THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

AMERICAN BUSINESS COLLEGE,

Docket No. 03-100-SP
Federal Student Aid Proceeding

Respondent.

DECISION OF THE SECRETARY

This matter comes before the Secretary on appeal by the Office of Federal Student Aid (FSA) of a second decision issued on remand by Chief Administrative Judge Ernest C. Canellos on August 10, 2005. FSA requests that I reverse the judge's decision reducing the liability of Respondent, American Business College, from $1,241,464 to $186,148. According to FSA, the judge's decision erred in two ways. First, FSA argues that by reducing Respondent's liability to the amount supported by Respondent, the judge ignored the directive in my remand decision issued on April 8, 2009, which required the tribunal to conduct fact-finding to determine the "precise amount Respondent must pay to the Department for its violation of the regulatory requirements governing the ability-to-benefit exam." In addition, according to FSA, Judge Canellos improperly barred recovery in excess of $186,148 due to application of the doctrine of laches.[1]

Opposing FSA's appeal,[2] Respondent argues that Judge Canellos's decision should be upheld for two reasons: first, that FSA's evidence lacks credibility and is too unreliable to support FSA's proposed calculation of liability, and, secondly, that the claim for recovery based on the ability-to-benefit exam is barred under the doctrine of laches.[3]

Given Judge Canellos's reliance on the doctrine of laches to bar a significant part of FSA's recovery, it is appropriate to review the procedural history of this case. In August of

[1] The issues in this appeal are limited solely to FSA's claim for recovery on the finding involving the ability-to-benefit exam. In my Decision on Remand, I upheld Judge Canellos's determination finding Respondent liable for $359,833 for failure to properly calculate and issue refunds; that holding is not at issue here.

[2] In its 5-page submission, counsel for Respondent explains that although it does not withdraw as counsel for Respondent, Respondent's lack of resources has resulted in the filing of an "abbreviated" response.

[3] It is worth noting that Respondent did not raise the doctrine of laches as a defense in this case. Instead, Judge Canellos raised the defense of his own accord. Even in this appeal, Respondent does not raise the doctrine of laches in its defense; rather, Respondent merely asserts why it agrees with the judge's analysis.

ADMINISTRATIVE NOTE

2002, FSA conducted an on-site review of Respondent's administration of Federal student aid funds that uncovered evidence indicating that Respondent's student aid files contained pervasive erroneous information. On July 29, 2003, FSA issued an expedited Final Program Review Determination (FPRD). The expedited FPRD forms the basis of issues disputed in these proceedings. After developing a record in the case, Judge Canellos issued a decision resolving the disputed issues between the parties on March 24, 2005, which FSA timely appealed.[4] On April 9, 2009, I issued a decision remanding this matter to Judge Canellos for further proceedings.[5] Judge Canellos issued his decision on remand on August 10, 2010.

Notwithstanding the narrow scope of my remand, Judge Canellos issued a legal ruling, *sua sponte*, barring most of FSA's recovery.[6] The ruling to bar most of FSA's recovery was based on the judge's conclusions of law regarding the application of the doctrine of laches. According to Judge Canellos, FSA may be barred from obtaining its full recovery because of a delay in adjudicating this case that, in the judge's view, constitutes prejudice to Respondent by rendering it difficult for Respondent to defend itself. Since this ruling eliminates a substantial portion of FSA's potential recovery and was raised by the judge on his own motion and without the benefit of argument from counsel, I will address the merits of the ruling prior to assessing other issues raised by FSA's appeal.

I.

The doctrine of laches is a long-standing doctrine created by courts seeking to invoke considerations of fairness and equity in judicial proceedings based on the recognition for the need for speedy vindication or enforcement of rights; the doctrine is typically, if not exclusively, raised as an affirmative defense by the party seeking its shield.[7] The affirmative defense requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.[8] Although Judge Canellos concluded that both elements were present in this case, I do not agree.

First, the initial element is not present, much less proven. Judge Canellos does not cite a single instance of delay by FSA at any time during the adjudication of this case. Indeed, there is not a scintilla of evidence identified by the judge that could be fairly attributable to FSA's conduct.[9] Instead, Judge Canellos analyzes the initial element of laches by what he views as "the

---

[4] During the time this case was under review by Secretary Margaret Spellings, she did not issue a decision.

