UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202
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In the Matter of

The Estate of Decker College,

Docket No. 21-02-SA

Federal Student Aid Proceeding

ACN: 04-2005-52005

Respondent.

Appearances: Jay Vaughan, Esq., and Naomi May, Esq., Cooley LLP, for Respondent

Steven Z. Finley, Esq., Office of the General Counsel, for U.S. Department of Education, Federal Student Aid Office

Before: Elizabeth Figueroa, Administrative Law Judge

DECISION

I. Introduction

A. Summary of this Decision

This Decision upholds a portion of the findings and liabilities presented in the Final Audit Determination (FAD) issued in this matter. Specifically, the findings for Federal Pell Grant Liabilities for the Unaudited Period, including cost of funds, in the amount of $16,408,375.83, and Liabilities for Unsubstantiated Excess Cash DL for the Unaccounted Period and Prior Award Years in the amount of $20,736.00 are supported and, therefore, affirmed. 34 C.F.R. § 668.118(b). The findings for Loan Liabilities for the Unaudited Period in the amount of $214,933.71, and Liabilities for Closed School Loan Discharges in the amount of $6,896,759.00, however, are not supported. *Id*.

B. Procedural History of this Case

On December 31, 2020, the Estate of Decker College (Decker College or Decker), by and through the Trustee in the Chapter 7 Bankruptcy Proceeding involving Decker (the Trustee or

Bankruptcy Trustee), filed a Request for Review, challenging the Final Audit Determination (FAD) issued by the Federal Student Aid Office (FSA) of the U.S. Department of Education (the Department) on November 16, 2020.[1] In the FAD, the Department claims that Decker closed on September 30, 2005, and that Decker has not submitted the close-out audit report for the period July 1, 2004 to September 30, 2005, as required by 34 C.F.R. § 668.26(b)(2).[2] The Department, therefore, claims that Decker College is liable for funds it received during the unaudited period of July 1, 2004 to September 30, 2005, in the total amount of $23,540,804.54.[3] Because Decker is in bankruptcy, the FAD did not provide repayment instructions for the liability.

In its Request for Review, Decker College asserts, among other things, that issuance of the FAD violated the automatic stay under 11 U.S.C. § 362(a) of the Bankruptcy Code; that it should not be held liable for the funds claimed because the FAD inaccurately states the dates of Decker College's closure and the end of its participation in Title IV programs; that the cohort default rate used in the FAD violates a prior decision issued by the Office of Hearings and Appeals (OHA); and, that the liabilities asserted in the FAD are unenforceable because the FAD was issued more than fifteen years after Decker ceased participation in Title IV programs.

By Order Governing Proceeding issued by OHA on February 1, 2021, the parties were ordered to file, by March 3, 2021, statements on their positions as to whether this proceeding could continue concurrently with the pending Bankruptcy Court proceeding. On March 3, 2021, the parties filed a joint stipulation in response to the February 1, 2021 Order, by which they stipulated that this adjudication could proceed despite ongoing proceedings in Bankruptcy Court. Because the parties' joint stipulation did not sufficiently address whether this adjudication was excepted from the broad scope of the automatic stay of the Bankruptcy Court, on March 5, 2021, OHA issued an Order requiring both parties to file, by March 15, 2021, a response clarifying their positions regarding the impact of the Bankruptcy Court's automatic stay on this proceeding. On March 15, 2021, FSA filed a copy of the Bankruptcy Court's Order Dismissing Trustee's Complaint Without Prejudice, in which Order the Bankruptcy Court stated that the FAD and the adjudication of the FAD by OHA do not violate the automatic stay provision pursuant to 11 U.S.C. § 362(a).

By Order Governing Proceeding and Briefing Schedule issued on March 17, 2021, OHA set deadlines by which the parties' briefs and any reply brief, together with any exhibits, were to

[1] *See* Footnote 1 in letter dated January 28, 2021, filed with the Office of Hearings and Appeals (OHA) on January 28, 2021, addressed to Hon. Anthony Cummings, Director, OHA, from Susan D. Crim, Director, Administrative Actions and Appeals Service Group (AAASG), U.S. Department of Education, in which Ms. Crim states that Decker's appeal request was received by AAASG on December 31, 2020, but not date-stamped as having been received until January 8, 2021, due to constraints resulting from COVID-19.

[2] Decker disputes the September 30, 2005 date of closure identified in the FAD. Exhibit (Exh.) R-1 at 1. Decker, in fact, ceased offering classes and closed on October 12 or 21, 2005. Exhs. R-4 a 0048, R-5 at 0085; ED-2 at 5, ED-3 at 1, ED-4 at 10.

[3] The Department's claim in the total amount of $23,540,804.54 is based on the following: $16,408,375.83 for Federal Pell Grant liabilities, including $2,151,957.83, for Cost of Funds; $44,299.19 for Direct Loan liabilities; $170,634.52 for the Department's estimated loss for excess subsidies paid to lenders for ineligible loans extended under the Federal Family Education Loan Program; $6,896,759.00 for Closed School Loan Discharges; and, $20,736.00 for unsubstantiated Excess Cash Direct Loan program funds. Exh. R-2.

be filed.

On April 14, 2021, Decker College filed a brief outlining the reasons it is not responsible for the liabilities assessed in the FAD. On May 12, 2021, FSA responded with a brief outlining the reasons that the FAD should be upheld in its entirety, with interest calculated when the decision is finalized. On May 26, 2021, Decker College filed a reply brief. Both parties submitted exhibits with their briefs. [4]

The issues having been fully briefed, the administrative record is closed, and this matter is ripe for decision.

II. Previous Adjudication Before OHA

In April of 2006, Decker requested administrative review of a Final Program Review Determination (FPRD) that FSA issued on March 31, 2006. Exhibit (Exh.) R-4 at 0048. OHA docketed the case as Docket No. 06-22-SP. At the parties' request, the OHA case was stayed pending a ruling by the Bankruptcy Court on an issue about Decker's accreditation, which accreditation was the basis for one of the six findings in the FPRD.

In July of 2012, the Bankruptcy Court ruled in Decker's favor on the issue concerning its accreditation. The ruling was appealed to the United States District Court, where it was affirmed. The District Court's ruling was appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit dismissed the appeal for lack of jurisdiction.

The stay of the OHA case remained in place until February 2015. After the federal court appeals of the Bankruptcy Court's ruling were resolved, OHA lifted the stay and ordered the parties to file briefs.

On March 15, 2016, the Honorable Robert G. Layton, the presiding administrative judge, issued a decision regarding the six findings in the FPRD. In his decision, Judge Layton ruled, among other things and as relevant to this case, that the last published cohort default rate of 2.7%, not the 65% rate formulated by FSA using Decker student loan data, should be applied and ordered FSA to recalculate Decker's liabilities for estimated loan losses. FSA appealed two rulings in the decision to the Secretary, but not the ruling on the cohort default rate.

