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

In the Matter of	**Docket No. 18-08-SP**
Bramson ORT College	Federal Student Aid Proceeding
	PRCN: 2012-3022-7888
Respondent.	

Appearances:

Joel M. Rudnick and Nicolas E.M. Michiels, Powers Pylyes Sutter & Verville PC for Bramson ORT College

Alexandra Sweeney, Esq. for the Office of the General Counsel, U.S. Department of Education, Washington, D.C., for Federal Student Aid

Before: Robert G. Layton, Administrative Law Judge

DECISION

Bramson ORT College (Bramson) was a private nonprofit postsecondary institution offering associate degrees. Bramson is appealing liability assessed in the U.S. Department of Education's ("Department") Final Program Review Determination ("FPRD") that was issued on November 30, 2017. In response to findings in a New York State Tuition Assistance Program audit, Federal Student Aid ("FSA"), an office of the Department, conducted an offsite program review of Bramson from April 30, 2012 through May 4, 2012 to evaluate the institution's administration of Title IV funds. FSA issued a Program Review Report ("PRR") on October 14, 2014. Bramson responded to the PRR, and FSA then issued an FPRD based on its findings on November 30, 2017. Before the FPRD was issued, Bramson closed in February 2017.

In the FPRD, FSA imposes a liability on Bramson to return $1,158,435.93[1] to the Department for violations of Title IV of the Higher Education Act of 1965, as amended 20 U.S.C. § 1070 *et seq.* and its implementing regulations. Specifically, FSA made three findings resulting in a liability owed by Bramson.

In the FPRD, FSA firsts asserts liability that Bramson disbursed Title IV program funds to students who did not meet the definition of regular students eligible for the programs under 34 C.F.R. §600.4. FSA also charges that Bramson disbursed Title IV funds to students who did not have a high degree, GED or the equivalent and did not have a passing score on an ability to benefit test (ATB) as required by 34 C.F.R. §§ 668.32(e) and 668.141(a)(1). FSA assessed further liabilities for funds that were disbursed when Bramson did not adequately determine the student's enrollment status and failed to return Title IV funds when the student unofficially withdrew, as required by 34 C.F.R. §§ 668.164(b) and 668.22(c) respectively. Finally, FSA, in the FPRD, also concluded that Bramson failed to properly publish and distribute copies of the annual security report as required by the Jeanne Clery Act, 20 U.S.C. §1092, and 34 C.F.R. §§ 668.41 and 668.46 but did not assess liabilities for this finding.

Issues

FSA assessed labilities in Finding 2 for disbursing funds to students who had not reached the compulsory age of education. They additionally concluded in Finding 3 that Bramson owed liabilities for disbursing funds to ability to benefit (ATB) students who did not have a passing grade on an ATB test. In Finding 4, FSA imposes orders the school to return funds for failing to adequately determine student enrollment and return Title IV program funds for students who

[1] In its brief, FSA contends that the FPRD identified a liability of $1,163,743.79 against Bramson. The FPRD, however, states "Bramson owes the Department **1,158,435.93**." FPRD at 55. It is not clear why FSA now asserts that there is a larger liability owed.

failed to begin to attend class during the payment term or withdrew during the payment term. Bramson directly challenges FSA's determinations in Findings 2 and 3, but does not directly address the merits of Finding 4. Rather, in addition to directly challenging FSA's Findings 2 and 3, Bramson asks that a large portion of the liabilities assessed in the FPRD be dismissed as violating one of two statute of limitations and as being barred by laches.

Bramson contends that FSA improperly assessed liability in Finding 2 based on an incorrect determination whether Bramson's students had reached the age of compulsory education. Bramson contends that FSA misinterpreted 34 C.F.R. §600.4 and applied local standards applicable to New York City residents, requiring schooling until age 17, rather than the state law applicable to New York State residents, which set the age at 16. Bramson further argues that even if the compulsory age of education is 17, FSA improperly assessed liabilities for the entire enrollment period, when the school should not be liable for funds disbursed after a student turned 17 years of age.

FSA asserts that Bramson failed to comply with the requirement imposed by 34 C.F.R. §600.4(a)(2)(ii), that an institution only admit as regular students persons who "are beyond the age of compulsory school attendance in the State in which the institution is physically located" when it disbursed funds to 16 year old students. FSA argues that because all of Bramson's campuses are in New York City (NYC), it is subject to the rules and regulations of the City of New York Board of Education, which requires attendance in schools until age 17. Specifically, Section A-210 of the Chancellor's Regulations of the Board of Education of the City of New York states that "[e]ach minor from 5 to 17 years of age in New York City is required to attend school on a full-time basis." FSA argues that Bramson is mistaken in its reliance on section 3205(1) of the New York State Consolidated Laws, which states that "[i]n each school district of

the state, each minor from six to sixteen years of age shall attend upon full time instruction." FSA notes that section 3205(3) of the same state law empowers each school district in the state to raise the maximum age to 17. FSA argues that because NYC chose to raise the age to 17, and Bramson is located in NYC, it was subject to the NYC Board of Education's rule that raised the age to 17 and violated 34 C.F.R. §600.4(a)(2)(iii) when it disbursed funds to students who were not "regular student[s]" because they were under 17.

Bramson says FSA incorrectly asserted in the FPRD that ability to benefit tests taken before a student reached the age of compulsory education did not render the student eligible once the student reached age. Bramson argues that this contradicts the Department's official published guidelines. Bramson cites to the 2009-2010 Federal Student Aid Handbook, which instruct schools that test scores "are valid for ATB purposes indefinitely."

Bramson additionally contends that, in Finding 3 of the FPRD, FSA improperly assessed liability even after students who did not have a passing ATB score became eligible for Title IV funds after completing six credits. Bramson asserts that the version of the Higher Education Act applicable to the students at issue in this case stated that students will be determined to have the ability to benefit from the education or training offered upon satisfactory completion of six credit hours. Bramson further argues that the Department's practice has been to apply the six credit hour standard even if the student was admitted on a purportedly improper basis, and, therefore, it should be retroactively applied to the students who complete six credits. Bramson contends this would reduce the liability assessed in Finding 3 to $351,775, which is the Title IV funds disbursed to the cited students before their completed six credits.

Also, Bramson argues that Finding 3 of the FPRD cannot be upheld because the Department did not sustain a loss with respect to the students who completed 6 credits. Noting

that Subpart H proceedings are not punitive, Bramson argues that FSA can only seek compensatory damages in this case. Bramson points out that in a prior case, *In re Chicago State University*, Dkt. No 94-172-SA (April 26, 1996), the school did not have high school diplomas or financial aid transcripts before disbursing Title IV funds to students but the school later produced documentation to OHA demonstrating that the students were eligible to receive Title IV funds. In that case, Bramson contends, this tribunal held that because there must be some harm to the Department to assess liability, the liabilities for the students at issue were eliminated. Bramson argues that this tribunal should similarly eliminate liability in Finding 3 for students who completed six credit hours at Bramson, because the students then had the ability to benefit from the programs and, therefore, the Department did not suffer any loss with respect to those students.

FSA addresses both of Bramson's arguments, that students became eligible once they once they turned 17 or once they completed 6 credits, by arguing that these arguments have already been rejected by the Secretary. Specifically, FSA asserts that in *In re Fortis College*, Dkt. No 12-55-SP, and in *In re Galiano Career Academy*, 11-71-SP, the Secretary "expressly rejected the argument that a liability for improperly discharged funds may be offset by students becoming retroactively eligible for funds by completing six credit hours or 225 clock hours under 34 C.F.R. §668.32(e)(5)."[2] FSA uses *Fortis* to also argue that students cannot become eligible once they reach the compulsory age of attendance because, in *Fortis*, the Secretary held that students must become eligible for Title IV program funds prior to the disbursement of funds and rejected that liability for improperly disbursed funds may be offset by the students becoming retroactively eligible for Title IV funds. FSA argues that because the students were not eligible

[2] FSA Brief at 8.

for Title IV funds at the time the students enrolled, and the school determined eligibility, Bramson must repay all of the funds disbursed to ineligible students.

Bramson argues that this tribunal's decisions in *Fortis* and *Galiano* are either inapplicable to this case or should be overturned. First, Bramson contends that these two decisions involved whether a student was eligible during the time they completed the six credits while Bramson seeks to argue that the students became eligible once they completed the 6 credits. Bramson, in the alternative, argues that to the extent that *Fortis* and *Galiano* apply, they should be reconsidered because the decisions apply a holding from *In re Hamilton Profession School* that was decided before Congress authorized the six credit hours standard. Bramson also argues that these cases improperly relied upon statements from the Federal Register. Bramson asserts that statements in the Federal Register do not create legal obligations and were misinterpreted in *Fortis* and *Galiano*.

