified Nurse Assistance and the Diversified Office Occupations/Level III programs are ineligible to participate in the program because these programs do not offer the minimum amount of instruction to participate in any Title IV

programs. A school is also required to be licensed by the state in which the institution is located. *See* 34 C.F.R. § 668.8 (1994). The Nail Technology program is ineligible to participate in the Title IV programs because it was offered over a greater period of time than its license permits. The Richmond Ministerial Fellowship program is ineligible since it is not licensed at all. Therefore, the liability assessment for this portion of the finding is upheld.

Second, liability was assessed for students concurrently enrolled in both a high school diploma program and a post-secondary school program at OIC. *See* 34 C.F.R.
§ 668.7(a)(2)(1994). OIC argues that enrollment in its alternative high school completion program did not constitute enrollment in a secondary school. In response, SFAP agreed with OIC that the alternative high school completion program did not constitute a secondary school. Consequently, SFAP withdrew this portion of the finding and this tribunal need not reach the merits of the argument.

Therefore, the only remaining issue under Finding 1 is the total amount of liability remaining. SFAP held OIC liable to the Department for $1,037,917.00 in ineligible Pell Grants and $60,817.00 for ineligible Direct Loans. OIC contends that $454, 610.00 in liability assessed for invalid Pell Grant payments and $7,555.00, as a pro-ration of the $60,817.00, in liability assessed for invalid Direct Loans should be dismissed from the initial assessment of $1,098,734.00.[See footnote 2](#)[2] According to OIC, this would reduce the liability assessment for Finding 1 to $635,560.00. SFAP contends in its brief that the liability should be reduced to $645,560.00. However, SFAP provides no reasoning for the adoption of its figure. Therefore, since OIC has met the burden of persuasion on this issue by clearly setting out the computation of the reduction in liability and this assessment appears to be accurate, the new liability under finding 1 is $635,560.00.

**FINDING 2**

Finding 2 of the FPRD found that OIC failed to properly calculate the Pell Grants it disbursed to students. Institutions are required to pro-rate Pell Grants for students enrolled in programs of less than an academic year in length. *See* 34 C.F.R. § 690.63. OIC's programs range in length from a one quarter program (12 weeks) to a two quarter program (24 weeks). An academic year is defined as a period at least 30 weeks long during which a full-time students is expected to complete at least 36 quarter credits. *See* 34 C.F.R. § 668.2 (b). The students enrolled in one quarter length programs do not qualify to receive Pell Grants because these programs are ineligible. The students enrolled in two quarter length programs are eligible to receive Pell Grants, but only for a two-thirds pro-ration of the annual award. OIC never performed the pro-ration and instead students enrolled in its one quarter length program received half the annual Pell award and students enrolled in the two quarter length program received the entire Pell award. OIC was assessed $577,681.00 in liability for this violation.

In response to the program review report, OIC requested additional Federal Pell grants for students for whom it did not request all the funds to which these students were entitled. OIC proposes that these funds offset the liability assessed in the FPRD. According to 34 C.F.R.
§ 690.83(d), in order to receive these funds, an institution must have previously reported the student properly as eligible on a previous Student Payment Summary (SPS). Many of these students did not appear on the SPS, and OIC is thus ineligible to receive the funds for these students. The Department did, however, offset $10,952.00 for students who appeared on the SPS and were eligible to receive the funds. The remaining liability under Finding 2 is $566,861.00.

OIC additionally requests that this tribunal allow it to receive full credit for the payments made to these students, despite the fact that the regulations were not followed. OIC concedes that they have no legal means to adjust the Department's records and can not now place the student on a SPS. However, OIC argues that they had no remedy to fix its non-compliance, since by the time they discovered that they had under-requested funds, it was too late to add a student to the SPS. Additionally, OIC contends that the Department failed in its oversight responsibilities. Therefore, OIC should be relieved of responsibility. OIC also asks that 34 C.F.R. §690.83 be struck by this tribunal as an unconstitutional violation of the due process clauses of the 5th and 14th amendments.

