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

**Drake College of Business,**

**Docket No. 22-61-SP**

Federal Student Aid Proceeding

PRCN: 2020-2-01-30131

OPE-ID: 02223900

Respondent.

Appearances: Steven M. Gombos, Esq., and Jacob C. Shorter, Esq.,
Gombos Leyton PC, for
Respondent Drake College of Business

Denise Morelli, Esq., Office of the General Counsel, for
U.S. Department of Education

Before: Elizabeth Figueroa, Chief Administrative Law Judge

# DECISION

## I. Introduction

### A. Summary of this Decision

This Decision reverses the findings and liabilities in the Final Program Review Determination (FPRD) that Respondent Drake College of Business (Drake) has challenged in this matter. Specifically, the findings and resulting liabilities in the total amount of $758,531, for closed school loan discharges, are not supported and, therefore, not affirmed. 34 C.F.R. § 668.118(b).

### B. Procedural History of this Case

On November 14, 2022, Drake, through its counsel, filed a Request for Review dated November 10, 2022. The request challenges the FPRD issued by the Federal Student Aid Office

(FSA) of the U.S. Department of Education (the Department) on September 30, 2022.

By Order Governing Proceeding issued on December 14, 2022, the Office of Hearings and Appeals (OHA) set deadlines for the parties to file briefs, including any reply brief, and any exhibits.

On February 14, 2023, Drake filed its opening brief, in which it asserts that it is not responsible for the liabilities assessed in the FPRD. On April 14, 2023, FSA responded with a brief outlining the reasons that the FPRD is supportable and should be upheld, together with Exhibits (Exhs.) ED-1 through 4. On May 12, 2023, Drake filed a reply brief.

In its opening brief, Drake requested oral argument. On June 9, 2023, this tribunal issued an Order that required the parties to file a joint statement listing dates on which they would be available to appear for oral argument. On June 30, 2023, the parties filed a Joint Statement Regarding Oral Argument in which they stated that oral argument is not necessary and that the case can be decided on the briefs they submitted, without oral argument.

On July 20, 2023, this tribunal issued an Order that required the parties to file, by July 27, 2023, as joint exhibits, copies of FSA's February 22, 2016 letter responding to the close-out audit submitted by Drake, the Program Review Report and Final Program Review Determination concerning the open program review mentioned in the Declaration of Edward Buckley, each of which documents were mentioned in the parties' submissions but not filed as exhibits. On July 27, 2023, the parties filed the documents as ordered and they have been admitted as Joint Exhibits 1, 2, and 3, respectively.

The issues having been fully briefed and the administrative record having closed on July 27, 2023, this matter is ripe for decision.

## II. Jurisdiction

On September 30, 2022, FSA sent the FPRD to Drake. By request for review dated November 10, 2022, Drake requested review of the FPRD, pursuant to 20 U.S.C. § 1094(b) and 34 C.F.R. § 668.113. Drake's request for review was received by the Administrative Actions and Appeals Service Group, U.S. Department of Education (AAASG), on November 14, 2022, and was, therefore, timely filed within 45 days of Drake's receipt of the FPRD, as required by 20 U.S.C. § 1094(b)(1) and 34 C.F.R. § 668.13(b). OHA has authority to hear this case. 20 U.S.C. § 1094(b); 34 C.F.R. §§ 668.116(a) and 668.117; Secretary's Delegation of Authority dated July 2, 2009; and, 20 U.S.C. § 1234(a)(4). Jurisdiction is established.

## III. Findings of Fact

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

1. Drake was a proprietary educational institution that offered non-degree, one-year programs. Exh. ED-1 at 23. Drake was located in Elizabeth, New Jersey, and its owner, Ziad Fadel, was located in Harrison, New York. Exh. ED-1 at 1, 6, 19, and 23.

2. Sometime before 2014, Drake entered into a Program Participation Agreement with the Department to participate in federal student aid programs, including the William D. Ford Federal Direct Loan Program (Federal Direct Loan Program or Direct Loan Program).

3. The International Beauty School (IBS), which was another school owned by Drake's owner, Ziad Fadel, and the Department entered into a settlement agreement on December 19, 2014 regarding the Department's denial of IBS's recertification on April 18, 2014 for continued participation in Title IV Higher Education Act (HEA) programs based on a program review of IBS' compliance with Title IV requirements and a program review the Department had conducted of Drake (Settlement Agreement). Exh. ED-1 at 37-41; Exh. ED-4 at (unnumbered) 1, para. 4. In the opening paragraphs of the Settlement Agreement, the parties stated, "IBS, Drake, and the Department now desire to resolve the recertification denial, and the open program reviews of IBS and Drake." Exh. ED-1 at 37, para. C. Under the terms of the Settlement Agreement, Drake's owner agreed, among other things, that Drake would teach out students enrolled at Drake through January 5, 2015, and that Drake would close on July 31, 2015. Exh. ED-1 at 37, para. C.2. Drake also agreed that it would "not conceal, misconstrue, or otherwise misrepresent any student's eligibility for a closed school loan discharge." *Id*. at para. C.4.

