THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

BRAMSON ORT COLLEGE

Docket No. 18-08-SP

Federal Student Aid Proceeding

PRCN: 2012-3022-7888

Respondent.

DECISION OF THE SECRETARY

The core issue in this case is whether the Administrative Law Judge properly upheld Federal Student Aid's (FSA) findings of liability for the appealing institution, based upon the institution's participation in Title IV of the Higher Education Act of 1965 (HEA), as amended 20 U.S.C. § 1070 *et seq.* (Title IV). Based on the following analysis, I affirm the ALJ's decision.

A student must qualify for Title IV funds prior to disbursement by the school.[1] To qualify for Title IV funds, among other things, a student generally must have "a high school diploma or its recognized equivalent."[2] Alternatively, a student may pass an independently administered ability-to-benefit (ATB) test[3] or demonstrate ATB by completing six credit hours of instruction, also known as the "six credit hour rule."[4] An institution must make an accurate eligibility determination prior to disbursing funds to students.[5] An institution is liable to repay all funds disbursed to ineligible students. Absent a new, accurate eligibility determination, a student may not retroactively become eligible for Title IV funds by completing credits or graduating.[6] Where an institution makes an inaccurate eligibility determination and thereafter erroneously disburses funds to an ineligible student, the institution is liable for all of the disbursed funds.[7]

[1] *In the Matter of Fortis Coll.*, Dkt. No. 12-55-SP, U.S. Dep't of Educ. (Mar. 17, 2015) (Decision of the Secretary) at 7 (citing *In re Hamilton Prof'l Sch.*, Dkt. No. 02-49-SP, U.S. Dep't of Educ. (June 11, 2003)).
[2] 34 C.F.R. §§ 668.32(e), 668.141(a)(1).
[3] *Id*.
[4] *Id*. § 668.32(e)(5).
[5] *Fortis Coll.*, Dkt. No. 12-55-SP at 7 (citing *In re Hamilton Prof'l Sch.*, Dkt. No. 02-49-SP, U.S. Dep't of Educ. (June 11, 2003)).
[6] *Fortis Coll.*, Dkt. No. 12-55-SP at 7 (citing *In re Hope Inst.*, Dkt. No. 06-45-SP, U.S. Dep't of Educ. (Jan. 15, 2008); *In re Avalon Beauty Coll.*, Dkt. No. 04-24-SP, U.S. Dep't of Educ. (Dec. 20, 2005)).
[7] *Fortis Coll.*, Dkt. No. 12-55-SP at 8.

An institution "is subject to the highest standard of care and diligence" in administering Title IV programs and accounting for funds it receives.[8] Part of an institution's duty as a fiduciary is to "ensure that Title IV funds are only disbursed to eligible students."[9] Institutions are required to verify student information to establish eligibility for Title IV funds prior to disbursements.[10] Institutions are required to cooperate with FSA in periodic program reviews and provide records or other evidence demonstrating the institutions' compliance with Title IV requirements.

From 1942 to 2017, Bramson ORT College (Bramson) was a New York-based Title IV-participating private nonprofit postsecondary institution offering associate degrees.[11] FSA conducted a review of Bramson's Title IV compliance in 2012 and issued a program review report (PRR) on October 14, 2014. With the benefit of Bramson's response to the PRR, FSA issued a final program review determination (FPRD) on November 30, 2017. Bramson closed in February of 2017.

In the FPRD, FSA found that Bramson accrued to the Department a total liability of $1,158,435.93 in mismanaged Title IV funds. The liability stemmed from three separate findings. In summary, these findings were that Bramson disbursed Title IV funds to students who: 1) had not surpassed the state compulsory age of education; 2) were supposedly eligible due to their ability to benefit, but who had not actually achieved a passing grade on an ability to benefit test; and 3) had an enrollment status that did not justify disbursement of the funds, such as students who failed to begin attending class or who withdrew during the payment term.