Alternatively, Bramson asserts the liabilities are partially barred by one of two statute of limitations, but acknowledges that recent Supreme Court precedent might undermine that argument. First, Bramson argues that liability in the FPRD is a recovery of damages for an institution's breach of damages because Bramson's eligibility to participate in Title IV programs is through a program participation agreement that creates a contractual obligation. Bramson argues that, therefore, any liabilities arising more than six years before the issuance of the FPRD are barred by the six-year statute of limitations for government actions for breaches of contract under 28 US 2415(a). Bramson acknowledges that the United States Supreme Court denied application of this exact statute of limitations to administrative proceedings in *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006), but nevertheless asks that we disagree with the Supreme Court's holding and apply the six year limitation. Bramson alternatively argues that the bulk of liabilities

asserted in Findings 2 and 3 are FSA requiring repayment of liabilities after a student became eligible by passing the compulsory age requirement or by completing 6 credits, and so they are disgorgement and are, therefore, punitive under the Supreme Court's holding in *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017) and the Third Restatement of Restitution and Unjust Enrichment. Bramson argues that the applicable statute of limitations is five years, which generally applies to penalties imposed by the federal government under 28 U.S.C. § 2462.

FSA contends that our decisions in *In re Hair California Beauty Academy*, 18-13-SP, *In re Lincoln*, 13-16-SF, and *In re Platt Junior College*, 90-2-SA, all indicate that the statute of limitations in 28 U.S.C. 2415(a) does not apply. FSA further asserts that the U.S. Supreme Court, in *Burton*, denied the application of the statute of limitations in Section 2415(a) to administrative proceedings.

FSA argues that the statute of limitations in 28 USC 2462 similarly does not apply because in *Hair California* we expressly established that the statute of limitations does not apply to Subpart H proceedings. FSA further argues that the liability at issue in this case is a debt owed for improperly disbursing Title IV funds and a failure to return Title IV refunds, and it is not a penalty or fine that would be subject to Section 2462.

Finally, Bramson argues that laches should bar some of the liabilities assessed in the FPRD. Noting that in past cases the doctrine of laches has been applied to limit liability, Bramson cites to numerous sources discussing the harm that long delays by the Department can cause, including a 2019 statement in the Federal Register that noted that long delays can "generate massive liabilities for schools" and "impact their long-term financial stability." Bramson argues that the standard for laches, that a lack of diligence by the Department causes prejudice to Bramson, applies in this case. First, Bramson argues that there is evidence of

unreasonable delay, including that the alleged conduct at issue in FPRD dates back to 2006, the on-site program review was in May 2012, and the PRR was not issued until almost 2 and half years later in October 2014. The FPRD was not issued until November 2017, almost 2 and half years after Bramson timely filed their responses to the PRR. This means the FPRD was not issued until almost six years after the program review visit and as many as 11 years after some of the alleged conduct. Bramson further notes that the FPRD was not issued until almost a year after the school closed. In the Program Review Guide for Institutions, the Department indicates that it anticipates that a program review will be issued with 75 days and an FPRD will be "issued to the institution within 30 to 90 days" after the Department receives the complete and final response to the PRR. FSA delivered the PRR approximately 29 months (839 days) after the program review visit and issued the FPRD approximately 30 months (884 days) after Bramson responded to the PRR.

Bramson argues that the Department itself acknowledged that long delays are prejudicial to the schools during recent rulemaking, citing to the federal register. More specifically, Bramson argues that matters need to be processed based on relatively fresh recollections and with records still available. Bramson contends that the records at issue fell outside the records retention period and so Bramson had no obligation to possess the records. Additionally, Bramson argues that because the college closed almost a year before the Department issued the FPRD, it had little to no staff or resources to defend against the liability. Furthermore, Bramson points out that the delay impaired Bramson's ability to obtain proof to contradict Findings 2 and 3's liability. Specifically, because of the time, Bramson had trouble obtaining the consent from students to obtain proof from the state education department that students had high school equivalency diplomas.

FSA responds that Bramson has failed to prove that FSA was unreasonably delayed in asserting the claim against Bramson and that the school was prejudiced by the delay.

Addressing whether the delay was unreasonable, FSA argues that it took "extraordinary measures under challenging circumstances to issue the FPRD."[3] Specifically, FSA claims that the two year delay between when Bramson finished submitting its response to the PRR and when the FPRD was issued was caused by "a lack of staff resources, a significant workload in the area of program compliance, and the need for a particular level of expertise to analyze the issues raised in the program review."[4] FSA asserts that to issue the FPRD, it assigned the work to someone with the necessary expertise even though the FSA employee had moved from the New York/Boston office that was conducting the program review to another office within FSA.

FSA contends that Bramson failed to prove that it was prejudiced by the delay. Bramson was aware of all the findings when the PRR was issued on October 12, 2014 because there were no new issues in the FPRD that were not covered in the PRR. FSA also maintains that although Bramson argues in the abstract that the record retention requirements had long since passed when the FPRD was issued and that the importance of fresh recollections were negatively impacted by the delay, Bramson has not and cannot point to any factual instance of prejudice. FSA contends that it is "undisputed that Bramson has all of the necessary records establishing the liabilities because it self-identified the liabilities in its file review."[5] FSA highlights that Bramson was required to keep the records under 34 C.F.R. § 668.24(e)(3)(i) because the expenditures were in questions under the program review. Bramson claims that the time prejudiced the school because it could have contacted the ineligible students for high school completion credentials to establish

[3] FSA Brief at 11.
[4] FSA Brief at 10 n. 6.
[5] FSA Brief at 11-12.

eligibility. But that claim fails because Bramson had the opportunity to contact the students during the file review when it identified the students. FSA argues that because nothing happened in the interim time it took FSA to issue the FPRD that prevented Bramson from defending itself so the defense of laches does not apply.

The issues to be addressed are:

1. **Under 34 C.F.R. §600.4(a), is the compulsory age of education applicable to Bramson ORT College age 16 or age 17?**

2. **Does a student who is ineligible for Title IV funds when the funds are first disbursed because the student does not have a passing ATB test score become eligible when the student reaches the compulsory age or has completed 6 credits at Bramson ORT College?**

3. **Does the six-year statute of limitations or the five-year statute of limitations under 28 US 2415(a) and 28 U.S.C. § 2462 respectively limit the liabilities that can be imposed upon Bramson ORT College?**

4. **Does laches apply to limit the amount of funds Bramson ORT College can be required to return?**

Summary of Decision

The compulsory age of education applicable to Bramson ORT students was 16 and, so, the liabilities assessed in Finding 2 are dismissed. Students obtaining eligibility for Title IV program funds by completing six credit hours must do so before being disbursed funds, so the liabilities assessed in Findings 3 cannot be reduced for the time period after the students completed six credit hours at the school. The statute of limitations asserted by Bramson and laches do not apply to reduce the liability Bramson owes.

Findings of Fact

I. Events Before FSA Program Review

On May 19, 2006, Volume 71, Number 97 of the Federal Register was published. In it, the public, including Title IV program participating institutions, was provided notice that effective June 19, 2006, the passing score for both of the two versions of the Combined English Language Assessment (CELSA) ability to benefit test had been raised from 90 to 97. 71 FR 29135-29137.

The Tuition Assistance Program (TAP) is the largest student grant and scholarship program administered by the Higher Education Services Corporation in the State of New York.[6] The New York State Comptroller's Office conducted an audit of Bramson's administration of the TAP program for the 2005/06 and 2007/08 academic years culminating in a report issued on September 27, 2010.[7] The audit examined 200 TAP award recipients out of 2,793 TAP grants and scholarships awarded at Bramson over the three year period. From that sample of 200 awards, the auditors found 17 awards that should be disallowed. [8] Among those 17 disallowed awards were 15 TAP grants that were improperly awarded to students for whom Bramson could not produce a high school diploma or a GED and who did not pass an ability to benefit test approved by the U.S. Department of Education.[9] Specifically, six students had no high school diploma or GED at all, took the CELSA test, and did not have passing scores, but rather were admitted to Bramson based on scores that were passing before the minimum passing score was raised.[10]

II. FSA Program Review

[6] ED Ex. 3 - Letter from Steven E. Sossei to David Steiner and Elsa Magee (Sept. 27, 2010), at 2 (hereafter TAP Audit Letter).
[7] TAP Audit Letter, at 1.
[8] Id. at 1.