4. Drake closed and ceased participation in Federal Student Aid programs on July 31, 2015. Request for Review at 1; Exhs. ED-1 at 24 and ED-2.

5. After it ceased providing instruction, Drake provided FSA with the required close-out audit. Exh. ED-1 at 25. At the time of the close-out audit submission, FSA had not forgiven any Federal Direct Loans. *Id*. On February 22, 2016, FSA issued a Final Audit Determination (FAD) letter. Joint Exh. 1. In FSA's February 22, 2016 letter to Drake regarding the close-out audit Drake submitted, FSA informed Drake that liabilities for closed school loan discharges could be assessed through a program review process and that the Department would seek to recover those liabilities from Drake. *Id*. FSA instructed Drake that it must retain all records until the end of the applicable retention period under 34 C.F.R. § 668.24. *Id*.

6. After it closed, Drake ceased having access to the National Student Loan Data System (NSLDS).[1] Exh. ED-1 at 34.

[1] NSLDS is the Department's central data base for Federal Student Aid. 20 U.S.C. §1092b. Among other things, NSLDS tracks Direct Loans. *Id*. NSLDS is accessible to guaranty agencies, eligible lenders, eligible institutions, and students. *Id*.

7. The Department began discharging loans taken out by former Drake students in 2016. Request for Review at 1; Exh. ED-1, Appendix A.

8. On January 29, 2019, FSA issued a Final Program Review Determination to Drake based on a Program Review Report issued on October 25, 2016. Joint Exh. 3. That Program Review Report was based on a program review that was conducted in August 2010, and covered award years 2008-2009 and 2009-2010. *Id*. On March 28, 2019, Drake filed a request for review of the January 29, 2019 Final Program Review Determination with the Office of Hearings and Appeals (OHA) and OHA docketed the review request as OHA Docket No. 19-22-SP. That case is pending before OHA.

9. In the Final Program Review Determination issued on January 29, 2019, and the Program Review Report issued on October 25, 2016, FSA advised Drake that it was required to retain program records relating to the period covered by the program review until the later of resolution of loans, claims or expenditures questioned in the program review, or the end of the retention period otherwise applicable to the record under 34 C.F.R. §§ 668.24(e)(1), (c)(2), and (e)(3). *Id*.

10. The Department's FSA New York/Boston Participation Division conducted an off-site program review of Drake on January 14, 2020. Exh. ED-1 at 19. The focus of the review was to determine the institution's liability for the discharge of Federal Direct Loans due to Drake's closure on July 31, 2015. *Id*. at 23. The review consisted of a review of former Drake students' records in the NSLDS, which data system contains applications for loan discharges filed by students who were unable to complete their programs due to Drake's closure. *Id*.

11. The seven-step process for granting closed school loan discharges is as follows:

    a. When a school participating in the Title IV program closes, the Department's loan servicers are notified, and they reach out to students that are attending at the time of closure and those students that fall into the discharge window of the regulations. The servicers notify the students that they may be eligible for a closed school discharge, and they provide an application for the student to submit.

    b. Students wishing to apply for a closed school discharge submit that application to the servicer of the student's loan. On the application, the student must certify, among other things, that they were enrolled in the closed school and that they did not complete their program of study due to the school's closure.

    c. The servicer reviews the application and compares it to the information that had been submitted by the school in the Department's NSLDS regarding the student's

enrollment at the time of the school's closure. The student statuses in NSLDS include graduated, withdrawn, or currently attending. Schools are required to update NSLDS when a student's status changes.

d. If the servicer determines that the student meets the regulatory criteria for a closed school discharge, the student is marked approved.

e. A list of the discharge applicants is sent to FSA's Borrower Processing Division. The list is marked approved or denied and supporting documentation is provided for review. The team reviews the information to ensure the determination is accurate.

f. If the applications are approved after this review, the servicer initiates an adjustment in the system to bring the borrower's loan balance to zero and a notice is sent to the borrower. This information migrates to NSLDS to show the outstanding balance as zero.

g. If any applications are denied, the servicer sends a notice to the student explaining the reasons for the denial.

Exh. ED-3.

12. The Department delayed issuing a program review report based on its January 2020 program review because there was already an open program review and the Department was still in a dispute with Drake regarding the closure of that review. Exh. ED-4 at (unnumbered) 1, para. 5.

13. The Department discharged the loans of 72 students upon their applications for discharge, for a total discharge amount of $758,531. Exh. ED-3 at (unnumbered) 2, paras. 6-7. Based on the spreadsheet of discharged loans prepared by FSA, the Discharge Post Dates ranged from August 9, 2016 to November 23, 2019. Exh. ED-1, Appendix A.