[5] To avoid delay in resolving this case, in my remand, I established the deadlines for the submission of filings to the tribunal and expressed my expectation that the tribunal resolve this matter expeditiously. The case was remanded for further development because Judge Canellos acknowledged that he adopted Respondent's calculation of its liability without opportunity to hear from FSA and on the basis of a record where he was "unable to determine in any precise way how much [Respondent] must return to ED for the ATB violation."

[6] Judge Canellos's ruling barred all of the $1,241,464 in recovery sought by FSA except for $186,148.

[7] *Brundage v. United States,* 205 Ct. Cl. 502, 504 F.2d 1382, 1384 (1974).

[8] *Costello v. United States,* 365 U.S. 265 (1961) (prejudice involves the inability to defend oneself against the claim of the government because of the passage of time).

[9] Even if the evidence in the record plausibly demonstrated that FSA was the cause of unreasonable delay in the adjudication of these proceedings, my disagreement with that conclusion does not leave Respondent without an

Department's unexplained four-year procedural delay between the time of the Initial Decision and the Decision by the Secretary." But, the record reveals that the parties submitted timely filings to the Secretary, and that neither party attempted to delay the adjudication of the appeal.

In the judge's view, however, the four-year time period constitutes an unreasonable delay in the proceedings. According to Judge Canellos, the Department knew or should have known that Respondent had difficulty "developing evidence" during the proceedings before him and that this difficulty would be exacerbated by a delay in the adjudication of the case before the Secretary. The judge's assertion either imputes to FSA the purported delay by the adjudicator or stands for the remarkable position that I should uphold laches against myself. Both positions are mistaken, and each highlights more than just a failure of proof as to the initial element of laches; the judge's positions make it apparent that laches is not properly invoked. Instead, the judge's application of laches misconstrues the nature, scope, and reach of the doctrine of laches.

To support his determination, the judge cites Department case law finding that laches is available as a defense against FSA.[10] The Department's case law has recognized that a substantial delay or lack of diligence in asserting a claim or issuing a FPRD may subject FSA to laches, if Respondent can show that the substantial delay prejudiced Respondent in some pertinent way.[11] Even assuming that the Department's case law properly authorizes administrative judges to invoke equity to prevent the recovery of funds owed to the Department by applying laches against FSA, there is no case law support for invoking laches against the Secretary (or, for that matter, any tribunal) as a result of the time required to adjudicate a case and issue a decision.[12]

First a clarifying point of instruction to the judge: an administrative tribunal subject to the Secretary's review may not impose laches against the Department based on the time used by the Secretary to adjudicate an appeal. The Department's judges function pursuant to the Secretary's delegation of authority under a circumscribed jurisdiction. In doing so, the judges are not empowered to determine that the time a case appears on the Secretary's docket is unreasonable.[13] Nor do the Department's judges have authority to rule that the time a case is on appeal to the Secretary may constitute grounds to quash an otherwise lawful basis for the recovery of funds by FSA.

---

opportunity to seek a remedy. Final agency adjudications issued by me under the HEA offer Respondent an opportunity to seek judicial review in a federal district court.

[10] FSA argues that in his laches analysis, the judge improperly conflated the prosecution and adjudication functions of the Department in HEA cases. Clearly, the fact that Congress vested in the Secretary the power to make rules, to enforce them, and to adjudicate violations regarding the Higher Education Act of 1965 does not alter the fact that the adjudication function is a distinct exercise of delegated power. *See, e.g., Martin v. OSHRC*, 499 U.S. 144 (1991).

[11] *See In re CUNY,* Dkt. No. 93-3-0, U.S. Dep't of Educ. (March 30, 1994).

[12] There may be a number of reasons why this is so, but high among them must be that parties may bring to the immediate attention of the adjudicator any prejudicial risk that may beset them during the adjudication of a case. Moreover, the Secretary has allowed parties to seek interlocutory relief if a judge causes unreasonable delay in the adjudication of a case.