Between April 30 and May 4, 2012, FSA conducted a program review of Bramson.[11] The review was conducted by Tonya Sydney and Jane Eldred (Eldred) of the New York/Boston Regional FSA office.[12] The FSA's program review was conducted to determine whether Bramson had taken appropriate corrective action in response to the TAP audit.[13]

FSA first reviewed a sample of 15 student files from the 2010/11 and 2011/12 award years. A further 15 additional files were selected from the ATB population, one of which was selected by Bramson as an example of the student files given to the Department prior to its site visit. An additional fourteen student files were added that included those that the TAP auditor had identified as those who had not passed an ATB exam, those who may have been under the age of compulsory education, and those whose documents indicated that they received passing grades when they had not completed the term in question.[14]

On October 2014, the Department issued the PRR, in which it made 15 findings and ordered Bramson to take several actions. Included in those actions were instructions to conduct the full file reviews addressed below. After being granted multiple extensions to file responses to the PRR, Bramson filed numerous responses to the PRR, the last of which was sent on June 30, 2015.[15] While the Department was awaiting Bramson's responses, Eldred, who was leading the review, left the New York office that was conducting the review.[16] The review was reassigned to a new employee in the office, but because of the complexities of the review, the

[9] Id. at 3-5.
[10] Id at 4. One other student also did not have a diploma, GED or passing ATB test score but did not take the CELSA test. The other eight students' awards were disallowed based on issues with the submitted high school diplomas or equivalents.
[11] FRPD at 3.
[12] Id.
[13] Id.
[14] Id.
[15] ED Ex. 1 Declaration of Christopher Curry, Paragraph 7 (hereafter Curry Declaration); Respondent Initial Brief at 12.
[16] Curry Declaration at paragraph 9.

new employee was unable to complete the review.[17] In January 2016, the compliance manager for the New York/Boston office arranged for Eldred to be reassigned, even though she was no longer part of the office, to complete the program review for this matter.[18] After review of Bramson's responses, Eldred and FSA completed the review and FSA issued the FPRD on November 30, 2017.[19]

III. Final Program Review Determination

In the FPRD, FSA indicates that Bramson took corrective actions necessary to resolve Findings 5 through 14 and so the findings are considered closed. Additionally, because of Bramson closing in February 2017, FSA determined that Finding 1 was closed. For Findings 2, 3, 4, and 15, FSA made final determinations and for Findings 2,3, and 4 imposed liabilities in the FPRD.

Finding 2

In Finding 2, FSA notes that 34 C.F.R. §600.4(a)(2) requires public or nonprofit private institutions of higher education to only admit regular students who (1) have either a high school diploma or a recognized equivalent of a high school diploma or (2) are beyond the age of compulsory school attendance in the state in which the institution is physically located.[20] Bramson's two campuses are in Queens and Brooklyn, both of which are boroughs of New York City (NYC) within New York State (the State).

Prior to the onsite portion of the program review, FSA asked for a typical student file. The student file that was sent was for a student who FSA believed was under the age of

[17] Curry Declaration at paragraph 9.
[18] Id. at paragraph 10.
[19] Id. at paragraph 11.
[20] PRR at 5.

compulsory education "as defined by New York State, and New York City."[21] That student was added to the program review as Student 39.

In Student 39's folder was a memorandum from the Dean of Academic Services dated August 5, 2008. That memorandum stated that the general age requirement for ATB students to attend Bramson was 17, which was the rule for students who are part of the NYC Board of Education. The memorandum went on to note that the age requirement for the rest of the State is 16 and so if the student is not part of the NYC Board of Education, he or she can be admitted to Bramson at 16. Finally, the memorandum indicated that the age requirement must be met when the student starts at Bramson.[22]

During the onsite portion of the review, FSA reviewers met with Bramson officials. Bramson officials stated that they had been informed by the State that they could enroll students who were under 17 years of age, even though the school was in NYC. Additionally, Bramson officials referenced that the federal regulations refer to the state and not the city where the school is located. Therefore, Bramson believed that was able to enroll students who were 16 years of age.[23] When reviewers asked for documentation from either NYC or the State to corroborate the accuracy of Bramson's interpretation, the memorandum was the only document that could be provided.

FSA reviewers informed the President of Bramson that absent any other documentation to support the school's interpretation, Bramson needed to stop admitting student who did not meet the NYC age of compulsory education. The reviewers told the school that if it continued to admit student who were 16, it would not be meeting the definition of an institution of higher

[21] PRR at 5.
[22] PRR at 6.
[23] PRR at 6.

education and could jeopardize its institutional eligibility. The PRR and FPRD indicate that **after** the review, the reviewers sought out the provisions of State law and included them in the PRR. Specifically, FSA cited to Section 3205 of the State Education law which dictates, among other things, that the compulsory age of education in the State is from age six until sixteen and that local boards of education have the authority to require students age sixteen to seventeen who are not employed to attend school until the last day of the session in the school year during which they turn seventeen. FSA, in the PRR, also cited to the Chancellor's Regulations for the Board of Education in the City of New York, which dictates that children in NYC must attend school on a full-time basis from age 5 until 17.[24]

FSA, in the PRR, specifically identified and discussed in detail two students who FSA believed were improperly awarded Title IV money.

Student 39

Student 39 lived in Brooklyn, had been a resident of the State since December 2010, filled out his FAFSA form when he was 16 years and 5 months old, and had not completed high school but had last attended grade 11. Bramson accepted Student 39 after he took and passed a second ATB test in February 2011, when he was 16 years old.[25] FSA asserted that $2,775 of Federal Pell Grant funds were disbursed to Student 39 when he was 16 years of age.

Student 31

Student 31's file indicated that she enrolled at Bramson on January 23, 2011, was 16 years old at the time of enrollment, attended high school in Brooklyn, and that her last grade was 10th grade. FSA concluded that she was below the age of compulsory education in NYC, which was both her place of residence and where the school was domiciled. FSA contends that because

[24] PRR at 7-8.
[25] See FPRD Appendix D (indicating that that Student 39 was born in August 1994).

Student 31 "appeared" to be a student who Bramson would have identified as being part of NYC's board of education, it was not clear why the school felt it was appropriate to enroll her. She was enrolled at Bramson and received $5,500 in Federal Pell Grant funds for the 2010/11 award year.

In the PRR, FSA noted that both students resided in NYC and would seemingly be part of the NYC Board of Education. FSA, therefore, asserted that Bramson was not following its own policy in the Dean's memorandum.

The PRR further states that FSA "reviewed its internal data records and identified four (4) students who were not yet 17 by July 1, 2012, the beginning of the 2012/13 award year, yet were disbursed aid in the year."[26] FSA also identified one student "who was not yet 17 by July 1, 2013, the beginning of the 2013/2014 award year" who was disbursed aid in the 2013/2014 award year.[27] These five students were added to the expanded sample of student files.

In the PRR, FSA concluded that this demonstrates a violation of a "systemic nature" and ordered Bramson to conduct a full file review for all award years between the 2009/10 and 2013/14 award years.[28] FSA also indicated that if Bramson could "provide a definitive statement from a cognizant NY State and/or New York city official" that stated that the age of compulsory education is 16 for students in NYC then Bramson "may not be required to conduct the file review.[29]

After requesting and receiving an extension, Bramson filed responses to Finding 2 in the PRR on February 12, 2015. The school's response addressed six of the seven student files specifically addressed in Finding 2. Bramson produced evidence of high school diplomas for

[26] PRR at 9.
[27] Id.
[28] Id.
[29] PRR at 10.

two students and a GED for another student. In response to the other specifically identified students, Bramson asserted that the students were 16 years old, which is the compulsory age of education in NY State. Similarly, in the school's response to the full file review, Bramson did not identify any students as being ineligible for Title IV funding. Rather, Bramson cited to the federal statute and the State law and noted the students were beyond the age of compulsory education for the state where the institution is located, which is 16. With this statement, Bramson also submitted a spreadsheet and computer print-outs detailing the students admitted during the review period. Finally, Bramson states that, although it disagreed with FSA's interpretation of the regulation, it voluntarily revised its admission policy and procedures to only accept students who were at least 17 years old. The school's response, however, did not include any statements from a State or NYC official.

In the FPRD, FSA concluded that there was significant liability owed for students who began at the institution before reaching age 17. Specifically, FSA noted that Bramson did not take the opportunity to provide a statement from a State or City official. It also re-asserted that, because state law gave localities the authority to raise the age of compulsory education, FSA believed that the regulation required schools located in NYC to apply NYC law and as a result the compulsory age of education is 17.[30]

Of the seven students identified in the PRR, FSA agreed that there is no liability owed for the three students who had a diploma or GED. FSA concluded, however, that Bramson must return Title IV program funds for the other students specifically identified in Finding 2 of the PRR.

After "thoroughly" reviewing the spreadsheet and supporting information submitted by

[30] FPRD at 13-14

Bramson, FSA concluded that the school "regularly" admitted students who were under the age of compulsory attendance who both resided in New York City and had dropped out of high school. FSA, in the FPRD, asserts that Bramson was administering the ATB tests to the students when they were 16 years old and not providing the students another ATB test when they turned 17. Because FSA determined that this did not make the students eligible and "no separate student eligibility decision" was made for the students, FSA demanded the return of all funds disbursed to these students.[31] In total, FSA ordered the return of $98,948.00 in Finding 2.[32]

Finding 3

In Finding 3 of the PRR and FPRD, FSA notes that under 20 U.S.C. §1091 and 34 C.F.R. § 668.32 a student who does not have a high school diploma, GED, or its equivalent must pass an independently administered ability to benefit (ATB) test prior to receiving Title IV program funds.[33] Additionally, FSA notes that the regulations impose a fiduciary duty on schools in their administration, maintenance and investment of Title IV program funds to follow regulations. [34] Finally, FSA notes that in the May 19, 2006 edition of the Federal Register provided notice that the passing score for the CELSA test had changed from 90 to 97 effective June 19, 2006.[35]

Prior to the program review, FSA was aware of the TAP Report. In that report, Bramson was cited for erroneously admitting students using the CELSA exam when the students had not received passing scores on the exam. More specifically, Bramson had failed to recognize the revised passing score and admitted students using the outdated incorrect passing score of 90.[36] The Department sent a letter to Bramson, dated March 9, 2011, asking the institution to detail