Bramson appealed FSA's FPRD to the Department's Office of Hearings and Appeals (OHA). FSA ordered Bramson to return $98,948 under Finding 2. Before OHA, Administrative Law Judge (ALJ) Robert G. Layton agreed with Bramson's arguments on FSA's Finding 2. The ALJ held that FSA erroneously used the compulsory age of education applicable to residents of New York City (17 years) when the correct age was that applicable to residents of New York State (16 years). In reversing the finding, the ALJ overturned that portion of Bramson's liability.

The ALJ disagreed with Bramson's arguments regarding Findings 3 and 4, upholding the reasoning given by FSA in the FPRD. Specifically, the ALJ found that FSA correctly imposed liability under Finding 3 for students who Bramson sought to make a retroactive eligibility determination for Title IV funds by demonstrating ability to benefit, and the ALJ rejected Bramson's arguments that FSA was barred from imposing liability by either the statute of limitations or the doctrine of laches.

[8] 34 C.F.R. § 668.82(b) ("In the capacity of a fiduciary—
(1) A participating institution is subject to the highest standard of care and diligence in administering the programs and in accounting to the Secretary for the funds received under those programs.").
[9] *In the Matter of Bellefonte Acad. of Beauty*, Dkt. No. 17-28-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Nov. 2, 2020) at 3.
[10] *Id*. at 4.
[11] Decision at 1.

Bramson has since appealed the portion of the ALJ's decision regarding Findings 3 and 4.[12]

Bramson's Appeal to the Secretary

In an appeal under 34 C.F.R. Part 668 Subpart H (Appeal Procedures for Audit Determinations and Program Review Determinations), the institution bears the burden of showing that all expenditures were proper and that the institution complied with program requirements.[13] In a subsequent appeal before the Secretary, the appealing party bears the burden of demonstrating, with a preponderance of the evidence, that the hearing official erred in his or her findings.[14]

Bramson argues that the ALJ erred in upholding both Finding 3 and Finding 4. I will address Bramson's arguments on each issue separately below.

Finding 3 – ATB Students Admitted with Non-Passing Score

In Finding 3, FSA stated that the Combined English Language Skills Assessment (CELSA) test, an ATB test, had a minimum passing score of 90 prior to November 16, 2006, but the minimum passing score was raised to 97 effective November 16, 2006.[15] Notice of this change was published in the Federal Register.[16] During its program review, FSA determined that Bramson had distributed Title IV funds to students who were identified as eligible by passing the CELSA test, but who had not achieved the new passing grade of 97.[17] FSA ordered Bramson to provide a file review for the 2007–2008, 2008–2009, and 2009–2010 award years.[18] Based on the review, FSA found Bramson liable for $629,304.30 in funds disbursed to students erroneously determined eligible for Title IV funds using non-passing ATB test scores.[19]

Bramson argues that the six credit hour rule automatically renders a student eligible for Title IV funds upon completion of six credit hours of instruction.[20] Based on its theory, "students in Finding 3 became eligible upon the satisfactory completion of six credit hours of instruction at the College."[21] Although FSA and the ALJ pointed to past Departmental decisions

[12] Because Bramson has not appealed the ALJ's ruling with regard to Finding 2, that Finding is not at issue in this appeal and the ALJ's decision with regard to it is final for the Department.
[13] 34 C.F.R. § 668.116(d) ("An institution or third-party servicer requesting review of the final audit determination or final program review determination issued by the designated department official shall have the burden of proving the following matters, as applicable:
(1) That expenditures questioned or disallowed were proper.
(2) That the institution or servicer complied with program requirements.").
[14] *Central State University*, Dkt. No. 12-32-SA, U.S. Dep't of Educ. (Sept. 2, 2014) (Decision of the Secretary) at 1 (citing 34 C.F.R. § 668.116(d)); *see* 34 C.F.R. § 668.119(a) ("Within 30 days of its receipt of the initial decision of the hearing official, a party wishing to appeal the decision shall submit a brief or other written material to the Secretary explaining why the decision of the hearing official should be overturned or modified.").
[15] FPRD at 17.
[16] 71 Fed. Reg. 29,135–29,137 (May 19, 2006).
[17] FPRD at 17–19.
[18] *Id*. at 21.
[19] *Id*. at 22–23.
[20] Respondent Brief at 15.
[21] *Id*.