OIC is correct in that they are without legal means to adjust the records. Furthermore, OIC's apparent ignorance of the regulations does not relieve them of responsibility to follow regulatory requirements. OIC has a fiduciary responsibility, under the program participation agreement, to act in accordance with the Higher Education Act and its regulations.

While the Department may inform a school if it is in non-compliance, the Department has no responsibility to warn a school of regulatory non-compliance. *In re Hi-Tech Institute of Hair Design and Rickerson Beauty Academie #3 and #5*, Dkt. No. 94-66-ST at 3, U.S. Dep't of Educ. (Nov. 22, 1994). OIC attempts to blame the Department for its own violation of clear regulations. No such argument will accepted. Additionally, this tribunal does not have the power to waive or rule statues and regulations invalid, and thus no relief is in order. *See Gulf Coast Trades Center*, Dkt. No. 89-16-S, U.S. Dep't of Educ. (Decision of the Secretary) (October 19, 1990); *see also* 34 C.F.R. § 668.117. Therefore, the liability of $566,861.00 assessed under Finding 2 is upheld **.**

**FINDING 7**

Finding 7 found that OIC improperly awarded Pell Grants to students whose payment period was scheduled to occur in two award years. According to the FPRD, the school "improperly drew Pell Grants Funds from one award year that should have been drawn from two awards year as no payment period crossed an award year and the students' enrollment occurred during two award years". More specifically, OIC repeatedly awarded excess Pell Grants to students whose first term began in April and whose second term began in July. In this situation, a school is required to disburse the Pell Grants in the appropriate award year, not across award years. *See* 34 C.F.R. § 690.64.

A school may only disburse a Pell Grant to an eligible student if it obtains a valid Student Aid Report (SAR) or a valid Institutional Student Information Record from the student for a given year. *See* 20 U.S.C. § 1070a(a)(2); 34 C.F.R. § 690.61. OIC did not obtain these valid output documents for these students. In order to receive payment from the Department for the Pell Grant, a school must submit payment data by September 30 following the end of the award year in which the grant was made. *See* 34 C.F.R. § 690.83(a). If this deadline is not met, payment can only be received if the school can demonstrate that it qualifies for a payment by way of a finding contained in a timely audit submitted to the Department.

OIC presents four arguments to dismiss liability. First, OIC argues that the students would "most likely" have been eligible for the Pell grants in the new award year. Second, OIC contends that the failure of the Department to warn them of their non-compliance constituted a violation of the Department's oversight duties. Third, OIC argues that the regulation that prevents them from fixing their non-compliance is unconstitutional. Fourth, OIC argues that certain students whose second payment period started prior to July 1 be removed from the finding. OIC contends that the awards are not cross over awards since the first quarter ended prior to July 1.

Since timely audits were not submitted by OIC to the Department, the school can not demonstrate that it qualifies for payments to students. *See* 34 C.F.R. § 690.83(d). Additionally, OIC fails to establish that the students would "most likely" have been eligible for the Pell grants in the new award year. OIC provided no documentation that it properly determined eligibility for the second award year. To assume that eligibility for one year constitutes automatic eligibility would render the requirement of a new SAR meaningless. As previously mentioned under Finding 2, OIC's apparent ignorance of the regulations does not relieve them of responsibility under the regulations. Also, as mentioned above, this tribunal does not have the power to waive or rule statues and regulations invalid, and thus no relief is in order. *See* 34 C.F.R. § 668.117.

OIC additionally asks that students whose second payment period started prior to July 1 be reduced from liability. Once again, OIC improperly disbursed funds across two award years. By using a 12-week, instead of a 3-month term, and by stating that the first quarter ended prior to June 1, OIC attempts to argue that these this violations did not occur for three students in the 1990-91 award year and three students in 1991-92 award year. OIC did not follow the regulations regarding proper Pell Grant procedures, and therefore I find that OIC violated the requirements of 34 C.F.R. § 690.64[See footnote 3](#)[3].