III. Jurisdiction

On November 16, 2020, FSA sent the FAD to Decker. On December 31, 2020, Decker requested review of the FAD, pursuant to 20 U.S.C. § 1094(b) and 34 C.F.R. § 668.113. Decker's

[4] The record contains nineteen exhibits filed by Respondent: Exhs. R-1 – R-2, filed on March 15, 2021; Exhs. R-3 – R-13, filed on April 14, 2021; and, Exhs. R-14 – R-19, filed on May 26, 2021. The record also contains four exhibits filed by FSA: Exhs. ED-1 – ED-4, filed on May 12, 2021.

request for review, which was dated December 29, 2020, was received by the Administrative Actions and Appeals Service Group, U.S. Department of Education (AAASG), on December 31, 2020, [5] and was, therefore, timely filed within 45 days of Decker's receipt of the FAD, as required by 20 U.S.C. § 1094(b)(1) and 34 C.F.R. § 668.13(b). OHA has authority to hear this case. 20 U.S.C. § 1234; 34 C.F.R. § 668.117. Jurisdiction is established

IV. Issues Presented

Based on the challenges to the FAD that Decker has advanced and the arguments made by the parties, the issues presented are as follows:

1. Has Decker properly accounted for its use of Federal Student Aid funds by submission of a close-out audit upon the end of its participation in Title IV programs as required by 34 C.F.R. § 668.26(b)(2)?

2. Has Decker otherwise accounted for Title IV funds it received for the unaudited period by means other than a close-out audit?

3. Is Decker's failure to submit a close-out audit as required by 34 C.F.R. § 668.26(b)(2) excused by any misstatements concerning the scope and expanded requirements of the audit the Department may have made?

4. Is FSA's Final Audit Determination, including the assessed liability for unsubstantiated excess cash for the 2004-2005 award year, barred by the defense of laches because FSA did not issue the FAD until November 16, 2020, and did not raise the unsubstantiated excess cash issue before issuing the FAD, even though Decker College closed and ended its participation in Title IV programs in 2005?

5. Are the liabilities as they are assessed in the November 16, 2020 Final Audit Determination supportable or do any of the assessed liabilities require recalculation because they were calculated at an incorrect cohort default rate in contravention of the Administrative Judge's decision of March 16, 2016, in OHA Docket No. 06-22-SP?

6. Are the liabilities as they are assessed in the November 16, 2020 Final Audit Determination for school loan discharges due to Decker's closure supportable in fact and law?

7. Are the liability amounts assessed in the FAD inaccurate when they do not take into account Letters of Credit posted by Decker and drawn down by the Department?

The issue regarding outstanding reimbursements that Decker asserts should have been, but

[5] *See* Footnote 1, *supra*.

were not, paid to Decker by the Department while Decker was operating under the HCM2 system is not addressed in this decision. This tribunal's authority is limited to determining whether findings in a final audit determination are supportable. 20 U.S.C. § 1234; 34 C.F.R. § 668.118(b). In the FAD, FSA made no findings with respect to reimbursements due Decker under the HCM2 system. Exh. R-1. Notwithstanding the parties' assertions, disputes over the Department having not paid Decker under the HCM2 system, and the arguments each advances in their briefs, the issue is not properly before this tribunal. If Decker had submitted a close-out audit that included the HCM2 unpaid reimbursements, its request for review of any Final Audit Determination might have brought the issue within the scope of that review. But Decker having not filed a close-out audit limits the scope of this review to FSA's FAD, which is a "claw-back" action to recover all unaccounted Title IV funds. In the absence of a finding in the FAD concerning HCM2 monies, this tribunal lacks jurisdiction to address the issue. 20 U.S.C. § 1234; 34 C.F.R. § 668.118(b). Presumably, any reimbursements under the HCM2 system due Decker will be addressed outside of this decision, as either an offset to any sums determined to be owed by Decker or, if Decker is determined not to owe any sums, by issuance of payment to Decker. 20 U.S.C. § 1094(c)(7).

V. Findings of Fact

Based on the evidence presented by the parties, I make the following findings of fact:

Decker was a private two-year career institution, founded in 1989 and accredited in 1992 by the Council on Occupational Education (COE). Decker's corporate headquarters was located in Louisville, Kentucky, and it had additional locations in Kentucky, Georgia, Indiana, and Florida. Exhs. R-4 at 00045, R-5 at 0064. Decker sought approval for participation in Title IV programs and entered into a Program Participation Agreement (PPA) with the Department. Exh. R-4 at 0045. The PPA allowed Decker to participate in student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended. *Id*. By signing the PPA, Decker acknowledged its responsibility to comply with all Title IV program requirements and to account for Federal funds entrusted to it. Exh. ED-3 at 2. Decker participated in the Federal Pell Grant, Federal Family Education Loan Education (FFEL), Federal Direct Loan (DL), and Federal Supplemental Education Opportunity Grant programs. Exh. R5c at 0085.

Decker last submitted a compliance audit to the Department for the fiscal year ending June 30, 2004. That compliance audit covered the period January 1, 2003 through June 30, 2004. FAD at 4, FN 2. On this record, there is no indication that the compliance audit Decker submitted in 2004 was incomplete or that there were any findings concerning non-compliance related to that audit.

In 2005, the FSA Kansas City Participation Team (the Team) conducted a Final Program Review of Decker, which included an on-campus program review from June 6 through June 10, 2005. The purpose of the Final Program Review was "to determine Decker's compliance with the statutes and federal regulations as they pertain to the administration of the Title IV, HEA programs. The review consisted of, but was not limited to, a review of Decker's policies and procedures

regarding institutional and student eligibility, individual student aid and academic files, attendance account ledgers, and fiscal records." Exh. R-5c at 0085. The review covered the 2003 - 2004 and 2004 - 2005 award years. Exh. R-5c.

In June 2005, FSA placed Decker in its Heightened Cash Monitoring system (HCM2). Exh. R-4 at 0048.

On September 30, 2005, Decker lost eligibility to participate in Title IV programs when the Department denied its application for participation or re-certification. Exh. R-5c at 0085; Exh. ED-2 at 4.

On October 12 or 21, 2005, Decker ceased offering classes and closed. Exhs. R-4 at 0048, R-5 at 0085; ED-2 at 5, ED-3 at 1, ED-4 at 10.

On October 24, 2005, creditors file an involuntary Chapter 7 bankruptcy case, putting Decker into bankruptcy. Exhs. R-4 at 0048; ED-1 at 2. The bankruptcy case was filed in United States Bankruptcy Court for the Western District of Kentucky and is captioned In Re: Decker College, Inc., Case No. 05-61805.

Since the bankruptcy case was filed in October 2005, Decker has remained in bankruptcy and been involved in protracted, contentious litigation, which has included adversarial proceedings against the COE pertaining to Decker's loss of accreditation, as well as the Department.

On October 17, 2005, the Federal Bureau of Investigation (FBI) and the Department's Office of Inspector General (OIG) seized physical and electronic records from Decker. Exh. R-4 at 0048.

On November 9, 2005, FSA notified the Bankruptcy Trustee of Decker's obligation to submit a close-out audit. Exh. ED-2 at 5.

Decker did not submit a close-out audit within 90 days of the end of its participation in Title IV, HEA programs or closure and still has not done so as of the date of this decision.