[31] FPRD at 14-15.
[32] FPRD at 15.
[33] PRR at 10; FPRD at 16.
[34] PRR at 10-11; FPRD at 16.
[35] PRR at 11; FPRD at 17.
[36] PRR at 11.

what actions it had taken to resolve the impact that the TAP audit findings would have on Title IV program funds that were improperly disbursed.[37] Bramson responded, after an extension was granted, by letter dated April 14, 2011.[38] In its response, the school expressed its disagreement with many of the TAP audit findings. Bramson, however, did not identify any instances where federal funds were returned for students that the TAP auditor indicated had not received a passing score on the ATB test.[39] The school indicated that, even though it agreed that six students received Title IV program funds that they were ineligible for, it did not believe that it is responsible to return the funds. This was because the institution asserted that the error that caused the ineligible disbursements was caused by the software publisher who made the program that graded the exams failed to update the software with the appropriate passing score.[40] Documents Bramson provided before the onsite portion of the program review, however, indicated that the school was aware of the change in the minimum passing score.[41] During the onsite program review, Bramson's President again indicated that the school had not returned federal funds for the six students who were ineligible based on non-passing ATB scores. Those six students were added to the program review as students 46 through 51. Information provided by Bramson in its April 14, 2011 response indicated the amount of federal aid disbursed to the six students, totaling $28,629 in Pell Grant funds and $1,505 in Federal Supplemental Educational Opportunity Grant (FSEOG) funds.

Because of "systemic nature" of the finding, FSA ordered Bramson, in the PRR, to conduct a full file review to identify all Title IV program funds recipient students who were

[37] PRR at 12.
[38] Id.
[39] Id.
[40] PRR at 12.
[41] PRR at 12.

admitted based upon a CELSA ATB test administered after the score change went into effect on June 19, 2006 and whose score was below a 97.[42] Specifically, Bramson was to create a separate spreadsheet for each award year between the 2007/08 and 2009/10 award years that provided information about each student, including their CELSA ATB test scores and the amount of Title IV funds disbursed to the student.[43]

In its response, Bramson stated that it was told by the TAP auditors in 2009 about the change in the minimum passing score on the CELSA tests and that when it learned of the change, it contacted the testing company to ask about non-compliance. Bramson asserts that from that contact, it learned that the company inadvertently failed to update the software.[44] Bramson provided the FSA reviewers with a timeline of events related to the audit and the Department's reaction to the State audit. Bramson also asserted to FSA that because FSA's position as of 2009 was that a student became eligible for Title IV program funds after completing six credits, Bramson should only be liable to return Title IV program funds disbursed to student before they earned six credits.[45] Therefore, in the spreadsheets, Bramson distinguished between Title IV program funds that were disbursed before six credits were completed and the total Title IV program funds distributed.[46]

In the FPRD, FSA stated that it had reviewed Bramson's response to the PRR and "determined that Bramson had a fiduciary responsibility to determine student eligibility prior to admittance."[47] FSA, therefore, determined that the school is liable to return all Title IV funds for

[42] PRR at 13-14
[43] PRR at __; FPRD at 19-20.
[44] FPRD at 20.
[45] FPRD at 20.
[46] FPRD at 20-21. The FPRD also indicates that Bramson asserted that because the previous legal standard score for the ATB test had been 90, they should not be required to return funds for students who earned a score of at least 90 on the CELSA ATB test. Bramson, however, does not raise this argument in any filings in this tribunal.
[47] FPRD at 21.

students included in the file review who did not obtain a passing score of 97 on the ATB admittance test. FSA further notes that as a Title IV program participant, Bramson had an obligation to comply with the standards and regulations governing the programs, and so should have been aware of the change in passing scores based upon the notice in the Federal Register.[48]

FSA rejected Bramson's assertion that, for students admitted without a passing score, the school is not liable to return Title IV program funds disbursed after the student earned six credits.[49] FSA notes that although some students are permitted to be admitted into the Title IV programs after completing six credits, in this case, the institution failed to make a determination of the student eligibility at the time of admission. FSA, therefore, asserts that the Department does not apply the standard retroactively when making a liability determination, and Bramson must return all money disbursed to students who were admitted without a passing score. Finally, FSA, in the FPRD, notes that students were administered subsequent ATB tests after the audit was completed, but before FSA became aware of the audit findings. FSA contends that this indicates Bramson knew about the problems with students admitted with failing ATB scores before the Department began its program review.

Finding 4

Bramson does not challenge FSA's analysis or conclusions in Finding 4. In this finding, FSA noted that, pursuant to the applicable regulations, if a student does not attend any classes during a payment period, then the school must return all Title IV program fund disbursed to the student during that payment period.[50] Additionally, under the applicable regulations, if a student begins attendance in classes during the payment period but the withdraws, the school must return

[48] FPRD at 21.
[49] FPRD at 21.
[50] PRR at 14-15.

a portion of the Title IV program funds disbursed.[51] The institution must do a calculation to determine the amount of Title IV program funds that are required to be returned to the Department, using the midpoint of the term if there is not a record indicating when the student withdrew from the school.[52] If a student fails to earn a passing grade in any of the courses during the term, FSA assumes that the student unofficially withdrew unless the school can show that the student completed the period.[53]

Bramson had a grading policy that provided numerous different non-passing grades, including F and WF. FSA's review, however, revealed that as the grading policy was applied, Bramson did not have any non-passing grade that professors consistently assigned to students who completed the term but failed to earn a passing grade.[54] Therefore, FSA concluded that as Bramson applied its grading policy, it was impossible to use a student's grade alone to determine whether he or she had completed the term.[55] Additionally, in some cases, reviewers were unable to determine whether students who received passing grades even began attending class during the term.[56] In the PRR, FSA identified fourteen specific student files where Bramson was unable to establish that the students attended and finished the payment period or that the correct amount of Title IV program funds were returned for students who did not complete the term.[57]

During the onsite portion of the program review, FSA reviewers also learned that Bramson had been placed on probation for a two-year period by its accreditor. The Department

[51] PRR at 14-15.
[52] FPRD at 23-24. FSA, in the PRR and FPRD, notes that a school "*may* use as the student's withdrawal date a student's last date of attendance at an academically-related activity . . . ." PRR at 15; FPRD at 24. Although the last date of attendance may be used to determine a withdrawal date, it is not always necessary that a school have evidence of such date to prove that a student has completed the term. *See In re CUNY-Lehman College*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020).
[53] PRR at 14-15.
[54] PRR at 16; FPRD at 25.
[55] Id.
[56] PRR at 17.
[57] PRR at 18-22.

received a copy of the accreditation teams compliance report, and determined that "of particular concern" was the findings that students had received a D grade when they "had clearly not completed coursework or had little attendance past the mid-term exam."[58] Upon further review, FSA found two more students whose only passing grades were Ds in classes where they stopped attending in the later portion of the term and did not take the final exams.[59]

FSA concluded that "[d]ue to the systemic nature" of the findings and the "potential harm to students and the Department," Bramson was required to do a full file review for all students between the 2008/09 and 2013/14 award years who received any combination of all non-passing grades during the term or whose only passing grade was a D.[60] Specifically, Bramson was instructed to confirm that the students began and completed the term. For those students who Bramson could not show that they had not completed the term, the school was directed to provide information to do a calculation of the amount of Title IV program funds that needed to be returned.[61] Bramson was also ordered to notify the Department about the steps it intended to take to ensure proper monitoring of student enrollment by submitting a copy of the relevant procedures.[62]

Bramson requested multiple extensions and submitted its responses over multiple occasions, on or before June 30, 2015.[63] Bramson's responses included narrative responses addressing the specifically identified incidents of non-compliance and spreadsheets summarizing

[58] PRR at 23.
[59] PRR at 24-25.
[60] PRR at 25, 27.
[61] PRR at 25-27. The PRR states that the school "must only rely on source documentation that confirms that a student began the credits in question, and may not rely only on the attestation of a teacher." PRR at 26. This instruction is incorrect. Although not all faculty attestations are necessarily sufficient, a statement from a teacher may be sufficient to meet the school's burden of showing that it properly adhered to a grading policy. *See In re CUNY-Lehman College*, Dkt. No. 18-38-SP, U.S. Dep't of Educ. (Apr. 22, 2020).
[62] PRR at 26.
[63] FPRD at 38.

the findings from the ordered file reviews.[64] After reviewing the submitted materials, FSA concluded that "Bramson routinely retained funds for which it was not entitled."[65] Specifically, FSA identified $327,364.07 in liabilities for improperly disbursed funds from the 2008/09 through 2013/14 award years.[66] FSA also concluded that, because Bramson had closed, it would not need to develop corrective measures.[67]

Finding 15

Bramson does not challenge FSA's findings or conclusions in Finding 15. In the PRR, FSA asserts that Bramson violated the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, or the Clery Act. Under the law, institutions participating in Title IV programs must prepare and publish each year the Annual Security Report (ASR) that contains certain statistical and policy information about campus safety and crime matters required by 34 C.F.R. §668.46(b).