supporting Finding 3, Bramson asserts that those decisions should be overruled.[22] Specifically, Bramson asserts that the decisions in *Galiano Career Academy* and *Fortis College* erroneously relied on *Hamilton Professional Schools* because that case was decided prior to the creation of the six credit hour rule.[23] After positing that its students automatically became eligible for Title IV funds after completing six credit hours, Bramson argues extensively that the Department did not suffer any loss by disbursement of funds to eligible students.[24]

I disagree with Bramson's assertions regarding Finding 3. First, I find no basis for overturning the past decisions of the Department. The decisions at issue cite *Hamilton Professional Schools* for the basic proposition that students must qualify for Title IV funds prior to disbursement of the funds.[25] Relating that principle with erroneous eligibility determinations, the decisions also took into account the six credit hour rule to address substantially the same argument made here by Bramson. In *Fortis College*, then-Secretary Arne Duncan succinctly held the six credit hour rule provides "an opportunity for a student to obtain an initial determination of eligibility after completing six credits which would facilitate the rest of the course of study."[26] However, prior to becoming eligible under the six credit hour rule, students have to pay for these six credits without the benefit of Title IV funds.[27] The decisions in question addressed the six credit hour rule and even addressed the same 2012 letter cited by Bramson in an attempt to argue that the Department's past practice agrees with its interpretation of the six credit hour rule.[28] Bramson raises no compelling argument to overrule these past decisions.

In applying the Department's past decisions to this case, I note that *Fortis College* addresses a case substantially the same as Bramson's. In *Fortis College*, the institution erroneously determined students to be eligible for Title IV funds, made disbursements over a period of time, and then sought to claim those students as retroactively eligible for all Title IV funds disbursed after they completed their first six credit hours. As in *Fortis College*, I do not find that an institution can rely on the six credit hour rule to cure its previous, erroneous eligibility determination. The six credit hour rule does not automatically render students eligible for Title IV funds without an actual determination by an institution, based on the application of the six credit hour rule, that the students in question have become eligible. The applicable regulation states that a student is eligible to receive Title IV funds if the student "[h]as been determined by the institution to have the ability to benefit from the education or training offered by the institution based on the satisfactory completion of [six credit hours]."[29] While the regulations require a determination of eligibility to rely on the six credit hour rule, the same is not true to become eligible by holding, for example, a high school diploma. A student meets the

[22] *Id*. at 18–25.
[23] *Id*. at 18–19.
[24] *Id*. at 17, 21–25.
[25] *Fortis Coll.*, Dkt. No. 12-55-SP at 7 (citing *In re Hamilton Prof'l Sch.*, Dkt. No. 02-49-SP, U.S. Dep't of Educ. (June 11, 2003)).
[26] *Id*.
[27] *Id*.
[28] *Id*. at 7, n.64.
[29] 34 C.F.R. § 668.32(e)(5).

same regulatory provision if he or she "[h]as a high school diploma or its recognized equivalent."[30]

As in *Fortis* College, Bramson made no determination of eligibility based on the six credit hour rule prior to disbursing the funds in question. Bramson cannot avoid liability by claiming those students became automatically eligible for Title IV disbursements in the absence of the eligibility determination required by the regulation. Bramson is liable for all funds disbursed based on its erroneous eligibility determination whether such disbursements occurred before or after the students completed six credit hours of instruction.

Finding 4 – Inadequate Determination of Student Enrollment/Unmade Return of Title IV

In Finding 4, FSA determined that Bramson was liable for failing to return Title IV funds disbursed to students who did not attend classes during a payment period, withdrew during the payment period, or unofficially withdrew due to failing to earn a passing grade in any courses.[31] Based on its file reviews, FSA found Bramson liable for $327,364.07 for improperly disbursed funds between the 2008-2009 and 2013-2014 award years.[32]