On March 31, 2006, FSA issued a Final Program Review Determination (FPRD) based on the Kansas City Team's review. The Final Program Review and resulting FPRD addressed institution eligibility/unapproved programs, return of funds documented/not paid, FFEL disbursement attributable to unattended/incorrect payment periods, improper disbursement – federal Pell grants disbursed prior to mid-point, incorrect Federal Pell Grant calculations, and lack of administration capacity. In the FPRD, FSA stated, "(T)his FPRD and its findings are separate from Decker's obligation to submit a close out audit under 34 C.F.R. § 668.26." Exh. R-5c.

In April of 2006, Decker requested a review of the FPRD. OHA docketed the case as Docket No. 06-22-SP. At the parties' request, the OHA case was stayed, pending a ruling by the bankruptcy court related to Decker's accreditation.

In October 2006, Decker sought and received authorization from the bankruptcy court to hire an auditor to conduct the close-out audit. Exh. R-6a. In August 2007, the auditor wrote to Decker to inform it that the auditor could not complete the audit but was withdrawing from the engagement because records it received were not sufficiently complete to conduct the audit properly. Exh. R-6b.

On January 7, 2009, the FBI released the documents it had seized in October 2005 to the Bankruptcy Trustee. The Bankruptcy Trustee was informed that no indictment associated with the search wherein the records had been seized would be issued. Exh. ED-2 at 6.

In July of 2012, the Bankruptcy Court ruled in Decker's favor on the issue concerning its accreditation and the COE's statements as related to that accreditation. The ruling was appealed to the United States District for the Western District of Kentucky, where it was affirmed. The District Court's decision was then appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit dismissed the appeal for lack of jurisdiction.

The stay in OHA Docket No. 06-22-SP remained in place until it was lifted in February 2015, after appeals of the Bankruptcy Court's ruling on the issue concerning accreditation were resolved.

On March 15, 2016, the Honorable Robert Layton, the presiding administrative judge in OHA Docket No. 06-22-SP, issued a decision. In the decision, Judge Layton ruled, among other things, that the last published cohort default rate of 2.7%, not the 65% rate formulated by FSA using Decker student loan data, should be applied and ordered FSA to recalculate Decker's liabilities for estimated loan losses. FSA appealed some of the rulings in the initial decision, but not the ruling on the cohort rate, to the Secretary.

On November 2, 2016, the Secretary issued a Final Decision concerning the FPRD.

On March 29, 2017, Decker and the COE agreed to settle the adversarial proceeding. Exh. ED-2. In May 2017, Decker settled its litigation with COE. Exh. ED-1.

In November 2017, Decker receives approval from the Bankruptcy Court to hire a vendor to scan records. Exh. R-4 at 0050.

On September 19, 2019, the Bankruptcy Trustee asked the Bankruptcy Court for permission to hire an accounting firm to conduct the close-out audit. Exhs. R-4 at 0051; ED-2 at 11. The Bankruptcy Court approved the Trustee's request. Exh. R-4 at 0051.

On October 7, 2019, the Bankruptcy Trustee provided FSA with the auditor's engagement letter. Exh. ED-2 at 11.

On November 19, 2019, the parties met to discuss the scope of engagement of the auditor and the process for conducting the close-out audit. Exh. ED-2 at 11.

In February 2020, Decker communicated with the United States Department of Justice attorney handling the bankruptcy case regarding the scope of any close-out audit. Exh. R-9.

On June 24, 2020, the Bankruptcy Trustee informed the Bankruptcy Court it was having difficulty completing the close-out audit due to concerns with completeness of records. Exh. ED-2 at 11.

On October 13, 2020, the Assistant United States Attorney representing the Department in the bankruptcy proceeding informed the Bankruptcy Court that FSA was prepared to move forward with the FAD if the Bankruptcy Trustee would not submit the close-out audit. Exh. ED-2 at 11.

On November 16, 2020, FSA issued a Final Audit Determination asserting that Decker had failed to submit a close-out audit that covered the unaudited period July 1, 2004 to September 30, 2005. As a result of Decker's failure to submit a close-out audit, FSA claims Decker is liable in the aggregate amount of $23,540,804.54: $16,408,375.83 for Federal Pell Grants, including $2,151,957.83, for Cost of Funds; $44,299.19 for Direct Loan liabilities; $170,634.52 for the Department's estimated loss for excess subsidies paid to lenders for ineligible loans extended under the Federal Family Education Loan Program; $6,896,759.00 for Closed School Loan Discharges; and, $20,736.00 for unsubstantiated Excess Cash Direct Loan program funds. Exh. R-2.

After the FAD was issued, Decker filed a complaint against the Department, initiating an adversarial proceeding in Bankruptcy Court and also requested a Temporary Restraining Order enforcing the automatic stay imposed by 11 U.S.C. § 362, and preventing the Department from enforcing the FAD. Exhs. R-4 at 0053; ED-4.

VI. Discussion and Conclusions of Law

A. Burden of Proof

In Subpart H appeals of audit determinations, FSA bears the burden of production, while the institution bears the burden of proof. FSA meets it burden of establishing a prima facie case if it presents sufficient evidence that when considered alone would enable this tribunal to infer that the violation occurred. *In the Matter of Sinclair Community College*, Dkt. No. 89-21-S, U.S. Dep't of Educ. (Decision of the Secretary, Sept. 26, 1991). The institution has the burden of proving by a preponderance of the evidence that the Title IV funds in question were properly disbursed and that the institution complied with program requirements. 34 C.F.R. § 668.116(d); *In the Matter of DuQuoin Beauty College*, Dkt. No. 06-51-SP, U.S. Dep't of Educ. (May 14, 2009). Thus, it falls to Decker to demonstrate that the Title IV funds in question were properly disbursed and that it complied with program requirements.

B. Requirement for a Close-Out Audit

Federal regulations provide that if an institution's participation in a Title IV, HEA program ends, the institution must submit to the Secretary an independent audit of all funds that the institution received under the program. 34 C.F.R. § 668.26(b)(2). Specifically, within 45 days the institution must submit a letter of engagement under which an auditor will conduct the audit and then must submit the close-out audit within 90 days of the institution ceasing participation in Title

IV programs. *Id*. The regulatory obligation to submit a close-out audit is mandatory and the regulations do not provide for any exception, substitute or alternative. 34 C.F.R. § 668.26.

Failing to submit a close-out audit equates to the inability to account for federal funds for the period since the last periodic audit. *In the Matter of Institute of Medical Education*, Dkt. No. 12-59-SA (Feb. 14, 2013). If an eligible institution fails to submit a close-out audit or otherwise fails to prove that expenditures were proper, then it owes back all the Title IV student aid that it has disbursed because it has not met its burden of establishing that Title IV aid was proper. *In the Matter of Cosmetology College*, Dkt. No. 94-96-SP, U.S. Dep't of Educ. (Initial Decision, Aug. 23, 1995), (Decision of Secretary, certifying Initial Decision as Final Decision, Nov. 27, 1995); *In the Matter of Long Beach College of Business*, Dkt. No. 94-78-SP, U.S. Dep't of Educ. (Aug. 30, 1995); and, *In the Matter of Calvinade Beauty Academy*, Dkt. No. 93-151-SA, U.S. Dep't of Educ. (Sept. 18, 1995).