FSA asserts in the PRR that Bramson failed to prepare and publish an accurate ASR for 2011 and to properly notify prospective students and employees about the availability of the 2011 and prior ASRs.[68] In the PRR, FSA directed Bramson to revise its relevant procedures and policies and to take corrective action and distribute its ASR to all current students and employees.[69] Additionally, Bramson was ordered to submit documentation showing its compliance with the Clery Act, including a draft of its 2014 ASR.[70]

FSA asserts that, in its response to Finding 15, Bramson did not state whether it agreed with the finding. Rather, Bramson provided eight separate documents to demonstrate

[64] FPRD at 38.
[65] FPRD at 41.
[66] FPRD at 41-45.
[67] FPRD at 40.
[68] PRR at 45.
[69] PRR at 46.
[70] PRR at 46.

compliance with he actions directed in the PRR.[71] FSA reviewed Brmson's submissions and concluded first that the findings of noncompliance related to the 2011 ASR in the PRR were sustained.[72] FSA also reviewed the 2014 ASR and found numerous deficiencies.[73] FSA indicated that as a result of these violations, it would have usually pursued a fine action or required additional remedial actions, but, because the school closed, it would not be taking any further actions. Rather, FSA indicated the deficiencies would need to be remedied before the Department would consider reinstating Bramson's eligibility.

IV. Process Before OHA

Bramson's counsel submitted a request for review challenging the findings and liabilities assessed in the FPRD that was received by the Department on February 8, 2018. On February 12, 2018, the case was assigned to the undersigned as hearing official. On February 15, 2018, the Order Governing Proceedings was issued establishing the briefing schedule. After 17 motions for extension of time were granted, Bramson filed its initial brief. After an additional extension was granted, FSA filed its responsive brief and Bramson filed a reply brief.

Principles of Law

Institutions are permitted to disburse Title IV program funds only to eligible students. *See* 20 U.S.C. § 1091; 34 C.F.R. § 668.32. As we have stated in past cases, to be eligible for Title IV program funds, a student must be "have a high school diploma or its equivalent or be beyond the age of compulsory school attendance and have the ability to benefit from the program of instruction that is being provided." *In re Jays Technical Institute*, Dk. No. 13-60-SP, U.S. Dep't of Educ. (July 1, 2014).

[71] FPRD at 49.
[72] FPRD at 49.
[73] FPRD at 49-52.

I. Age of Compulsory Education

34 C.F.R. § 600.1 dictates that "an eligible institution of higher education may apply to participate." 34 C.F.R. § 600.1 then defines eligible institutions as those that qualify as "an institution of higher education, as defined in § 600.4; . . . a proprietary institution of higher education, as defined in § 600.5; or . . . a postsecondary vocational institution, as defined in § 600.6; and . . . meets all the other applicable provisions of this part." Subpart 600.4 defines "institutions of higher education" eligible for Title IV funds as public or private nonprofit educational institutions that, among other qualities, admit as "regular students" only those who have earned a high school diploma or a "recognized equivalent of a high school diploma;" or **"**are beyond the age of compulsory school attendance in the State in which the institution is physically located."

Title IV program funds disbursed by an institute to students who are younger than the age of compulsory education in the state where a school is physically located are improperly disbursed and must be returned to the Department. *See In re Roxbury Community College*, Dkt. No. 98-145-SA, U.S. Dep't of Educ. (May 10, 2000); *In re L'esthetique Cosmetology College Corp.*, Dkt. No. 96-12-SA, U.S. Dep't of Educ. (July 1, 1996).

II. Eligibility for students after completing six credit hours.

34 C.F.R. § 668.32 (e), as it was effective for the 2006 award year provided that a student eligible for Title IV program funds was one who had "a high school diploma or its recognized equivalent;" had a passing score on an ATB test approved by the Department; was enrolled in an eligible institution that participates in a "State process" approved by the Department; or was home-schooled.[74]

[74] Additional requirements are imposed on student whose eligibility derives from being home schooled. These are not at issue in this case, however.

The High Education Act was amended, effective August 14, 2008, to provide that students who had completed six credit hours applicable towards a degree became eligible for Title IV program funds. *See In re Fortis*, Dkt. No. 12-55-SP, U.S. Dep't of Educ. (March 17, 2015) (Dec. of Secretary) at 7 (citing to Pub. L. No. 110-315 (2008)). As the Secretary of Education has noted, 34 C.F.R. § 668.32 (e) was then amended to add "an additional method to demonstrate an ability to benefit during an *initial* determination of eligibility." Effective July 1, 2011, eligibility was extended under the regulation to a student who:

> Has 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 6 semester hours, 6 trimester hours, 6 quarter hours, or 225 clock hours that are applicable toward a degree or certificate offered by the institution. 34 C.F.R. § 668.32 (e)(5).

In *In re Fortis*, Dkt. No. 12-55-SP, U.S. Dep't of Educ. (March 17, 2015) (Dec. of Secretary), and then again in *Galiano Career Academy*, 11-71-SP, U.S. Dep't of Educ. (July 10, 2015) (Dec. of Secretary), the Secretary of Education held that when a school improperly disburses funds to a student who does not meet any of the eligibility criteria under 34 C.F.R. § 668.32, completing six credits at the institution does not render the student retroactively eligible and the school may not retain the Title IV program funds disbursed for that student.

III. Statutes of limitations

28 U.S.C. § 2415 establishes a six year statute of limitations on "actions for money damages" that are "brought by the United States" and are "founded upon any contract express or implied in law or fact." The United States Supreme Court, in a unanimous decision[75] in *BP America Production CO v. Burton*, 549 U.S. 84 (2006), concluded that this six-year statute of limitations is inapplicable to administrative proceedings like the issuances of FPRDs and Subpart H

[75] Chief Justice Roberts and Associate Justice Breyer did not take part in the consideration or decision of the case. All other seven Justices joined in the Opinion.

hearings. Specifically, the Court reasoned that:

> The statute of limitations imposed by § 2415(a) applies when the Government commences any "action for money damages" by filing a "complaint" to enforce a contract, and the statute runs from the point when "the right of action accrues." The key terms in this provision—"action" and "complaint"—are ordinarily used in connection with judicial, not administrative, proceedings. In 1966, when § 2415(a) was enacted, a commonly used legal dictionary defined the term "right of action" as "[t]he right to bring suit; a legal right to maintain an action," with "suit" meaning "any proceeding ... in a court of justice." Likewise, "complaint" was defined as "the first or initiatory pleading on the part of the plaintiff in a civil action." The phrase "action for money damages" reinforces this reading because the term "damages" is generally used to mean "pecuniary compensation or indemnity, which may be recovered in the courts."
>
> Nothing in the language of § 2415(a) suggests that Congress intended these terms to apply more broadly to administrative proceedings. On the contrary, § 2415(a) distinguishes between judicial and administrative proceedings. Section 2415(a) provides that an "action" must commence "within one year after final decisions have been rendered in applicable administrative proceedings." Thus, Congress knew how to identify administrative proceedings and manifestly had two separate concepts in mind when it enacted § 2415(a). 549 U.S. 84, 91-92

28 U.S.C. § 2462 establishes a five-year statute of limitations for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." In a past case we concluded that this statute of limitations applied to the assessment of a fine in a Subpart G proceeding. *See In re Lincoln University*, Dkt. No. 13-68-SF, U.S. Dep't of Educ. (March 16, 2015).[76] We have not, however, applied this statute of limitation to a Subpart H program review and return of funds matter. Rather, in *Hair California Beauty Academy*, Dkt. No. 18-13-SP, U.S. Dep't of Educ. (July 2, 2019), this tribunal concluded that the statute of limitations was not applicable to Subpart H matters, like this program review ordering the return of funds.

[76] This decision is currently on appeal to the Secretary.

IV. Laches

The Secretary of Education has recognized that laches may be available in Higher Education Act administrative appeals in *In re Platt*, 90-2-SA (January 19, 1990). The standard applied was taken from the Supreme Court's decision in *Costello v. US*, 365 U.S. 265 (1961), that laches apply when there is both (1) a lack of diligence by the party against whom the defense is asserted (an unreasonable delay); and (2) prejudice to the party asserting the defense (prejudice). *See In re Salon and Spa*, 18-16-SP (April 27, 2020); *In re Community College System of New Hampshire*, 09-35-SA (June 21, 2010); *In re CUNY LaGuardia*, 93-3-O (March 3, 1994).

In *In re Mary Holmes*, 94-90-SA (May 3, 1995) laches were found to limit liability. In that case, this tribunal found that the Department was unreasonably delayed in issuing a Final Audit Determination in September 1993 based upon an audit of the 1984-85 award year conducted by a CPA firm in August 1986. The Department claimed that the audit was not submitted to the Department until almost 6 years later in August 1992. This tribunal concluded that the Department was "not without fault in 'sitting on its hands' for almost 6 years without inquiring about the missing audit" and that it is just as likely that it was "misplaced, misdirected or lost at the [Department's] end." *In re Mary Holmes* at 3. This tribunal noted that the audit firm that conducted the audit had closed and the law firm representing school tried to get work papers to understand the facts underlying the audit from the only former partner of the CPA firm they could locate. He said the papers could not be found and consulted the Department which told the lawyer that they had no additional information about the audit findings. This tribunal concluded that even after taking these extraordinary measures, the school was in an impossible situation of defending itself against a 9-year old audit concerning a period of time that ended 10

years ago without any ability to locate or see supporting documentation or work papers. This tribunal also noted that the school acted promptly in getting the audit, sending a copy of the audit once notified by ED that it was missing, and made efforts to contact old partners at firm and get info from ED.