14. On January 31, 2020, FSA issued a Program Review Report (PRR) covering Drake's liability for the discharge of Federal Direct Loans due to the school's closure on July 31, 2015. Exh. ED-1 at 23. The PRR listed closed school loan discharges totaling $8,549,869. Exh. ED- 1 at 25; Exh. ED-4 at (unnumbered) 1, para. 6. That total included discharges that were the result of student applications and those resulting from automatic discharges initiated by loan services. Exh. ED-4 at (unnumbered) 1, para. 6. The FSA institutional review specialist who conducted the PRR was not aware when he read the NSLDS report that there were separate designations for discharges that were the result of student applications and those resulting from automatic discharges. *Id*. The discharges resulting from automatic discharges were addressed through a separate process. *Id.* at (unnumbered)

2, para. 7. The discharges addressed in the FPRD that followed the PRR are only for 72 students who submitted applications for loan discharges, based on NSLDS data. *Id.*

15. In the Program Review Report issued on January 31, 2020, FSA advised Drake that it must retain program records covered by the off-site program review until the latter of resolution of the loans, claims or expenditures questioned in the program review, or the end of the retention period otherwise applicable to the records under 34 C.F.R. § 668.24(e). Exh. ED-1 at 20.

16. On May 28, 2020, Drake, through counsel, responded to the PRR. Exh. ED-1 at 26-35. In its response, Drake asked the Department to vacate the PRR and in support thereof, Drake asserted, among other things, that the Department lacks authority under the HEA and implementing regulations to directly recover closed school discharges from institutions; the Department forfeited any claim to repayment of closed school loan discharges upon execution of the Settlement Agreement; and, the PRR is without factual support. *Id*. Additionally, Drake requested the underlying data on which the Department relied to prepare the PRR and the excel spreadsheet on discharged loans in order to respond to the Department's findings. *Id*.

## IV. The Final Program Review Determination

On September 30, 2022, FSA issued the FPRD to Drake, assessing it $758,531 in liabilities for 72 former students who were unable to complete their programs due to Drake's closure identified in the Program Review Report as having received closed school loan discharges for Federal Direct Loans. Exh. ED-1. Attached to the FPRD as Appendix A is a list of closed school loan discharges that comprised the $758,531 in liabilities. Exh. ED-1 at 12-17. For each discharged loan, the list contains "last 4 digits of borrower's SSN"; "borrower's last name;" "borrower's last name;"[2] borrower's middle initial;" "loan type;"; "discharge type;" "cumulative amount;" and, the "discharge post date," *Id*.; Request for Review at 6-46.

The list of loan discharges, Appendix A, was prepared by Scott Winters, Management and Program Analyst for the Student Experience and Aid Delivery Division of FSA. In a declaration submitted with FSA's brief, Mr. Winters explained how he developed the list of discharges: "I sent an e-mail to each servicer with the school's OPE ID number and asked them to provide a list of borrowers who received a closed school discharge as a result of the closure of the school. At the time there were about 10 loan servicers working with the Department. The servicers provided a list of students, the amount discharged and the date of the discharge. I compiled a comprehensive list with the information submitted by the servicers and provided that information to the team." Exh. ED-3 at para. 6.

In the FPRD issued on September 30, 2022, FSA stated that in its May 28, 2020 response to the PRR Drake had failed to provide any documentation establishing that specific students were

[2] The second column labelled " borrowers' last names" contains first names and appears to have been mislabeled.

not eligible for discharges because they did not meet the regulatory criteria. Exh. ED-1 at 8-9.

In the FPRD issued on September 30, 2022, FSA advised Drake that it must retain program records covered by the off-site program review that served as the basis for the FPRD until the latter of resolution of the loans, claims or expenditures questioned in the program review, or the end of the retention period otherwise applicable to the records under 34 C.F.R. § 668.24(e). Exh. ED-1 at 3.

## V. The Parties' Arguments

In its Request for Review and briefs, Drake argues that (1) the Department lacks authority to demand and seek recovery for discharged student loans; (2) Drake has a right to a jury trial under the Seventh Amendment and, therefore, the Department cannot adjudicate these claims through an administrative proceeding; (3) Subpart H proceedings are an improper process to adjudicate school liability for closed school loan discharges because the program review process applies only to institutions still participating in Title IV programs; (4) the Department forfeited its right to seek recovery for discharged loans because it did not reserve such right in the Settlement Agreement; (5) the doctrine of laches bars imposition of liability for the closed school loan discharges because due to the protracted delay between the time of Drake's closure and issuance of the FPRD, Drake is prejudiced because it does not have records necessary to challenge or defend the liabilities assessed it for closed school loan discharges; and, (6) the FPRD fails to establish a prima facie case.