The Department informed Decker College in November of 2005 that it would be liable for the funding received during the unaudited period if a close-out audit was not completed within ninety days. Exh. ED-3 at 10.

Decker does not challenge the conclusion that it failed to file a close-out audit following the end of its participation in Title IV, HEA programs, up through and including the present, and thus did not comply with the mandatory obligation to do so under 34 C.F.R. § 668.26. Instead, Decker variously argues that (1) it is excused from satisfying the requirement based on FSA's misstatements concerning the scope and expanded requirements of the audit; (2) FSA's claims are barred by the defense of laches; (3) FSA miscalculated liabilities at an incorrect cohort default rate in contravention of an earlier OHA decision; (4) school loan discharge liabilities as assessed are not supported by fact or law; (5) Federal Pell grants and loans for which it is being assessed were accounted for outside of a close-out audit; and, (6) the liability amount assessed is incorrect as it does not credit letters of credit posted by Decker. In turn, each of Decker's arguments is addressed below.

C. Liabilities for Federal Pell Grants and Loans for the Unaudited Period

In the FAD, FSA assesses Decker for all funds it received during the unaudited period of July 1, 2004 to September 30, 2005, claiming the amount of $16,408,375.83 for Federal Pell Grants, including $2,151,957.83, for cost of funds, for that unaudited period.

Decker argues that liabilities assessed by FSA in the FAD for Federal Pell grants and loans are improper even though Decker did not submit a close-out audit as required by 34 C.F.R. § 668.26 (b)(2)(ii) because it accounted for the grants and loans outside of a close-out audit. Specifically, Decker contends that it provided all the components of a close-out audit as listed in the 2000 Audit Guide at the time of the Final Program Review conducted in June 2005 for award years 2003 - 2005, together with Decker's participation in the HCM2 system from June 2005 through its closure in October 2005. In short, Decker asserts that the Final Program Review and its participation in the HCM2 system substituted for the close-out audit.

FSA counterargues that it properly assessed Decker for the unaudited period of July 1,

2004 through September 30, 2005, using the start date of July 1, 2004 based on the last compliance audit filed by Decker, which covered the period January 1, 2003 through June 30, 2004. FSA does not directly address Decker's arguments that the Final Program Review and Decker's participation in the HCM2 system satisfied, by substitution, in whole or in part, the close-out audit requirement, but in response to Decker's argument for substitution counters that the close-out audit is mandatory.

A Final Program Review results from a program compliance review of an institution's participation in Title IV, HEA programs. 34 C.F.R. § 668.12(b). In contrast, a close-out audit must be prepared by a qualified, independent auditor under generally accepted government auditing standards and in accordance with the guidelines established by the Department's Office of Inspector General. 34 C.F.R. § 668.12(a); 34 C.F.R. § 668.23(a)(5).

OHA decisions reaching back more than twenty-five years have addressed arguments advanced by institutions that certain departmental reviews and requirements constitute an appropriate substitution for the close-out audit, consistently ruling that the close-out audit requirement is mandatory but recognizing that other evidence may satisfy, in whole or in part, the evidentiary burden of showing aid was properly disbursed. Likewise, the Secretary has consistently ruled, or at least inferred, that the close-out audit requirement can be obviated if the institution was held accountable in a substitute process that includes the same elements employed in a close-out audit. Consistent with the Secretary's rulings that substitute processes should be considered to determine if they satisfy the close-out audit requirement, OHA decisions have examined and ruled on what substitute processes might obviate the close-out audit requirement.

In 1994, the presiding administrative judge held that the institution failed to provide the Department with requested enrollment data needed to account for Title IV funds, but noted that the institution could have provided relevant data to satisfy the institution's evidentiary burden of showing that it disbursed federal aid properly. *In the Matter of Selan's System of Beauty Culture*, Dkt. No. 93-82-SP, U.S. Dep't of Educ. (Dec. 19, 1994).

In 1997, the presiding judge found that the institution failed to submit the required close-out audit and considered the institution's appeal of an FPRD and liabilities thereunder concurrently with institution's liabilities for failure to submit close-out audit. *In the Matter of Interamerican Business College,* Dkt. No. 96-20-SP, U.S. Dep't of Educ. (May 28, 1997).

In 1998, the presiding judge found that the institution had not submitted annual compliance audits or close-out audit for unaudited years, indicating that late-submitted compliance audits might have been used to account for Title IV funds for unaccounted years, but could not because they were incomplete and therefore unacceptable. *In the Matter of Magic Touch Beauty Institute,* Dkt. No. 97-161-SP, U.S. Dep't of Educ. (July 2, 1998).

In 1997, the judge remanded a case in which the institution had closed but no close-out audit was submitted because the agency's decision-making process had not, but should have, included evidence of compliance from an on-site program review the agency had conducted and agency records of Pell Grant payments where the institution was on a reimbursement system. *In*

the Matter of Liberty Academy of Business, Dkt. No. 96-132-SP, U.S. Dep't of Educ. (Dec. 8, 1997).

In 2003, the judge held that an adequate substitution for a close-out audit must include documents that properly account for expenditure of Title IV funds, fulfilling the institution's burden of proving that all Federal funds were properly disbursed. 34 C.F.R. § 668.16(d); *In the Matter of Business Training Institute*, Dkt. No. 01-06-SP, U.S. Dep't of Educ. (May 23, 2003).

In 2008, the Quality College of Culinary Careers argued that it need not submit a close-out audit for the period subsequent to its last compliance audit because it otherwise accounted for federal funds it received through the Heightened Cash Monitoring process (HCM2), an accounting tool used by FSA to assess and monitor high risk institutions, conducted by FSA. The judge rejected this argument, finding that the institution had submitted no evidence to establish that the HCM2 process accounted for the federal funds at issue, and ordered the institution to return all federal funds disbursed during the period the close-out audit would have covered. *In the Matter of Quality College of Culinary Careers*, Dkt. No. 08-36-SA, U.S. Dep't of Educ. (Initial Decision, June 10, 2009). On Quality College's appeal of this ruling to the Secretary, the Secretary remanded the case to the judge, with directions to determine whether, and if so to what extent, the HCM2 process conducted by FSA had accounted for the expenditure of Federal funds at issue. *In the Matter of Quality College of Culinary Careers*, Dkt. No. 08-36-SA, U.S. Dep't of Educ. (Decision of Secretary, Nov. 25, 2009). On remand, the ALJ adopted the analysis of *In the Matter of Harrison Career Institute*, Dkt. Nos. 07-55-SA and 07-63-SA, U.S. Dep't of Educ. (Decision on Remand, Dec. 8, 2009), and concluded that the HCM2 process did not serve as a substitute for a close-out audit because the purpose of the HCM2 was to examine and validate student eligibility to receive Title IV funds, and did not in any way address the broader and more complex elements of a close-out audit, such as institutional eligibility, timely disbursements and refunds of unearned funds, loan reporting and disbursements, and close-out requirements. *In the Matter of Quality College of Culinary Careers*, Dkt. No. 08-36-SA, U.S. Dep't of Educ. (Remand Order, Mar. 31, 2010).