Where there has not been the same lack of diligence on the part of the Department or the same prejudice that extraordinary measures by the school could not overcome, laches may not be applied. Where the delay has been caused at least in part by the school itself, there is no finding of lack of diligence or unreasonable delay by the Department. *See In re CUNY LaGuardia Community College*, 93-3-O (March 30, 1994) (the delay prong not met where the delay was caused, at least in part, by the school repeatedly submitting information and the parties negotiating to reduce liability at issue by almost 50%). Additionally, where the length of the delay is justified based upon the circumstances, there is no unreasonable delay. *See In re Community College System of New Hampshire*, 09-35-SA (June 21, 2010) (a 21-month delay between receiving full file review information and issuing FAD was not unreasonable because there was indications of fraud and so prosecutorial authorities had to be consulted and where the initial reviewer left and a new reviewer was required to examine all documents.).

Additionally, no prejudice has been found where the delay did not prevent the school from putting forth its defense. *See In re OIC Vocational Institute*, 98-12-SP (Sept. 23, 1998) (*"*Prejudice involves the inability to defend oneself against a claim because of the passage of time."); *see also In re Community College System of New Hampshire*, 09-35-SA (June 21, 2010) ("the prejudice required to be established for laches to apply is a legal evidentiary one, i.e. a showing of an interference with the ability to procure probative evidence caused by the inordinate delay.") When the claimed prejudice did not affect the primary cause of the liability

there has been no prejudice. *See In re CUNY LaGuardia Community College*, 93-3-O (March 30, 1994) (prejudice prong not met where school claimed prejudice because delay caused "[m]emories of witnesses regarding significant events have faded, other witnesses have moved and cannot be located, and one important witness died" and we concluded that the central issue in case was whether awards were properly disbursed, which did not depend on the credibility of witnesses but could be resolved using documentary evidence.)

Analysis

I. Age of Compulsory Education

34 C.F.R. § 600.4(a)(2)(iii) defines regular students as those who "are beyond the age of compulsory school attendance in the ***State*** in which the institution is physically located." (emphasis added). There is no indication in the plain language of the regulations that local policy must be considered. Furthermore, the term "State" is defined in 34 C.F.R. § 600.2. That definition includes a "State of the Union" but makes no reference to a city, municipality or locality. By the plain language of the regulation, it is the state law, and not a local or city ordinance that controls whether a student has reached the age of compulsory education.

Additionally, when discussing the requirement to readmit students, 34 CFR 668.18(a)(4), directs that "the requirements of this section supersede any ***State law (including any local law or ordinance)***, contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this section for the period of enrollment during which the student resumes attendance, and continuing so long as the institution is unable to comply with such requirements through other means." (emphasis added). In *Russello v. United States,* the Supreme Court noted "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Russello v. US*, 464 U.S. 16, 23 (1983). The same canon of statutory construction applies to regulations. *See Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (superseded by statute on other grounds) (noting that "Only by such full reference to the context of the whole can the court find the plain meaning of a part [of a law]" and that "the canons of construction of course apply equally to any legal text and not merely to statutes."); *Black & Decker Corp. v. Commissioner of Internal Revenue,* 986 F.2d 60, 65 (4th Cir.1993) ("Regulations, like statutes, are interpreted according to the canons of construction."). Where the consideration of state law explicitly includes a consideration of local law and ordinances in one regulation, 34 CFR 668.18, and not in 34 CFR 600.4's discussion of the age of compulsory education, we do not presume that this was an oversight.

As cited by the Department in the FPRD, Section 3205 of the New York State Education Law, states "in each school district of the state, each minor from six to **sixteen** years of age shall attend upon full time instruction."[77] Similarly, under the "State Requirements and Programs" section of its handbook for new administrators of non-public schools, the New York State Department of Education states, "the compulsory attendance law in New York State requires that all children between the ages of six and **sixteen** be provided with a program of instruction, either at a public school or elsewhere."[78]

The Department correctly notes that the Section 3205 also empowers school districts

[77] Title IV, Article 65, Part I, Section 3205 of the New York Consolidated Laws.
[78] Manual for New Administrators of Non-Public Schools, State Requirements and Programs, *available at* http://www.p12.nysed.gov/nonpub/manualfornewadministratorsofnps/statereqs.html (last visited June 9, 2020).

within the state to raise the age of compulsory attendance to seventeen and New York City regulations have raised the age to 17 and all of Bramson's campuses are in NYC.[79] The Department argues that, therefore, the age of compulsory education for the Bramson is 17. That the New York State Law gives school districts the authority to raise the age of compulsory education, however, does not change the fact that 34 C.F.R. §600.4, by its plain terms, relies upon the age of "compulsory school attendance in the ***State*** in which the institution is physically located," not the city. The age of compulsory education for the State of New York is sixteen.

In Finding 2, FSA identified two students who both enrolled in Bramson at age 16. Because the age of compulsory education in the State of New York is 16, these students meet the definition of "regular students" under 34 C.F.R. § 600.4(a)(2)(iii).[80] In the PRR, FSA further identified five other students who received Title IV program disbursements before they were 17 years old. The PRR, however, does not indicate if any of these students were under the age of 16 when they enrolled at Bramson. In the PRR, FSA does not identify any students who were enrolled before turning sixteen years old. Because sixteen is the compulsory age of education in New York State, the state where the school is located, FSA has not identified any students who are not regular students under 34 C.F.R. § 600.4(a)(2)(iii). Without establishing any violations, FSA cannot find a systemic problem and did not have basis for ordering a full file review. Therefore, Finding 2 is dismissed.[81]

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[79] The state law actually only allows school districts to raise the age of compulsory education to students who are not employed. Title IV, Article 65, Part I, Section 3205(3) of the New York Consolidated Laws Even if the NYC law did apply to some students, FSA does not appear to consider whether any of the students who were sixteen were also employed.

[80] FSA, in the PRR, indicates that because the students live in NYC, Bramson was not following its own policies by admitting students 31 and 34 who would have been part of the NYC Board of Education. The plain and unambiguous language of 34 C.F.R. § 600.4(a)(2)(iii), however, uses the State where the institution is located to define the age of compulsory education. Where the student lives or whether the school has a policy further restricting the admission of students who are between 16 and 17 is not at issue in the regulation.

[81] Because the liabilities in Finding 2 are dismissed, it is not necessary to address Bramson's alternative argument that students who were admitted before turning 17 years old became eligible once they turned 17 based upon ATB tests taken when they were 16.

II. Retention of funds for the period after ineligible students completed 6 credit hours.

Bramson argues that liability in Finding 3 of the FPRD should be reduced to only require the school to return Title IV program funds disbursed to students without passing ATB scores for the time period before the student completed six credits at Bramson. Specifically, Bramson argues that the applicable law recognizes that students will be determined to have the ability to benefit upon satisfactory completion of six credit hours and it has been the Department's practice to apply the six-credit standard even if the student was admitted on a purportedly improper basis. Therefore, the institution argues that the six-credit standard should be applied to require the return of funds for students for whom Bramson improperly disbursed funds only up until the time the students completed six credits at Bramson.

FSA responds that Bramson's argument has already been addressed in *In re Fortis College*, Dkt. No 12-55-SP, and in *In re Galiano Career Academy*, 11-71-SP. In those cases, the Secretary rejected the argument that liability for improperly discharged funds can be offset by students becoming retroactively eligible for funds by completing six credit hours or 225 clock hours under 34 C.F.R. §668.32(e)(5). FSA argues that because the students were not eligible for Title IV funds at the time the students enrolled, and the school determined eligibility, Bramson must repay all the funds disbursed to ineligible students.

In response, Bramson asserts that this tribunal's decisions in *Fortis* and *Galiano* are either inapplicable to this case or should be overturned. First, Bramson contends that these two decisions involved whether a student was eligible during the time they completed the six credits while Bramson seeks to argue that the students became eligible once they completed the six credits. Bramson, in the alternative, argues that to the extent that *Fortis* and *Galiano* apply, they should be reconsidered because they apply a holding from *In re Hamilton Profession School*, that

was decided before Congress authorized the Six Credit Standard. Bramson also argues that these cases improperly relied upon statements from the Federal Register. Bramson asserts that statements in the Federal Register do not create legal obligations and were misinterpreted in *Fortis* and *Galiano*.

When an institution participates in Title IV programs, it becomes a fiduciary of the Department and "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." 34 C.F.R. §668.82(b)(1). As a participant in the Title IV programs, Bramson had an obligation to ensure that it only disbursed funds to eligible students. Bramson failed to fulfill this obligation when it enrolled and disbursed Title IV funds to students who were admitted based upon non-passing ATB scores.