**FINDING 10**

Under Finding 10, SFAP assessed liability for excess federal cash balances maintained by OIC. OIC had requested

and received more federal funds than were needed for a three-day period. OIC was assessed $214, 839.82 in interest charges that accrued on these improperly disbursed Pell Grants, though no separate liability was established for the Pell Grants. Since SFAP concedes part of the liability assessed for improper Pell Funds under Finding 1, these funds should not be considered in assessing the interest OIC owes under Finding 10. OIC thus requests that $49, 873.74 be dismissed from Finding 10.

The Department may recoup interest on improperly disbursed Pell Grants. *See In re Macomb Community College*, Dkt. No. 91-80-SP, US Dep't of Educ. (June 28, 1993) (holding that upon a finding of liability, SFAP may additionally recover interest on any improperly disbursed Title IV funds); *See also In re International Career Institute*, Dkt. No. 92-144-SP, U.S. Dep't of Educ. (July 7, 1994). However, since the liability for a portion of Finding 1 has been removed, the interest assessed must be removed as well. Therefore, OIC's liability under Finding 10 is reduced to $161,105.02.

**IMPLIED STATUTE OF LIMITATIONS**

OIC argues that the three-year record retention requirement creates an implied three-year statute of limitations on actions by the Department. OIC challenges the FPRD generally on this basis and argues that it should be excused from liability for award years prior to and including 1992-93. This argument must fail. This claim ignores the fact that the retention regulations also require that an institution retain "all record involved in any loan, claim, or expenditure questioned by a Title IV, HEA program audit until the resolution of that questioned loan, claim, or expenditure". 34 C.F.R. § 668.24(e)(3). Compliance audits were not submitted to the Department until March 30, 1998, well after the initiation of this proceeding. Therefore, the adoption of an implied statute of limitations would defeat the clear purpose of this additional language. Even assuming that an implied statute of limitations existed, OIC was governed by a five year record retention requirement until October 20, 1994. This would cover the award years at issue in the FPRD well past the date of the program review. Therefore, OIC's request for relief based on an implied statute of limitations is denied.

**LACHES**

OIC asks this tribunal to dismiss all liabilities assessed for award years prior to the 1994- 95 award year due to the equitable defense of laches. Courts traditionally have described laches as a "fairness doctrine by which relief is denied to one who has unreasonably and inexcusably delayed in the assertion of a claim. Failure to act promptly will operate as a bar to recovery where the delay result in injury [or] prejudice to the adverse party." *Brundage v. United States*, 504 F.2d 1382, 1384, 205 Ct.Cl. 502 (1974).

While the doctrine of laches is well established, the United States is usually not subject to the defense of laches when enforcing its rights. *See Costello v. United States*, 365 U.S. 264 (1961); *Summerlin v. United States*, 310 U.S. 413 (1940). However, as with any "general rule," the rule holding the government exempt from laches has become marked with exceptions. Some courts have chosen to follow these exceptions, while others have held fast to the traditional strict rule. Since SFAP contends that laches is always inapplicable against the government and asserts that the precedent of this tribunal was wrongly decided, the time has come to reexamine the doctrine of laches within this tribunal.

The threshold question is whether laches may be asserted as a defense in a Subpart H proceeding, or whether laches is *per se* unavailable. Not unimportantly, this tribunal has a substantial history of allowing laches to be raised as defense, first meeting the issue in *In re Platt Junior College*, Dkt. No. 90-2-SA, U.S. Dep't of Educ. (Decision on Remand) (October 31, 1991). The initial decision in that case held that laches was unavailable as an equitable defense to *Platt*.[See footnote 4][4] The Secretary, however, disagreed that laches was always unavailable against the government when it is enforcing a public right or protecting a public interest. *In re Platt Junior College*. This tribunal on remand found that laches was available as a defense against OSFA.[See footnote 5][5] *Id.* In subsequent decisions, this tribunal indicated that a defense of laches may be raised in an SFAP proceeding. *See In re Belzer Yeshiva*, Dkt. No. 95-55-SP, U.S. Dep't of Educ. ( June 19, 1996); *In re National Training Service*, Dkt. No. 92-101-SP, U.S. Dep't of Educ. (October 6, 1995); *In re Mary Holmes College*, Dkt. No. 94-90-SA, U.S. Dep't of Educ. (May 3. 1995); *In re City University of New York (CUNY)*, Dkt. No. 93-3-0, U.S. Dep't of Educ. (March 30, 1994).