In 2009, the Secretary remanded an initial decision to OHA with instructions that the judge determine whether the HCM2 process could serve as a substitute for the close-out audit the institution had failed to submit. On remand, the judge held that the HCM2 process could not substitute for a close-out audit because that system's purpose is to examine student eligibility and does not address all the other significant elements of the institution's participation in Title IV programs, such as institutional eligibility, loan reporting and disbursements, return of Title IV funds, grant administration, cash management, required management operations, and close-out requirements. *In the Matter of Harrison Career Institute*, Dkt. Nos. 07-55-SA and 07-63-SA, U.S. Dep't of Educ. (Decision on Remand, Dec. 8, 2009).

In 2014, the Secretary rejected the institution's argument on appeal that an e-mail between it and the Department showing Title IV funds were properly disbursed was not an adequate substitute for the mandated close-out audit. *In the Matter of Institute of Medical Education*, Dkt. Nos. 12-59-SA, 13-58-SP, U.S. Dep't of Educ. (Decision of Secretary, Aug. 18, 2014).

Decker argues that the Final Program Review contains components of a close-out audit such that it satisfied some, if not all, of the close-out audit requirements. The Final Program Review, of course, was not conducted by an independent auditor as required for a close-out audit. And, although it addressed Decker's handling of Title IV funds, the Final Program Review did not cover the same areas of assessment as those that would have been addressed in a close-out audit and that are the subject of the FAD.

The FPRD process covered the 2003 – 2004 and 2004 – 2005 award years, and entailed "a review of Decker's policies and procedures regarding institutional and student eligibility, individual student financial aid and academic files, attendance records, student account ledgers, and fiscal records." Exh. R-5c at 0085. The Final Program Review was conducted by FSA's Kansas City Participation Team.

The Final Program Review covered six areas: (1) Ineligible/Unapproved Programs, for which FSA assessed a liability of $31, 595, 885, based on the finding that Decker offered courses under Title IV, HEA program funding that FSA asserted were unapproved under Decker's accreditation from the COE, Exh. R-5c at 0086; (2) Return of Funds Not Documented/Not Paid, for which FSA demanded the return of $3,291,759, based on Decker's failure to return Title IV funds to the Department for students who withdrew prior to completing their program and which culminated in Decker's acknowledgment that it had failed to return unearned Title IV funds to their respective programs, Exh. R-5c at 0088; (3) FFEL Disbursements Attributed to Unattended/Incorrect Payment Periods, for which FSA assessed Decker liabilities of $2,290.90, for disbursing FFEL funds to students for payment periods in which they did not attend school, Exh. R-5c at 0090; (4) Improper Disbursement—Federal Pell Grants Disbursed Prior to Midpoint, for which FSA assessed Decker $1, 350, 650, for disbursing Pell Grants to students who did not reach the mid-points in their courses; (5) Incorrect Federal Pell Grant Calculation for Institution Without Fixed Terms, for which FSA assessed Decker liabilities of $905, 507, for dispensing Pell Grant funds without using the calculations required by 34 C.F.R. 690.63, Exh. R-5c at 0092; and, (6) Lack of Administrative Capacity, which concerned Decker's demonstrated lack of administrative capacity. Exh. R5c at 0094.

Although the Final Program Review touched on proper disbursement of some Title IV funds, it did not account fully for Decker's expenditure of Title IV funds. Rather, it generally focused on Decker's administration of funds vis-à-vis students.

Further, none of the components of the Final Program Review satisfy the items listed in the FAD, each of which is an accounting measure of proper disbursement of Title IV funds and broader and more complex than the components of a Final Program Review: accounting for Federal Pell Grants for the unaudited period; accounting for Direct Loans and Federal Family Education Loans for the unaudited period; assessment for school loan discharges due to school closure; and, accounting for unsubstantiated excess cash for the unaudited period. Exh. R-1. Decker has not demonstrated that components of the Final Audit Determination are duplications or overlaps of the components covered by the Final Program Review. In short, the Final Program Review did not fulfill Decker's obligation to prove all Federal funds were properly disbursed.

Finally, Decker's argument that the close-out audit is not required for the period from June 2005 through 2006 is not persuasive. Decker argues that its participation in the HCM2 system between June 2005 until its closure, immediately preceded by the final program review, provides sufficient evidence that it accounted for the expenditure of Federal funds at issue. As explained in previous OHA decisions that have rejected an institution's participation in the HCM2 system as a substitution for a close-out audit, the HCM2 process cannot serve as a substitute for a close-out audit because the purpose of the HCM2 is to examine and validate student eligibility to receive Title IV funds, and does not in any way address the broader and more complex elements of a close-out audit, such as institutional eligibility, timely disbursement and refunds of unearned funds, loan reporting and disbursements, and close-out requirements. *In the Matter of Quality College of Culinary Careers*, Dkt. No. 08-36-SA, U.S. Dep't of Educ. (Remand Order, Mar. 31, 2010); *In the Matter of Harrison Career Institute*, Dkt. Nos. 07-55-SA and 07-63-SA, U.S. Dep't of Educ. (Decision on Remand, Dec. 8, 2009).

It is well established that in the absence of a close-out audit, unless a school can otherwise account for the federal funds received, the school is liable for all funds received since the last submitted audit. *In the Matter of Magic Touch Beauty Institute*, Dkt. No. 97-161-SP, U.S. Dep't of Educ. (July 2, 1998); *In the Matter of Belzer Yeshiva*, Dkt. No. 95-55-SP, U.S. Dep't of Educ. (June 19, 1996); and, *In the Matter of Calvinade Beauty Academy*, Dkt. No. 93-151-SA, U.S. Dep't of Educ. (March 21, 1995).

Contrary to Decker's arguments, neither the Final Program Review nor Decker's participation in HCM2 obviated the need for a close-out audit and neither can serve as substitutes for the close-out audit. Therefore, the FAD is supportable and FSA's assessment of liability for Federal Pell Grants and Loans based on failure to submit a close-out audit is upheld.

D. Excusal of Failure to Submit Close-Out Audit Based on Misstatements

Decker's argument that it should be excused for its failure to submit a close-out audit as required by 34 C.F.R. § 668.26(b)(2) based on misstatements made by FSA concerning the scope and expanded requirements of the audit the Department is unavailing. In support of its argument, Decker states that its attempts to submit a close-out audit were frustrated, and it should be excused, based on the Department's misstatements about what needed to be included in the audit. The history of this case and the clear regulatory requirements concerning close-out audits lead me to conclude that these assertions are without merit or, at least, do not excuse Decker's failure to submit a close-out audit.

Federal regulations are clear that a close-out audit is required within 90-days of when an institution's participation in the Title IV, HEA program ends. 34 C.F.R. § 668.26. FSA reminded Decker of this obligation in the FPRD issued on March 31, 2006. FSA's guide to close-out audits, presented by Decker as an exhibit, provides detailed information on what should be included in a close-out audit. Exh. R-8b.