The *Fortis* and *Galiano* decisions are decisions from the Secretary, which are binding precedent in this appeal. Based on the Secretary's decisions in those cases, Bramson must return all Title IV program funds that it disbursed to students who were enrolled without a passing score on a valid ATB test.

In *Fortis*, the Secretary noted that the comments to the rule-making when the six credit hour eligibility was added to 34 C.F.R. § 668.32 specifically state that this method of becoming eligible for Title IV program funds "would require students to pay for these six credits without the benefit of title IV, Higher Education Act program assistance." *Fortis* at 7 (quoting 75 Fed. Reg. 66,832, 66,921 (Oct. 29, 2010)). The Secretary held that it had been the "long held" standard that students must qualify for Title IV program assistance prior to the disbursement of funds, and the amendments to 34 C.F.R. § 668.32(e) did not change these "well-established

rules." *Fortis* at 7.[82] The Secretary further noted that there was no evidence that the school in that case made a new determination of eligibility for the students after they completed six credit hours. He concluded that he was "not persuaded that the six credit hour rule provides an avenue for [the school] to reduce liability for funds disbursed based on erroneous determinations" and held the school liable for "all of the funds disbursed to ineligible students." *Fortis* at 8.

Later the same year, in *Galiano Career Academy*, 11-71-SP, U.S. Dep't of Educ. (July 10, 2015) (Dec. of Secretary), the Secretary reiterated his conclusion. The Secretary stated,

> The six credit hour rule did not provide retroactive eligibility for students erroneously determined to be eligible by the institution. Rather, demonstrating an ability to benefit under this provision required students "to pay for these six credits without the benefit of title IV, [Higher Education Act] program assistance" and, afterwards, to receive an initial determination of eligibility. *Galiano* at 4.

Noting that, like the school in *Fortis*, the school does not assert that it made a new eligibility determination for the students after they completed six credit hours, the Secretary concluded that the school's "theory of retroactive eligibility cannot prevail" and held the school liable for the funds disbursed to the ineligible students. *Galiano* at 4-5.

Bramson does not seek to keep a portion of the funds that it improperly disbursed to students who were ineligible when the school first began disbursing them funds, only the funds disbursed after the student completed six credits. The Secretary's rulings in *Fortis* and *Galiano*, however, are clear. A school must make a determination that a student is eligible before disbursing funds to that student. The completion of six credit hours does not mitigate the

[82] The Secretary cites to *In re Hamilton Professional Schools*, Dkt. No. 02-49-SP, U.S. Dep't of Educ. (June 11, 2003) for the long-standing rule that institutions must determine that a student is qualified before disbursing Title IV program funds to the student. Bramson argues that it was in error to rely on this decision that was issued before the six-credit rule was passed by Congress. In *Fortis*, the Secretary, however, cited to this case for the long-standing rule and then specifically states that the change that subsequently occurred adding the six credit hour path to eligibility did not change this rule.

responsibility of the school to return all Title IV program funds disbursed after the school fails to make this determination. Bramson has not asserted or provided evidence that it made a second separate determination that the students were eligible after completing six credit hours. Under the Secretary's decision, it must return all Title IV program funds disbursed to the ineligible students.

Bramson raises an interesting argument that, unlike in *Fortis* and *Galiano*, it does not seek to retain funds paid before the student completed six credit hours, but rather "prospectively" after they completed six credit hours. The Secretary's holdings and reasonings in *Fortis* and *Galiano*, that a determination of a student's eligibility must be made before the disbursement of funds to the student or all funds must be returned, do not allow for this distinction. The decisions of the Secretary are binding precedent, and require the return of all Title IV program funds that were disbursed to students who were ineligible for the programs when the funds were first disbursed.

In support of its assertion that liability should not be assessed after a student completed six credits, Bramson also argues that the Department did not sustain a loss with respect to the students who completed 6 credits and under the law have the recognized ability to benefit. Correctly noting that Subpart H proceedings are not punitive, Bramson argues that FSA can only seek compensatory damages in this case. The school contends that in *In re Chicago State University*, Dkt. No 94-172-SA (April 26, 1996), this tribunal allowed the school to remedy the school's failure to secure high school diplomas or financial aid transcripts before disbursing Title IV funds by letting the school later produced documentation to OHA demonstrating that the students were eligible to receive Title IV funds. In that case, however, the school was permitted to, after the disbursement, provide evidence that showed that the disbursement to the students

was proper when it was first made. In other words, if the school had done a proper assessment before disbursing program funds, it would have determined that the student was eligible for the Title IV program funds. Here, Bramson began disbursing funds to students who were ineligible when the disbursements began. That the students later completed six credits and would have been eligible if the school had begun disbursing funds at that time does not change the fact that the student was ineligible when Bramson began disbursing Title IV program funds to the student. Subpart H proceedings are intended to determine whether a school can prove that it properly disbursed Title IV program funds, which Bramson is not able to do with respect to students admitted with a non-passing ATB test score.

The liability assessed in Finding 3, for the disbursement of funds to students with non-passing ATB test scores is affirmed.

III. Statutes of limitations

Six Year Statute of Limitations pursuant to 28 U.S.C. § 2415

As both parties acknowledge, the Supreme Court has definitively decided that this statute of limitations does not apply to administrative actions.[83] Bramson urges this tribunal to disregard the unanimous decision of the United States Supreme Court. Administrative proceedings are obliged to follow existing law, especially when it is a decision from the Supreme Court. The six-year statute of limitations found in 28 U.S.C. § 2415 does not apply to this administrative action.

Five Year Statute of Limitations pursuant to 28 U.S.C. § 2462

As noted above, in the past, this tribunal has only applied the five-year statute of limitations to a fine proceeding. The statute, by its terms, limits "an action, suit or proceeding

[83] Respondent's initial brief at 8; FSA Brief at 9-10.

for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." Bramson argues that the bulk of liabilities asserted in Finding 3 require the repayment of liabilities after a student became eligible by completing 6 credits, and so they are disgorgement and are, therefore, punitive under the Supreme Court's holding in *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017) and the Third Restatement of Restitution and Unjust Enrichment. As noted above, however, there is no indication that Bramson did an ability to benefit assessment of the students after completing six credit hours to render them eligible for Title IV program funds.

Moreover, a similar argument was raised and addressed by this Tribunal in *Hair California Beauty Academy* when we concluded that Section 2462's statute of limitations does not apply to Subpart H proceedings like this. Like Bramson, the school in that case compared the FSA imposed liabilities to the S.E.C. disgorgement in *Kokesh*. Following our analysis in that case, the statute of limitations cannot apply.

Bramson's "comparison with *Kokesh* is based upon a mischaracterization of the fiduciary relationship between the Department and Title IV fiduciaries like [the school]." *Hair California* at 15. Namely, the whereas the S.E.C.'s disgorgement in *Kokesh* was levied "to recover the amount of funds obtained by illegal activity," the liabilities, the liabilities at issue in the FPRD in this matter were funds initially transferred by the Department to Bramson to "be maintained and disbursed according to Title IV requirements." Id. The liabilities are not sanctions, but rather an effort to recover specific funds held in trust by Bramson for the Department. As such, the liabilities are not sanctions imposed to deter infractions of public law, but rather "a monetary recovery necessary due to Bramson failing to responsibly disburse the Department's funds, and it is designed to compensate the Department for its loss due to Bramson's failing to properly serve as its fiduciary." Id.

The *Kokesh* Court concluded that the statute of limitations applied to the disgorgement was that the disgorgement was not designed to be compensatory. Although the liabilities are levied in this

matter "as a consequence of Title IV violations, the Department is merely trying to recover funds to which it holds a legal right." Id. Therefore, the "recovery is not a punishment, but a means of compensation for fiduciary violations." Id. As a participant in Title IV programs, Bramson was on notice that the Department would recover improperly disbursed funds. In short, "the uniqueness of the financial fiduciary relationship established between the Department and Title IV participating institutions, such as Bramson, makes 34 C.F.R. Part 668 Subpart H proceedings distinct from the statute of limitations imposed by § 2462 as interpreted in *Kokesh*." Id. at 15-16.

IV. Laches

Unreasonable delay

Bramson argues that there is evidence of unreasonable delay at multiple stages of the process. None of the delays showed a lack of diligence by the Department or an unreasonable delay in its actions.

First, Bramson notes that the onsite program review began in 2012, but the liabilities assessed in the FPRD address alleged conduct dating back to 2006. The program review was initiated to determine whether Bramson had taken appropriate corrective action in response to the State's TAP audit.[84] The final report from the TAP audit was issued on September 27, 2010.[85] The program review began on April 30, 2012, nineteen months later.[86] During those nineteen months, Bramson collected information from the auditors and sent it to the Department, which, in turn, then made a decision to begin a program review.[87] Nineteen months is not an unreasonable amount of time for the Department to become aware of the report, collect information related to the audit report findings, review the information, make a determination

[84] PRR at 3.
[85] TAP Audit Letter, at 1.
[86] PRR at 3
[87] FPRD at 20.

that a program review was necessary, and plan and begin a program review. The initial program review was done by examining student files from the 2010/11 and 2011/12 award years, the two years immediately preceding the program review. Once the review was done and findings were made, file reviews were directed for prior award years to assess the full scope of liabilities. Bramson does not claim that it lacked the documents needed to conduct those file reviews.