[13] Of course, the parties are free to bring to the Secretary's attention a potential prejudicial effect arising during the time period an appeal is under the Secretary's review.

Moreover, even if it were plausible to say that FSA caused an unreasonable delay in resolving this case, I find Judge Canellos's findings of fact inadequate to support his determination that Respondent was prejudiced by an unreasonable delay. The judge urges that FSA introduced new evidence on remand that Respondent was unable to rebut because the institution closed seven years prior to the issuance of my remand. Yet, it is unclear how this evidence caused prejudice to Respondent, since the judge found FSA's evidence unreliable "double-hearsay"; by finding FSA's evidence lacking in credibility, Respondent could not be prejudiced by failing to rebut the evidence.

I am also mindful that the doctrine of laches has not seen widespread application to the Federal government. Indeed, courts have generally found that laches is inapplicable to a suit brought by the Federal government to enforce its rights. The traditional rule is that the United States is not subject to the defense of laches in enforcing its rights.[14] Although some courts have found extenuating circumstances opening the door to applying laches against the Federal government these exceptions have not uprooted laches from its judicially developed foundation limiting its application to the Federal government. Hence, notwithstanding the path taken by some of the Department's cases, it is doubtful that the doctrine properly applies to proceedings to recover misspent Federal financial aid.[15]

Finally, Judge Canellos raised the doctrine of laches *sua sponte* notwithstanding that the doctrine is an affirmative defense, wherein the party raising the defense carries the burden of proof. Ostensibly, Judge Canellos invoked his purported power to make his own motion for laches against FSA. I find that the judge lacks this authority. Not only does the basis of the equitable interests undergirding the judicially created doctrine of laches itself counsel against an impartial adjudicator stepping in the shoes of one party to raise the doctrine on its behalf, but so too does the neutral role of judge.[16] The Department's administrative judges are not vested with sweeping powers; instead, the power and authority of the Department's administrative judges are circumscribed by statute, regulation, and Department policy.

---

[14] *See United States v. Kirkpatrick,* 22 U.S. (9 Wheat.) 720, 735 (1824) ("The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions"); *Bowen v. Inspector General of Health & Human Services,* 2008 U.S. LEXIS 103302 (S.D. Ohio 2008) (holding that laches is not available as a defense against the government); *United States v. Peoples Household Furnishings, Inc.,* 75 F.3d 252, 254 (6th Cir. 1996) ("The ancient rule *quod nullum tempus occurit regi* – 'that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations' – has enjoyed continuing vitality for centuries."); *cf. United States v. Ruby Co.,* 588 F.2d 697 (9th Cir. 1978) and *Roberts v. Morton,* 549 F.2d 158 (10th Cir. 1976) (implying that an exception to the traditional rule may be warranted in certain cases) and *Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1090* (7th Cir. 1992) (recognizing that laches may attach to a case in which a Federal agency brings an action in its corporate capacity - - i.e., as a receiver for a bank - - rather than in an enforcement action where the government asserts its own rights, and, therefore, "is not subject to the equitable defense of laches.")

[15] Moreover, as noted *supra*, in proceedings involving the HEA, parties have available procedures for seeking relief from potentially prejudicial delays in adjudication.

[16] *See Sibley v. U.S. Department of Education,* 111 F.3d 133 (7th Cir. 1997) (ruling that a party's failure to raise the defense of laches removes that issue from review). FSA argues that the "fact that Judge Canellos, and not [Respondent], raised the defense itself raises questions with respect to the proper application of the doctrine of laches."

Courts generally lack the power to raise an affirmative defense *sua sponte*, and so too do the Department's judges presiding over HEA cases. Courts have identified few limited exceptions to this general rule. For example, courts have recognized that it may be appropriate to raise an affirmative defense *sua sponte* in cases where doing so insures the finality of decisions, conserves judicial resources or avoids unnecessary judicial waste, and protects litigants from multiple lawsuits.[17] Notably, this case does not fit precisely within the circumstances of the limited exception. When this case was remanded in 2009 to clarify matters before the judge in 2005, the administrative litigation did not waste the Department's adjudicatory resources, or impair the finality of the Department's decision. Moreover, this limited exception, of course, does not alter the general rule that the failure to plead an affirmative defense results in a waiver of that defense.[18] For the aforementioned reasons, I reverse Judge Canellos's ruling on laches.