Although not within, and well beyond, the 90-day period window in which it was required

to submit a close-out audit, Decker sought and was authorized by the Bankruptcy Court twice, first in 2006 and then again in 2019, to obtain the services of an auditor to conduct the close-out audit. The auditor selected in 2006 did not complete the audit but withdrew from the engagement in 2007, because records he received were not sufficiently complete to conduct the audit. Records seized by the FBI and OIG were returned to Decker in 2009. Then, nothing further transpired with respect to the close-out audit until November 2017. During the pendency of its appeal of the FPRD, from April 2006 through March 2016, Decker did not submit a close-out audit, even though reminder to do so was included in the FPRD. In November 2017, Decker received approval from the Bankruptcy Court to have a vendor scan its records. In September 2019, Decker sought and was authorized by the Bankruptcy Court to obtain the services of an auditor to conduct the close-out audit. In October 2019, the Bankruptcy Trustee provided FSA with a copy of the auditor's engagement letter. In February 2020, Decker communicated with the Department of Justice attorney in the bankruptcy case concerning the scope of the audit. In June 2020, the Bankruptcy Trustee informed the Bankruptcy Court that the audit had not been completed due to difficulties with the records.

Decker's arguments that it made good faith efforts to complete a close-out audit for years but was impeded by the Department's conduct are not persuasive. The chronology of events demonstrates that Decker was continuously aware of its obligation to submit a close-out audit, from at least in March 2006, when it received the FPRD and continuing up through 2020, when the Bankruptcy Trustee informed the Bankruptcy Court that the audit had not been completed due to difficulties with the records. Decker now professes to have not submitted the close-out audit because it did not receive reimbursement from the Department and because the Department directed it to conduct the audit under an inapplicable edition of the audit guide and to provide three new audited financial statements and 90/10 calculations covering 2003 – 2005, as well as insisting that any reimbursements owed Decker be considered as part of the close-out audit.[6] The chronology of events in the Bankruptcy Court does not support Decker's professed reasons for not complying with the audit requirement. Instead, the chronology indicates that Decker sought and was granted approval to retain an auditor twice, that auditors were selected twice, but that neither auditor could complete the audit due to difficulties with the records.

To the extent Decker argues that it could not complete the close-out audit due to insufficient records, that reason, without more, does not justify failure to submit the required audit. Although its records were seized upon execution of a search warrant by the FBI and OIG in 2005, the records were returned to the Bankruptcy Trustee in January 2009. In cases where institutions have raised "insufficient records" to justify their failure to submit a close-out audit, presiding judges have ruled that institutions are obligated to maintain records and, if necessary, make efforts to obtain records to fulfill the close-out audit obligation. *See*, *e.g.*, *In the Matter of Chicago Educational, Inc*., Dkt. No. 94-132-SP, U.S. Dep't of Educ. (Aug. 16, 1995) (as a Title IV participant going out of business, institution knew it would have to make arrangements for a close-out audit, which would require retention of records, and, to the extent the records were in possession of Office of Inspector

[6] Under the 90/10 Rule, no more than 90% of a school's revenue can come from Title IV funds. 20 U.S.C. § 1002(b)(1)(F) (2003). Respondent's accountant asserts that the Department generally has not required closed schools to submit a 90/10 Rule calculation after the school is closed. Exh. R-9 at 0791, 0795. Respondent's accountant also asserts that the Department generally has not required schools to submit financial statements after a school has closed. *Id.*

General, the institution could make arrangements to obtain records).

Finally, if Decker's request is for a complete reprieve from the close-out audit requirement, OHA lacks authority to waive the requirement. 34 C.F.R. § 668.117(d).

E. Defense of Laches to the FAD and Liability for Unsubstantiated Excess Cash

Decker also argues that the defense of laches bars the FSA's assertion of liability because any liability arose before issuance of the FPRD in 2006, including liability for unsubstantiated excess cash, assessed in the amount of $20,736.00 in the FAD, which was not raised in the FPRD, and delays in issuing the FAD and establishing liabilities are attributable to FSA and prejudicial to Decker. FSA counters that there was no unreasonable delay in issuing the FAD and points to the protracted litigation, including bankruptcy proceedings and a related stay in a pending OHA adjudication, and argues that no prejudice has been worked to Decker with respect to establishing liabilities.

This tribunal has long held that laches as an equitable defense may be asserted in Subpart H proceedings. *In the Matter of Platt Junior College*, Dkt. No. 90-2-SA, U.S. Dep't of Educ. (Oct. 31, 1991) (defense of laches applied where there was an extended delay, non-negligent in nature, over nine and one-half years before issuance of a Final Audit Determination); *In the Matter of Mary Holmes*, Dkt. No. 94-90-SA, U.S. Dep't of Educ. (May 3, 1995) (defense of laches applied where there was a seven-year delay, negligent in nature, in issuing a Final Audit Determination and the delay prevented the institution from locating supporting information); *In the Matter of OIC Vocational Institute*, Dkt. No. 98-12-SP, U.S. Dep't of Educ. (Oct. 30, 1998) (criteria for defense of laches not met where institution did not show lack of diligence on government's part or prejudice by the delay); and, *In the Matter of Community College System of New Hampshire*, Dkt. No. 09-35-SA, U.S. Dep't of Educ. (June 21, 2010) (defense of laches not allowed because twenty-one month delay in issuing Final Audit Determination was not unreasonable where audit report indicated fraud, prosecuting authorities had to be consulted, and new employee had to examine documents, and institution failed to establish that delay interfered with its ability to defend itself).

As the proponent, Decker has the burden of establishing the defense. To successfully assert the defense of laches, the proponent must establish there was an unreasonable delay in the government's assertion of its claim and that the delay resulted in prejudice to the proponent. *Id*.

Generally, delays found to constitute unreasonable delay have been caused by extreme negligence or only in egregious circumstances and to have been attributable to more than mere negligence. *Id*., citing *United States v. Administrative Enterprises, Inc.*, 46 F.3d 670 (7th Cir. 1995); *Hecker v. Community Health Services of Crawford County, Inc*., 467 U.S. 51 (1984).

As was explained in *In the Matter of Community College System of New Hampshire*, *id*., applicability of the defense of laches to a Subpart H proceeding necessarily requires examination of the various steps in the administrative enforcement process.

The administrative enforcement process leading up to issuance of the FAD in this case, which Decker accurately notes spanned almost fifteen years, involved multiple administrative steps and protracted litigation involving Decker's appeal of an FPRD issued after Decker closed, as well as a Chapter 7 bankruptcy proceeding that lead to a ten year stay in Decker's appeal of the FPRD. In October 2005, Decker closed and was placed in bankruptcy. In 2006, FSA issued the Final Program Review Determination and Decker requested review of the FPRD. The parties agreed to stay the FPRD review by OHA, pending resolution by the Bankruptcy Court judge of an issue that would impact adjudication of the FPRD. In February 2015, after the Bankruptcy Court judge ruled and appeals of his rulings were fully resolved, OHA lifted the stay and allowed the parties to file briefs. In March 2016, the OHA judge issued a decision, which was appealed to the Secretary. In November 2016, the Secretary issued a decision. In the meantime, the bankruptcy case remained pending. In November 2020, FSA issued the FAD, after which Decker filed an adversarial proceeding with the Bankruptcy Court asserting that the FAD was issued in violation of the automatic stay imposed under the bankruptcy code. This chronology, in the context of the trajectory of a Subpart H proceeding, coupled with the impact of the bankruptcy proceedings and the numerous appeals at different stages and in different forums, and without evidence to the contrary, leads to the conclusion that the delay, although lengthy, was not caused by negligence on the government's part and not unreasonable. The contentious, protracted, and complex history of these proceedings supports this conclusion.