The holdings of this tribunal regarding laches and the government are consistent with federal precedent. First, the Supreme Court has refused to shut the door on the possibility of a laches defense against the government, noting its availability in the appropriate circumstances. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-95, 111 S.Ct. 453, 457-58, 112 L.Ed.2d 435 (1990)*; Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-61, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373, 97 S.Ct. 2447, 2458, 53 L.Ed.2d 402 (1977). There are ample cases that apply laches against the federal government when enforcing a public right. *See e.g. NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893-94 (7th Cir. 1990); *EEOC v. Vucitech*, 842 F.2d 936, 942- 43 (7th Cir. 1988)*; Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n*, 620 F.2d 900, 909 (1st Cir. 1980) (stating that "courts have not construed [sovereign immunity doctrine] as an absolute bar where unreasonable agency delay has caused hardship")*; United States v. Rhodes*, 788 F. Supp. 339 (E.D. Mich. 1992) (holding that laches bars government collection of student loan); *United States v. Zue*, 704 F. Supp. 535, 537 (D.Vt. 1988) (applying *SER* to hold that laches can bar student loan collection); *See also JANA, Inc. v. United States*, 936 F.2d 1265, 1269 (Fed. Cir. 1991) (explaining that at the very least "it is not entirely clear whether the defense of laches may be asserted against the government"); *But see United States v. Menatos*, 925 F.2d 333, 335 (9th Cir. 1991); *United States v. St. John's General Hospital*, 875 F.2d 1064, 1071 (3d Cir. 1989).

This tribunal's precedent, combined with parallel precedent in the federal courts, persuades me that laches is available in some circumstances as a defense in an Subpart H proceeding. The question remains, however, as to its scope. Within this tribunal, laches has been successfully raised in two cases. The first occurred in *Platt*, which found that laches would bar a claim if the delay at issue was non-negligent in origin.See footnote 6[6] This was based on the rationale that the government exemption from laches was based on the policy of protecting the public from loss caused by the negligence of public officials. *See Costello*, 365 U.S. at 281. Since the Department knowingly and strategically delayed bringing its claim in *Platt*, this tribunal held that this rationale for holding the government exempt from laches did not apply.

The second situation arose in *Mary Holmes College*, in which it was found that laches was applicable in situations that constituted extreme negligence on the part of the Department.See footnote 7[7] In *United States v. Administrative Enterprises, Inc.*, 46 F.3d. 670 (7th Cir. 1995), Chief Judge Posner provides support for the extreme negligence exception. Relying on the Supreme Court in *Heckler*, and the 7th circuit in *Lindberg*, Judge Posner argues that the use of laches against the government is possible in "the most egregious instances". *Administrative Enterprises*, 46 F.3d at 673. Therefore, the precedent of this tribunal indicates that even though the Department is acting to enforce a public right or protect the public interest, the applicability of laches includes the aforementioned two situations.

In that context, the facts of this case do not meet the criteria for the defense of laches. OIC has not shown that there was a lack of diligence by SFAP in asserting the claim and that they were prejudiced by the delay. OIC states that it was not aware that compliance reports were required annually. OIC further contends that the Department should have been aware of this deficiency by December 31, 1993, but failed to notify the school until September 1996. OIC blames the Department for its continued non-compliance because the Department allowed OIC to continue participating in the Title IV programs. Thus, OIC claims that had it had "timely notice of its non-compliance, it could have mitigated the liabilities now owed the Department."