II.

This case was remanded to the judge to resolve the question of what Respondent must pay as a result of its liability for improper administration of the ability-to-benefit exam. On remand, Judge Canellos rejected FSA's calculation of liability, and reinstated his initial adoption of the Respondent's calculation. In doing so, the judge reduced FSA's recovery from $1,241,464 to $186,148. I find that the judge erred in rejecting FSA's calculation.

According to FSA, its calculation of liability is based on a projection from a sample of students awarded Federal student aid funds without a valid ability-to-benefit test to the total number of students awarded Federal student aid based on an ability-to-benefit exam. The sum of this projection is $1,241,464. FSA argues that the evidence it presented to the judge on remand is not new evidence, but evidence existing in the record at the time the judge erroneously ruled in the Initial Decision that there was a "paucity of credible evidence from either party as to how ATB testing was administered."[19] I am persuaded that FSA's projected error rate calculation is appropriate because the proposed measure of recovery is coextensive with FSA's allegation – based on 76 student interviews – that Respondent engaged in widespread misrepresentation of the institution's administration of ability-to-benefit exams.[20] Aside from generalized assertions

---

[17] *See Arizona v. California,* 530 U.S. 392 (2000) (indicating approval of a court raising *res judicata* sua sponte to avoid unnecessary judicial waste). It is worth noting that no court has precisely approved of a court raising laches sua sponte.

[18] *See Horton v. Potter,* 369 F.3d 906, 911 (6th Cir. 2004) (citing *Haskell v. Washington. Township,* 864 F.2d 1266, 1273 (6th Cir. 1988)).

[19] To be eligible to receive student financial assistance under the HEA, a student attending an eligible postsecondary institution must have a high school diploma, its equivalent, or a demonstrated "ability to benefit" from a program of study offered by the institution. What is more, to qualify for eligibility by proof of a demonstrated ability to benefit, a student must be administered a standardized or industry-developed test measuring the prospective student's aptitude to complete successfully the program of study to which the student has applied. 20 U.S.C. §§ 1088(b) & 1091(d).

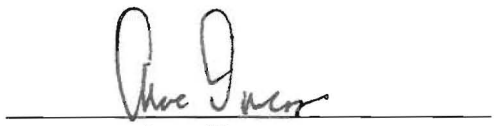
[20] The use of projections is a methodology that is not only consistent with the Department's long-standing and reasonable practice of calculating liability to determine the amount of a postsecondary institution's liability, but has been authorized by a wide-ranging number of courts as a reasonable method of calculating liability by Federal agencies. See In re Saint Louis University, Dkt. No. 99-29-SA, U.S. Dep't of Educ. (Decision of the Secretary November 12, 2010).

that not *all* ability-to-benefit exams were falsified or otherwise improperly administered, Respondent did not establish or otherwise make a plausible evidentiary showing that the exams at issue were administered properly.[21] In this light, FSA's sampling formula is an equitable measure of recovery since the amount recovered under a sampling formula is by definition less than what FSA could recover when an institution fails to meet its burden of proof showing the proper expenditure of HEA program funds.

ORDER

ACCORDINGLY, I HEREBY ORDER American Business College must pay the U.S. Department of Education $1,241,464.

So ordered this 7th day of January 2011.



Arne Duncan

Washington, D.C.

[21] Indeed, this is the law of the case. Notably, Judge Canellos determined in his Initial Decision that Respondent did not meet its burden of proof to account for the proper expenditure of HEA program funds for students who were administered the ability-to-benefit exam, and my Decision on Remand accepted the judge's conclusions on this matter.

SERVICE LIST

Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Peter S. Leyton, Esq.
Steven T. Cinema II, Esq.
Ritzert & Leyton, P.C.
11350 Random Hills Road, Suite 400
Fairfax, VA 22030

Denise Morelli, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110