Additionally, Decker has not established that the delay interfered with its ability to defend itself. Decker was on continuing notice of potential liabilities, the need to maintain adequate records for an audit, the requirement to provide a close-out audit, and the eventuality of issuance of a Final Audit Determination, from the time it executed the Program Participation Agreement with the Department and began participating in student financial assistance programs under Title IV. Despite reminders to submit the close-out audit surrounding the time Decker lost eligibility to participate in Title IV programs and throughout the bankruptcy proceeding, Decker has not submitted a close-out audit. As recently as March 8, 2021, the Honorable Joan A. Lloyd, the presiding judge in Decker's bankruptcy case, admonished:

> Notwithstanding the Trustee's complaints against the Department of Education, it is clearly established that Decker College has been responsible for producing a close-out audit to the Department of Education for the amount of its reimbursement to be fully determined. That close-out audit responsibility stems from conditions and restrictions Decker College agreed to when it received funds from the Department of Education's student loan program. Nothing in the Bankruptcy Code allows the Trustee to avoid those responsibilities.

In Re: Decker College, Inc., Case No. 05-61805, AP No. 20-03026 (Order Dismissing the Trustee's Complaint without Prejudice, Mar. 8, 2021).

This tribunal finds that Decker is not entitled to relief based on laches because it has not shown that the delay in issuance of the FAD was unreasonable or that there was any prejudicial harm to Decker.

F. Cohort Default Rate Used in Estimating Losses Due to Ineligible Loans

In the FAD, FSA assesses Decker liabilities for defaulted Direct Loans (DL) and Federal Family Education Loans (FFEL), basing those liabilities on the Estimated Loss (EL) formula. In applying the EL formula, FSA assigns Decker a cohort default rate of 18%, which it uses to calculate Decker's EL, resulting in assessed liabilities of $44,299.19 for DL's and $170,634.52 for FFEL's.

Decker argues that FSA's use of the 18% cohort default rate disregards the holding in OHA Docket No. 06-12-SP, that the applicable cohort default rate is 2.7%, and that FSA incorrectly applied the 2017 fiscal year rate of 18%, rather than the rate in effect when Decker closed in 2005.

In its brief, FSA responds only that FSA utilized the most recently published cohort default rate of 18% when it issued the FAD in 2020, and that the rate set in the decision in OHA Docket No. 06-12-SP is not binding on the Department.

Decker's previous appeal of the cohort default rate applied by FSA when using the estimated loss formula to estimate losses due to ineligible loans in the 2006 FPRD presented the same issue as presented here. On appealing the FPRD, Decker challenged FSA's use of a cohort default rate that FSA formulated based on Decker student loans that went into default between October 1, 2005 and October 31, 2007. Decker argued, among other things, that the last published cohort default rate of 2.7%, published in Fall of 2005 for FY 2003, should be applied. The presiding administrative judge agreed, applied the 2.7% for the audit period at issue in the FPRD, and opined about what cohort rates for future award years should be used.

As explained in *In the Matter of Christian Brothers University*, Dkt. No. 96-4-SP, U.S. Dep't of Educ. (Feb. 13, 1997), and relied upon by Judge Layton in the Decision in OHA Docket No 06-12-SP, the estimated loss formula is a tool the Department uses to estimate losses due to ineligible loans that the institution certifies. In order to calculate an institution's estimated loss using the formula, the Department must determine the institution's cohort default rate and then multiply it by the number of ineligible loans that were issued during that particular year. *Id*. Therefore, the higher the default rate, the higher the liabilities will be for the school. The cohort default rate is the percentage of students, in an award year when 30 or more students enter repayment on loans, who default on their student loans before the end of the following award year. 20 U.S.C.A. § 1087bb(g)(1)(A) (1972), 34 C.F.R. § 668.183 (d)(2) (2010). If there are not 30 or more students entering repayment of student loans, then the default rate is calculated using the three most recent award years. 20 U.S.C.A. § 1087bb(g)(1)(B) (1972), 34 C.F.R. § 668.183(d)(1) (2010). Neither provides for the use of future standards when calculating the default rate.

In further reliance on *In the Matter of Christian Brothers University*, Judge Layton quoted a statement made by FSA in the *Christian Brothers University* proceeding: "in any future case, (the Department) will use the rates applicable to the period under review, if final, or, if not, the most recent cohort default rate." Reasoning that the practice explained by FSA should be applied and not deviated from, Judge Layton applied FSA's practice on deciding Decker's appeal of the

FPRD. He ruled that the cohort default rate should be identified by using the rate applicable to the period under review and held that the last published cohort default rate, 2.7%, was the applicable rate for the award year at issue. Judge Layton went on to say that where there is no published cohort default rate for a year the Department normally applies the fiscal year's national average cohort default rate for similar proprietary schools and that "therefore for payments made on loans during FY 2004, FY 2005, and FY 2006, the relevant national average cohort default rates should be applied." *In the Matter of Decker College*, Dkt. No. SP-06-12, U.S. Dep't of Educ. (Mar. 16, 2016).

Based on the same or very comparable facts presented here, I agree with Judge Layton's analysis and adopt a similar conclusion of my own.

The 2017 rate of 18% employed by FSA to calculate Decker's liabilities is too far removed in time from the 2004 – 2005 and 2005 – 2006 award years at issue here. The Institution Review Data Sheet at the front of the FPRD, which covered award years 2003 - 2004 and 2004 – 2005, indicates that the applicable cohort default rate for those years was 2.7%. Exh. R-5c at 0084.

If 2.7% was the last published cohort default rate for the award years at issue here, 2004 – 2005 and 2005 – 2006, then it should be the cohort default rate applied. If there was a last published cohort default rate closer in time to the award years than the 2.7% rate identified by Judge Layton, that rate should be used. If there was no published cohort default rate for FY 2004, FY 2005, and FY 2006, the relevant national average cohort default rates should be applied, but certainly not the remote 2017 rate of 18% selected by FSA.

For these reasons, the FAD assessment for liability for school loan discharges, based on the 18% cohort default rate used by FSA, is not supportable and will not be upheld, but should be recalculated.

G. Liability for School Loan Discharges

In the FAD, FSA states "(w)ith regard to loan discharges due to school closure, Decker owes the Department $6,896, 759.00. *See* Appendix D." Exh. R – 1 at 3.

