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

In the Matter of

COMMUNITY COLLEGE SYSTEM OF NEW HAMPSHIRE,

Respondent.

Docket No. 09-35-SA

Federal Student Aid Proceeding

Appearances: Milton L. Kerstein, Esq., Wellesley, MA, for the Community College System of New Hampshire.

Russell B. Wolff, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C., for Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION

The Community College System of New Hampshire (CCS) operates as an instrumentality of the State of New Hampshire and has cognizance over the operations of seven community colleges established within New Hampshire. As instrumentalities of the state, audits of CCS's operations must be included in the annual Single Audit Report of the State of New Hampshire as required by Title 31, Chapter 75, United States Code. New Hampshire's Single State Audit for the year ending June 30, 2005, was prepared by KPMG, in accordance with requirements laid out in OMB Circular A-133. Said audit report was compiled and forwarded by KPMG to authorities of the State of New Hampshire on March 21, 2006. The audit report included findings relative to the programs that are governed by Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. 2751 *et seq.* As a consequence, that portion of the audit involving Title IV federal student aid funds was forwarded for action to the office of Federal Student Aid (FSA), the organization within the U.S. Department of Education (ED) that administers these programs.

One of the actionable findings of the KPMG report dealt with instances of CCS's alleged failure to verify information provided by students seeking federal student aid, when such student's application was selected for verification, in violation of 34 C.F.R. § 668.54(a)(2)(i). In

a second finding, the audit report found instances where CCS failed to determine whether a student was meeting the satisfactory academic progress standards prior to disbursing Title IV funds, in violation of 34 C.F.R. § 668.16(e). Finally, the audit report delineated instances of late and/or incorrectly calculated refunds of federal student aid, in violation of 34 C.F.R. § 668.22. A series of communications ensued between FSA and CCS culminating in CCS providing FSA with additional information. After considering these inputs, FSA issued a Final Audit Determination (FAD) on May 4, 2009, affirming the findings in the audit report and demanding that $899,468.00, be returned to ED, for those findings. On June 18, 2009, CCS's counsel requested a hearing to challenge the findings of the FAD and, once assigned the case, I issued an order to commence the hearing process. During the course of the briefing schedule that I had established, FSA accepted Respondent's argument as to the extent of liability and, as a result, reduced its demand to $759,662.00.

After the submission of a series of briefs and responsive briefs, on May 6, 2010, I presided at an oral argument relative to the issues in this appeal. Counsel's arguments and my colloquy with them were recorded by a court reporter and a transcript of such proceeding was provided to both parties. During such briefing process as well as the oral argument, the parties' respective positions relative to the issues before me were clearly delineated. In a nutshell, CCS did not dispute the facts behind and the findings contained in the KPMG audit. Rather, it raised two affirmative defenses to the action, to wit: the equitable defense of *laches;* and a claim that the errors that occasioned the findings of the FAD were committed by CCS's employees acting in good faith. In response, FSA posited that *laches* is inapposite under the circumstances, and good faith is not a defense to the claim raised under the audit findings.

Because CCS submitted no evidentiary matter in defense of its action on the merits, I will accept the allegations contained in the FAD as true and accurate. I find that CCS did not verify information for students at issue when required to do so, and did not properly determine the academic progress of students in issue before disbursing Title IV aid to them. I further find that CCS erred in both the calculation of and the timing of refunds of federal student aid. In conclusion, I find that these errors resulted in an actionable loss to the United States in the amount of $759,662.00. Although, I have found that there has been a *prima facie* showing of violation of Title IV regulations and CCS has failed to present contradictory evidence, I will discuss the affirmative defenses it raised, separately.

As is the case in all affirmative defenses, CCS as the proponent has the burden of establishing the defense. As to the asserted equitable defense of *laches*, first it must be established whether that defense can be applied at all against the United States. Historically, the weight of authority was that the defense of laches could not be asserted against the United States for actions resulting from its enforcement powers. *See generally, Costello v. United States,* 365 U.S. 264 (1961); *Summerline v. United States,* 310 U.S. 413 (1940). Over time, however, the general rule holding the government exempt from *laches* has been eroded by numerous exemptions. The Supreme Court has indicated that the defense of *laches* could be asserted against the United States in the appropriate circumstances. *See, Irwin v. Department of Veterans Affairs,* 498 U.S. 89 (1990).

Importantly, this tribunal also has a history of allowing *laches* to be asserted as an equitable defense in Subpart H administrative proceedings, like the case before me. First, an Administrative Law Judge found that the defense of *laches* did apply in a situation where there was an extended delay of over nine and one-half years before the issuance of a Final Audit Determination. *See, In the Matter of Platt Junior College,* Docket No. 90-2-SA, U.S. Dep't of Educ. (Oct. 31, 1991). Also, in another decision, the Tribunal found that *laches* did apply against FSA when a seven-year delay in issuance of a final audit determination prevented the respondent from locating supporting information. *See, In the Matter of Mary Holmes College,* Docket No. 94-90-SA, U. S. Dep't of Educ. (May 3, 1995). Finally, this Tribunal has, on a number of occasions, recognized the liberalized developing law of applying the defense of *laches* against the United States and its agencies. *See, In the Matter of OIC Vocational Institute,* Docket No. 98-12-SP, U.S. Dep't of Educ. (Sept. 23, 1998), and the cases cited therein. As a result, I will assess whether the defense of *laches* is applicable in this matter.