Bramson then notes that the PRR was not issued until almost 2 and half years later after the program review began, in October 2014. The FSA Program Review Guide indicates that the Department "anticipate[s]" issuing the PRR within 75 days.[88] The Program Review was officially conducted between April and May 2012. The Department was collecting information about Bramson being placed on probation by its accreditor that was relevant to Finding 4 as late as March 20, 2014, less than seven months before the PRR was issued.[89] Although the 208 days between the receipt of information about the accreditation issues is significantly more time than the "anticipated" 75 days, it is not an unreasonable amount of time to review the information and adjust the program review findings accordingly.

The FPRD was not issued until November 30, 2017, which is 29 months after Bramson submitted its last response to the PRR on June 30, 2015.[90] Bramson notes that the Program Review guide states that "typically the FPRD is issued to the institution within 30 to 90 days after the Department's receipt of a complete and final response to the Program Review Report."[91] The Guide also states that "more time may be needed to prepare the FPRD if: a file review is extensive and includes supporting documentation and/or an auditor's attestation, . . . the reviewers need to seek concurrence or information from other offices, and/or . . . Department priorities require the reviewers to give their

[88] Program Review Guide, at 6-2 (2009).
[89] FPRD at 31.
[90] ED Ex. 1 Declaration of Christopher Curry, Paragraph 7 (hereafter Curry Declaration); Bramson brief at 12.
[91] Program Review Guide at 9-1.

attention to other cases."[92]

The PRR had 15 findings. After multiple extensions were granted to Bramson, the school submitted information relating to 5 award years. Additionally, while the Department was awaiting Bramson's responses to the PRR, Jane Eldred, who was leading the review, left the New York office that was conducting the review.[93] The review was reassigned to a new employee in the office, but because of the complexities of the review, the new employee was unable to complete the review.[94] In January 2016, the compliance manager for the New York/Boston office arranged for Eldred to be reassigned, even though she was no longer part of the office, to complete the program review for this matter, which she did despite having obligations in her new role, in approximately 22 months.[95] Given the scope of the program review and Bramson's responses, and the need to make two changes to the lead reviewer assigned to the matter, it is not unreasonable for the Department to take less than two and half years to reach its final conclusions. *See In re Community College System of New Hampshire*, Dkt. No. 09-35-SA, U.S. Dep't of Educ. (June 21, 2010) (concluding that a 21-month delay in the issuance of a Final Audit Determination was not unreasonable when, among other factors, there was a change in the lead reviewer). [96]

Prejudice

Bramson claimed it was prejudiced because the records necessary to respond to the findings in the PRR and FPRD fell outside the record retention period and so the institution had no obligation to retain the records. Bramson further argues that because the college closed almost a year before the Department issued the FPRD, it lacked the staff and resources to defend

[92] Program Review Guide at 9-1.
[93] Curry Declaration at paragraph 9.
[94] Curry Declaration at paragraph 9.
[95] Id. at paragraph 10.
[96] Bramson also notes that the FPRD was not issued until after the school closed in

against the liability. Additionally, Bramson points out that the delay troubles impeded the institution's ability to acquire the necessary consent from students to obtain proof from the state education department that students had high school equivalency diplomas, which impaired the school's ability to obtain proof to contradict Findings 2 and 3's liability.[97]

As we have stated in *In re CUNY LaGuardia Community College***,** *In re OIC Vocational Institute*, and *In re Community College System of New Hampshire*, prejudice comes down to the effect that the delay and its consequences had on Bramson's ability to prosecute the case. Under 20 USC 1099c-1(b)(6), the Department is required to give the institution "an adequate opportunity to review and respond to any program review report and relevant materials related to the report before any final program review report is issued." Did the delay in this case prevent Bramson from having an "adequate opportunity" to respond to the PRR?

As in *In re CUNY LaGuardia Community College*, the full file reviews that were ordered almost entirely required a review of student files by Bramson. Although Bramson asserts that the files at issue are outside the retention period, the college does not state it lacked the records. Bramson was able to provide specific information in the full file reviews, from which the liabilities were assessed. This shows Bramson had the information needed to address the findings. Where Bramson is not even claiming that it lacks the documents necessary to address the findings, just that the timing could have caused the absence of records, the school was not prejudiced. *See U.S. v. Weintraub,* 613 F.2d 612, 619 (6th Cir. 1979) (noting that where the case was "based almost entirely upon documentary evidence and, to a lesser extent, appellant's

[97] Bramson also argues that the Department has noted that long delays are prejudicial to schools during rule making. As noted, a necessary showing of prejudice requires a showing that the delay has directly affected the ability of the party raising the defense to assert a defense. A generalized prejudice that schools could face does not warrant laches. Rather a prejudice to the party itself is required.

credibility, neither of which were greatly affected by the lapse of time" there was insufficient prejudice to sustain laches); *see also In re Armstrong Atlantic State University*, 01-21-SA (holding the school liable for its failure to prove proper disbursements when the liability was based on documents that the school was required to retain under the regulations)**.**

Historically applying laches against the government has been unfavored. *See In re Platt Junior College*, Dkt. No. 90-02-SA, U.S. Dep't of Educ. (Jan. 19, 1990) (Dec. of Secretary) at 2. The defense is only available in the most extreme cases. *See In Re Community College System of New Hampshire*, Dkt. 09-35-SA, U.S. Dep't of Educ. (June 21, 2010) at 4 (stating that "the defense of *laches* when asserted against the federal government is an extraordinary remedy, to be applied only to extreme cases of delay."). The file review primarily required a review of documents, so the unavailability of students does not create sufficient prejudice. And while it is logical that it be harder to review files when a school is closed and does not have staff or revenue to review the files, schools have repeatedly been required to complete file reviews after closing their doors. *See In re 360 School of Beauty*, 12-09-SP; *In re Helman Institute of Massage Therapy*, 11-83-SP; *In re Modern Trend Beauty School*, 98-109-SP. When laches was applied in *Mary Holmes*, there was prejudice, and the school and its attorneys went above and beyond to try to remedy the impediments cause by the delay (in that case, trying to obtain the lost documents supporting the audit by reaching out to the former partner at the auditing firm and the Department). The record here does not support a finding that Bramson went to the same lengths.

Because Bramson has failed to show that the Department unreasonably delayed completion of the various stages of the program review or that the school was sufficiently prejudiced by delays, laches cannot apply.

Conclusions of Law

1. **As an institution located in New York State, the age of compulsory education for to students enrolling at Bramson ORT College under 4 C.F.R. §600.4(a)(2)(ii) is 16.**

2. **Based on the binding precedent from the Secretary of Education, a student who is ineligible for Title IV funds when the funds are first disbursed because the student does not have a passing ATB score does not become eligible when the student reaches the compulsory age or has completed 6 credits at Bramson ORT College.**

3. **Based on the binding precedent from the United States Supreme Court, the six-year statute of limitations and the five-year statute of limitations under 28 US 2415(a) and 28 U.S.C. § 2462 respectively do not limit the liabilities that can be imposed upon Bramson ORT College.**

4. **Laches does not apply to limit the amount of funds Bramson ORT College can be required to return.**

Order

Federal Student Aid's determination is **AFFIRMED in part and REVERSED in part**. Finding 2 of the Final Program Review Determination is reversed. Bramson ORT College is liable for the liabilities assessed in Findings 3 and 4 of the Final Program Review Determination.

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Robert G. Layton
Administrative Law Judge

Date of Decision: July 30, 2020

NOTICE OF DECISION AND APPEAL RIGHTS-SUBPART H

This is the initial decision of the hearing official pursuant to 34 C.F.R. § 668.118. The regulation does not authorize motions for reconsideration. The following language summarizes a party's right to appeal this decision as set forth in 34 C.F.R. § 668.119.

An appeal to the Secretary shall be in writing and explain why this decision should be overturned or modified. An appeal must be filed within 30 days from receipt of this notice and decision. If an appeal is not timely filed, by operation of regulation, the decision will automatically become the final decision of the Department.

An appeal to the Secretary shall be filed in the Office of Hearings and Appeals (OHA). The appealing party shall provide a copy of the appeal to the opposing party. The appeal shall clearly indicate the case name and docket number.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system. Otherwise, appeals must be timely filed in OHA by U.S. Mail, hand delivery, or other delivery service. Appeals filed by mail, hand delivery, or other delivery service shall be in writing and include the original submission and one unbound copy addressed to:

Hand Delivery or Overnight Mail*	U.S. Postal Service*
Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 550 12th Street, S.W., 10th Floor Washington, DC 20024	Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 400 Maryland Avenue, S.W. Washington DC 20202

These instructions are not intended to alter or interpret the applicable regulations or provide legal advice. The parties shall follow the regulatory requirements for appealing to the Secretary at 34 C.F.R. § 668.119. Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.

Notice: Due to the consequences from the current COVID-19 event, OHA is unable to directly accept hand delivery or courier-delivered mail or parcels at the OHA's physical location and delivery by U.S. Mail to OHA will be delayed due to modifications to interoffice mail delivery.

Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.