Decker argues that this assessment should be reduced for four reasons. First, the formula FSA used to assess liability for school loan discharges was based on an amended regulation, 34 C.F.R. § 682.402(d), which was not in effect at the time the liabilities arose or when Decker closed. Decker argues the regulation in effect at the time of its closure should be applied, not the formula in the amended regulation. Second, FSA applied the formula based on an erroneous school closure date. Third, FSA has not provided sufficient documentation to support its assessment. Fourth and finally, FSA's assessment does not address whether the listed students were unable to complete the program due to Decker's closure or for some other reason.

FSA does not refute that the regulation in effect at the time of closure and the 90-day time frame therein applies instead of the amended regulation that contains the 120-day time frame FSA applied in assessing liability. Rather, FSA argues that Decker has the burden of proof to show it is not liable for the assessed liability, but that Decker produced no evidence showing that any of

the loan discharges for which it was assessed and as listed on Appendix D were for students who withdrew outside of the 90-day time frame of the applicable formula.

34 C.F.R § 682.402(d), as amended June 20, 2013, provides that student loan borrowers who "withdrew from (an) institution within 120 days preceding the institution's closure, and who were unable to complete their program because of the closure may apply for a closed school discharge of their Federal student loan." Prior to June 20, 2013, the regulation limited discharges to student loan borrowers who "withdrew from the school not more than 90 days prior to the date the school closed." 34 C.F.R. § 682.402(d) (2005). The discharge provision applies to any student who was in attendance when the campus closed or who withdrew within 90 days of the closure. 34 CFR § 682.402(d)(3). FSA does not dispute that the earlier version of the regulation applies and that the "not more than 90 days prior to the date the school closed" formula therein should be applied.

If the borrower's loan is discharged, the borrower is relieved of responsibility to repay the loan and automatically assigns their right to the Department, up to the amount discharged, which provides the Department with the authority to recover liabilities from the institution for the loan amounts discharged. 34 C.F.R. §§ 682.402(d)(5) and 685.214(e).

In applying the discharge provisions of § 682.402(d), FSA used September 30, 2005 as the date of Decker's closure. Exh. R-3. The formula used to assess loan discharges to an institution is based on the date of the "institution's closure." 34 C.F.R § 682.402(d). "A school's closure date is the date that the school ceases to provide educational instruction in all programs." 34 C.F.R. §682.402(d)(1)(ii)(A). According to FSA's FPRD, and I have so found, Decker lost eligibility to participate in Title IV programs when the Department denied its application or request for re-certification on September 30, 2005, but it did not cease to provide educational instruction in all programs until October 12 or 21, 2005. Exhs. R-4 at 0048, R-5 at 0085, ED-2 at 5, ED-3 at 1, ED-4 at 10. Therefore, the closure date that should have been used for assessing loan discharges is not September 30, 2005.

The FAD Letter summarily states that Decker owes the Department $6,896,759.00, and refers to the attached Appendix D. Exh. R-1. Appendix D contains twenty-four pages of spread sheets, each of which contains approximately one hundred line items. For each line item, there are thirty-one columns of information, including, but not limited to "Enrollment End Date" and "Discharge Date." Based on the total of $6,896, 759.00 listed at the end of the spread sheets, it appears that every discharged loan listed on the spread sheets is attributed to school closure and included in the total amount assessed. No information is provided on whether students were unable to complete their programs for reasons other than Decker's closure or whether they may have completed their programs elsewhere. Many of the "Enrollment End Dates" listed are as early as April 1, 2003, 2004, and early 2005. If "Enrollment End Dates" is equivalent to students' dates of withdrawals, then a large number of student withdrawals appear to have occurred outside of the "not more than 90 days prior to the date the school closed." If "Enrollment End Dates" is not equivalent to students' dates of withdrawals, then Appendix D does not appear to provide information on dates of withdrawals. In either event, Appendix D, without more, does not provide sufficient evidence to show who was in attendance when the campus closed, who withdrew within 90 days of the closure, or who was unable to complete their program due to the school's closure.

34 CFR § 682.402(d)(3).

FSA is correct in arguing that Decker bears the burden of proof. But FSA, in the first instance, bears the burden of establishing a prima facie case that presents sufficient evidence that when considered alone would enable this tribunal to infer that the violation occurred. *In the Matter of Sinclair Community College*, *supra*. The evidence presented by FSA on student withdrawals shows only that there were some enrollments that ended and resulted in loan discharges, but that evidence, when considered alone, does not enable this tribunal to ascertain that the liability assessed to Decker was based on student withdrawals that occurred within 90 days or even to draw an inference that those students who withdrew within that timeframe were unable to complete their programs due to school closure as set out in 34 C.F.R § 682.402(d). Thus, FSA has not established a prima facie case with respect to loan discharges.

For these reasons, the FDA determination on liability for school loan discharges is not supported and cannot be upheld.

H. Letters of Credit Posted by Decker Not Included in FAD Calculations

In its Brief, Decker argues that liabilities assessed it in the total amount of $23,540,804.54 in the FAD are incorrect because they do not take into account two letters of credit that Decker posted in 2005, in the amounts of $456,300.00 and $631,100.00, in connection with financial review and on which the Department drew down in 2006. Exh. R-13 at 0801 - 0804.

FSA counters that funds from the letters of credit have not been credited against Decker's liabilities at this stage because they are not relevant to any determination of Decker's liabilities but will be applied only after liability is determined.

FSA's argument is persuasive. This tribunal's authority and the scope of this proceeding are limited to a review of the Department's preliminary determination, the FAD in this case. 20 U.S.C. 1234(e); 34 C.F.R. § 668.113. Any credits against liabilities assessed for funds from the letters of credit do not reduce liabilities at issue in the FAD, but are related to any collection action that may follow, which is a proceeding separate and apart from the proceeding here. 34 C.F.R. § 668.123. Therefore, Decker's argument for reduction in liabilities based on FSA's failure to credit funds from the letters of credit cannot be considered and is dismissed.

VII. Conclusion and Order

With respect to liability for Federal Pell Grant Liabilities for the Unaudited Period in the amount of $16,408,375.83, including the costs of funds, and Liabilities for Unsubstantiated Excess Cash DL for the Unaccounted Period and Prior Award Years in the amount of $20,736.00, the findings contained in the FAD sufficiently state allegations in a manner that demonstrate the

existence of a prima facie showing that Decker failed to comply with Title IV procedural requirements. Decker failed to meet its burden of establishing that its expenditures of Title IV funds, as enumerated in the FAD, were correct. The FAD findings with respect to liability for Federal Pell Grant Liabilities for the Unaudited Period in the amount of $16,408,375.83, including the costs of funds, and Liabilities for Unsubstantiated Excess Cash DL for the Unaccounted Period and Prior Award Years in the amount of $20,736.00 are supported and the FAD is upheld with respect to those findings. 34 C.F.R. § 668.118(b).

However, based on the foregoing findings of fact and conclusions of law, the FAD findings with respect to Loan Liabilities for the Unaudited Period in the amount of $214,933.71, and Liabilities for Closed School Loan Discharges in the amount of $6,896,759.00 are not supported. *Id*.

Dated: July 6, 2021

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Elizabeth Figueroa
Administrative Law Judge

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