In Subpart H proceedings, a substantial delay between non-compliant audits and issuance of an FPRD has shown a lack of diligence by the Department. A lack of diligence in asserting a claim can be shown through evidence that the claim was delayed for an "unreasonable and unexplained" amount of time. *See In re CUNY*, Dkt. No. 93-3-0, U.S. Dep't of Educ. (March 30, 1994). While OIC has shown that there was a delay between the submission of its noncompliant audits and SFAP's issuance of the FPRD, OIC has failed to show that this delay was unreasonable or unexplained in any way. The passage of time does not *per se* constitute an unreasonable delay. *See Id.*

Even assuming that OIC could prove a substantial delay, OIC fails to prove that this delay prejudiced them in any way. Prejudice involves the inability to defend oneself against the claim because of the passage of time. *See In re CUNY; In re National Training Service.* OIC has offered no facts of anything that occurred in the interim that would have prevented OIC from defending themselves in a fair and just manner. OIC misconstrues the nature of prejudicial delay to include lost opportunity to mitigate future claims. This interpretation is incorrect, and this tribunal finds that the elements of a laches defense are not present in the instant matter.

## WAIVER AND ESTOPPEL

OIC argues that certification to participate in the direct loan program constituted a waiver of liability for years prior to the 1994-95 award year and estops the Department from seeking recovery. OIC is incorrect in this assertion. Certification to participate in another Title IV program does not constitute waiver of liability of participation in other Title IV programs. OIC also argues that the failure of the Department to make sure that the required training in administering the Title IV programs was complete constituted a waiver for any subsequent violations committed by the school. While the failure of the Department to complete these tasks was not addressed by SFAP in its brief, OIC has failed to establish that they were in compliance with the regulations. It is OIC's responsibility to properly administer the Title IV programs in which it participates. *See* 34 C.F.R. § 668.116(d).

## ORDER

On the basis of the foregoing, it is hereby **ORDERED** that OIC Vocational Institute pay to the Department of Education **$1,395,917.02**.

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Judge Richard I. Slippen

Dated: September 23, 1998

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SERVICE

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

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Footnote: 1 [1]*Relief granted by this tribunal in a Subpart H proceeding is limited to monetary liabilities assessed by the Department. Therefore, findings 3-5, 24, and 26 will not be discussed.*

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Footnote: 2 [2]*OIC also contends that $49,873.74 in interest should be dismissed under Finding 10. This will be dealt with, infra, under Finding 10.*

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Footnote: 3 [3]*Since SFAP jointly assessed the liability for Finding 7 with the liability for Finding 2, no separate liability is assessed under Finding 7.*

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Footnote: 4 [4] *This tribunal in the original Platt decision relied upon U.S v. Arrow Transportation Company, 658 F.2d 392, 394 (5th Cir., 1981) (holding that laches "cannot be asserted against the United States in its sovereign capacity to*

*enforce a public right or protect the public interest”).*

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Footnote: 5 [5]*OSFA was the predecessor of SFAP.*

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Footnote: 6 [6]*In Platt, the Department of Health, Education and Welfare (HEW) issued a November, 1975, report of an audit of the Title IV programs administered at Platt Junior College. Negotiations between Platt and HEW ensued, and Platt made a payment to HEW during August, 1978. On March 17, 1988, the Office of Student Financial Assistance Programs (OSFA) issued a Final Audit Determination. In the interim, Platt disposed of records necessary for its defense, and students and former school personnel had scattered. The ALJ found that the delay was a result of a deliberate strategy to advance the Department's interest in pending litigation, and was thus not negligent in origin.*

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Footnote: 7 [7]*Mary Holmes College involved numerous Final Audit Determinations (FAD) issued on September 30, 1993, and March 3, 1994. One of the FADs issued on September 30, 1993, involved an audit of the 1985 award year. This audit was allegedly either not submitted to the Department by the auditing firm or was misplaced by the Department. The auditing firm subsequently went out of business. The Department, however, had waited seven years to inquire about the missing audit in July 1992. After the request, the school transmitted to the Department a copy of the 1985 audit which it received from the auditing firm in 1986. This tribunal remarked, "[The school] is required to defend itself against findings related 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”. In re Mary Holmes College at 3.*

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