Both before the ALJ and in the instant case, Bramson does not dispute the factual or legal basis of Finding 4. Rather, Bramson asserts the defense of laches. Laches is an equitable doctrine that prevents a party from pursuing a right or claim after an unreasonable delay that prejudices the party against whom relief is sought.[33] In this case, Bramson states that FSA exceeded its self-imposed timeframes for issuing PRRs and FPRDs "by several years."[34]

Enforcement of laches against the government is disfavored where the government is acting in the public interest. The Supreme Court has held, "It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress. 'As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest.'"[35]

The ALJ already considered and rejected Bramson's assertion of laches in the Decision under appeal. The ALJ found that FSA's timeframes in this case were justified. Bramson asserts that the ALJ "fail[ed] to acknowledge or justify" the 839 days that elapsed between the program review and issuance of the PRR.[36] Bramson also disagrees with the ALJ's conclusion that it was "'not unreasonable' for FSA to take 884 days from Bramson's response to the PRR to issue the FPRD."[37]

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[30] *Id*. § 668.32(e)(1).
[31] Decision at 21–22.
[32] *Id*. at 24.
[33] BLACK'S LAW DICTIONARY, *Laches* (11th ed. 2019).
[34] Respondent Brief at 3.
[35] *U.S. Immigration and Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917)).
[36] Respondent Brief at 7.
[37] *Id*.

I find that the ALJ properly considered and rejected Bramson's arguments regarding the length of the delay. The ALJ considered the extensive nature of the program review, the numerous queries for information made by FSA, the length and content of the PRR, the multiple extensions granted to Bramson to submit information, and justifiable staffing issues faced by FSA while completing the program review.[38] The ALJ's description of the time frames comprising the total program review demonstrates that Bramson's claim of extreme delay is oversimplified.[39] For instance, Bramson asserts that the program review began in 2012 to review conduct dating back to 2006, but the program review began on April 30, 2012, prompted by the September 27, 2010, issuance of a state audit.[40] The ALJ also noted that, although the program review officially concluded in May 2012, FSA was still collecting information from Bramson's accreditor as late as March 20, 2014.[41] Based on these and other circumstances, the ALJ ruled that FSA did not engage in inexcusable delay that would constitute a basis to impose laches.

The issuance by FSA of a FPRD 3 years after issuing its PRR is not legally deficient. But FSA should strive to be efficient and complete program reviews on reasonable timeframes with the resources it has. That said, Bramson's mere disagreement with the ALJ's conclusions is not a basis to reverse the decision.

Bramson also asserts it was prejudiced by the delay. First, Bramson asserts it was "under no obligation to possess records for the 2006-2007 through 2010-2011 award years" when the PRR was issued in 2014.[42] Bramson also asserts that it is prejudiced because, having closed prior to issuance of the FPRD, Bramson now has no resources or staff to raise a defense against liability.[43] Specifically, Bramson asserts that, with more prompt issuance of an FPRD, it could have conducted a search for students who may have qualified for Title IV funds under an alternative provision 34 C.F.R. § 668.32(e).

I find that the ALJ properly considered and rejected Bramson's claims of prejudice. I note that Bramson does not assert that, based on the applicable records retention periods, it justifiably destroyed records demonstrating its compliance and is now prejudiced because they are not available. As recognized by the ALJ, "Bramson was able to provide specific information in the full file reviews, from which the liabilities were assessed."[44] Bramson's claims that, with more staff, it might find alternative credentials for students, but this claim is speculative and insufficient to impose the "disfavored" doctrine of laches against the government.[45]

Conclusion

Based on the preceding analysis, I find that the ALJ correctly affirmed FSA's Findings 3 and 4 and their associated liability.

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[38] Decision at 40–42.
[39] *Id*.
[40] *Id*. at 40.
[41] *Id*. at 41.
[42] Respondent Brief at 9.
[43] *Id*. at 9–10.
[44] Decision at 43.
[45] *See id.* at 44.

ORDER

ACCORDINGLY, Judge Layton's decision in this case is AFFIRMED. Bramson must pay the liabilities assessed in Findings 3 and 4 of the FPRD.

So ordered this 15th day of October 2021.

Miguel A. Cardona, Ed.D.

Washington, D.C.

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