In order to successfully assert the defense of *laches,* the respondent has the burden of establishing two requisites. First, it must establish that there has been an unreasonable delay in the government's assertion of its claim, and second, the delay has resulted in prejudice to the respondent. Delays that have been found to constitute unreasonable delay, have been variously described as having been caused by extreme negligence or, have been held to apply against the United States only in the most egregious circumstances. *See, United States v. Administrative Enterprises, Inc.*, 46 F.3d 670 (7th Cir. 1995). *See also, Heckler v. Community Health Services of Crawford County, Inc.,* 467 U.S. 51 (1984). Under any scenario, it is clear that the delay that has been occasioned has to be attributable to more than mere negligence in order to support the defense of *laches*.

In any attempt to analyze the applicability of the defense of *laches*, it is imperative that we examine the timing of the various steps in the administrative enforcement process. The following dates are pertinent in that analysis: First, the Single State Audit was forwarded by KPMG to the State of New Hampshire on March 21, 2006; the audit was then forwarded to ED, and assigned to FSA for action on September 9, 2006; because the findings of the audit raised questions regarding the full extent of the errors throughout the CCS system, on February 27, 2007, FSA required CCS to perform a full file review of all the appropriate student records; CCS forwarded a report of such review to FSA on August 8, 2007, and the FAD was ultimately issued on May 4, 2009. CCS claims that the 21-month delay in issuance of the FAD between the date FSA received all the necessary information and the date the FAD, was issued is unreasonable and, therefore, acts as the predicate for application of the affirmative defense of *laches.*

In response, FSA points out that during the period in question, a number of factors contributed to the length of time needed to issue the FAD. First, the audit report included indications of fraudulent activity in CCS' Title IV operations and, in such situations, prosecutorial authorities needed to be consulted. Also, the employee originally assigned to finalize the review left the employ of FSA after a 12-month period, necessitating reassignment to a new reviewer. The new reviewer was required to examine all the documents submitted and

needed to coordinate with CCS employees resulting in the FAD being issued nine months later. FSA argues that this period, although admittedly greater than the time period normally necessary to complete a similar Single State audit review, clearly fell short of the delay necessary to support the defense of *laches*. Further, FSA argues that the FAD was issued well within the record retention period as provided in 34 C.F.R. § 668.24(e).

The second prong to the *laches* analysis deals with the requirement that the respondent establishes prejudice that was caused by the delay. Normally, this requires the respondent to show that the unreasonable passage of time has interfered with its ability to defend itself against a claim. Cases that have discussed the defense of *laches* have all analyzed this requirement in the context of an evidentiary failing precipitated by the passage of time. In the face of these authorities, CCS takes a rather novel approach to the establishment of prejudice. It argues that as a result of the downturn in the economy that occurred contemporaneously with the time frames involving the finalization of the New Hampshire Single State Audit, New Hampshire state tax revenues fell. CCS contends that since the citizens of New Hampshire are unduly burdened by the extra funds that are needed to support these state community colleges, the degree of prejudice required, is established. Not unsurprisingly, FSA disagrees and argues essentially that prejudice requires a showing that the delay has interfered with CCS's ability to defend itself.

It seems abundantly clear that by applying the weight of authority relative to the defense of *laches* to the facts of this case, I am lead inescapably to conclude that the defense does not lie here. I am convinced that the defense of *laches* when asserted against the federal government is an extraordinary remedy, to be applied only to extreme cases of delay. Although less than ideal, I find that the delay in this case was clearly not of the type that could be classified as unreasonable. In addition, I agree with FSA that the prejudice required to be established is a legal evidentiary one, i.e. a showing of an interference with the ability to procure probative evidence caused by the inordinate delay. Applying this standard, I find that CCS has failed to establish prejudice.

As an additional affirmative defense, CCS asserts that the errors uncovered during the audit were caused by employees acting in good faith; therefore, CCS should be excused from paying back the amount demanded in the FAD. Although good or bad faith may be a factor in cases of adverse action against an eligible institution, such as in a termination or fine proceeding under the provisions of Subpart G, it is not relevant in a Subpart H -- audit and program review -- proceeding. As a result, I find that good faith, even if established, does not have a bearing on my decision in this case.

It is well established that in Subpart H proceedings, the respondent has the burden of proving by a preponderance of the evidence that the Title IV funds it received were lawfully disbursed. 34 C.F.R. §668.116(d). If a respondent fails to establish the correctness of its expenditure of federal education funds, it must return all such funds to ED. The record is absolutely clear -- CCS has not presented any evidence to rebut the findings in the FAD. In fact, on the merits, it has provided absolutely no evidentiary matter to comply with its commitments in this case. In summary, I am clearly convinced that the findings contained in the FAD sufficiently state allegations in a manner that demonstrate the existence of a *prima facie* showing

that the institution failed to comply with Title IV program requirements. Consistent with the record before me, I find that CCS has failed to meet its burden of establishing that its expenditures of Title IV funds, as enumerated in the FAD, was correct. Therefore, CCS owes $759,662.00, in Title IV liability.

ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that the Community College System of New Hampshire pay to the United States Department of Education the sum of **$759,662.00,** in the manner as required by law.

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Ernest C. Canellos
Chief Judge

Dated: June 21, 2010

SERVICE

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

Milton L. Kerstein, Esq.
Kerstein, Coren & Lichtenstein
60 Walnut Street
Wellesley, MA 02482

Russell B. Wolff, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W., Room 6E120
Washington, D.C. 20202-2110