## VI. Issues Presented

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

1. Does the Department have authority to seek recovery from Drake for the closed school loan discharges granted to the 72 students at issue in the FPRD?

2. If the Department has authority to seek reimbursement from Drake for the loan discharges at issue, does the Department have authority to seek reimbursement for the full loan amounts for which it has assessed Drake liability or is the Department's recovery limited by its position as a subrogee of the student's rights under 34 C.F.R. § 682 .214(e)?

3. Does the Department have authority to seek reimbursement for loan discharges through an administrative process or must it seek recovery in an Article III court?

4. Is the Department precluded from pursuing its claims against Drake through an administrative proceeding because Drake's Program Participation Agreement with the Department terminated?

5. Is the Department precluded from pursuing its claims against Drake through an administrative proceeding because Drake has a right to a jury trial under the Seventh Amendment?

6. Did the Department forfeit any claims to repayment of closed school loan discharges against Drake by failing to reserve the right seek such claims in the Settlement Agreement executed by the parties in 2014?

7. Has Drake established a laches defense by proving that FSA's delay was attributable to lack of diligence that resulted in prejudice to Drake such that it is disabled from defending itself?

8. Has FSA met its burden of production and established a prima facie case by introducing into evidence the declarations of an FSA staff member on the established procedures for processing loan discharges and his certification that the information on loan discharges in the FPRD was obtained from loan servicers to show that Drake is liable for the closed school loan discharges assessed it in the FPRD?

9. If the FSA met its burden of production, has Drake met its burden of persuasion in demonstrating that it is not liable for the closed school loan discharges assessed it in the FPRD?

## VII. Discussion and Conclusions of Law

### A. Overview

The Higher Education Act of 1965 (HEA) was enacted to increase educational opportunities and "assist in making available the benefits of postsecondary education to eligible students…in institutions of higher education." 20 U.S.C. § 1070(a). To that end, Title IV of the HEA restructured federal financial aid and established three types of federal student loans. Direct Loans, which is one of the three types of federal student loans, is the subject of this case. Direct Loans are made directly to students and funded by the federal fisc. 20 U.S.C. §§ 1071, 1078, 1087 et seq.

The terms of federal loans are set by law, so they often come with benefits not offered by loans originated by private lenders. 20 U.S.C. §§1077, 1080, 1087e, 1087 dd. These benefits include deferment of repayment after graduation, loan qualification regardless of credit history, relatively low fixed interest rates, income-sensitive repayment plans, and government payment of interest while the borrower is in school. *Id*. The HEA also specifies the terms and conditions that attach to federal loans, including interest rates, loan fees, repayment plans, and consequences of default. *Id*.

The HEA also authorizes the Secretary to cancel or reduce loans under certain limited circumstances and to forgive the loans of borrowers who have died or become permanently and totally disabled such that they cannot engage in substantial gainful activity. 20 U.S.C. §§ 1087j, 1087ee, 1087(a). Additionally, the Secretary is directed to discharge loans for borrowers falsely certified by their schools, borrowers whose schools fail to pay loan proceeds, and, as most relevant here, borrowers whose schools close down. 20 U.S.C. § 1087(c).

### B. The Direct Loan Application Process

Under the HEA's Direct Loan program, an eligible student receives a loan from a participating lender, to pay tuition and living expenses incident to their attendance at an institution participating in the Direct Loan program. 20 U.S.C. § 1071. Repayment of the loan is insured by a state or private guarantee agency, which, in turn, is reinsured by the Department. 20 U.S.C. § 1078(b); 34 C.F.R. § 682.404. In addition to insuring the loan, the Department provides subsidies to lenders to compensate them for below market interest rates and pays the holder of the loan interest during the period in which the student-borrower is attending school. 34 C.F.R. §§ 682.209 and 682.300.

A school may participate in the Direct Loan Program only pursuant to written agreement, the Program Participation Agreement, in which the school agrees to comply with the HEA, Direct Loan regulations, and other applicable general Title IV, HEA regulations. 34 C.F.R. § 682.601(a)(2)(b) (2015). To participate in the Direct Loan Program, the school must agree, among other things, to "accept responsibility and financial liability stemming from its failure to perform its functions under the Program Participation Agreement." 20 U.S.C. §1087d(a)(3).

### C. Requirement and Process for a Closed School Loan Discharge

Under 20 U.S.C. § 1087(c)(1), the Secretary of Education is required to discharge a student's liability on a loan if the student was unable to complete the program of study in which he or she was enrolled due to the closure of the school and to subsequently pursue any claim available to the borrower. A "borrower whose loan has been discharged pursuant to Section 437(c)(2) shall be deemed to have been assigned to the United States the right to a loan refund up to the amount discharged against the institution." 20 U.S.C. § 1087(c)(2).

Under the Federal Direct Loan Program regulations in effect in 2015 when Drake closed, a student can be eligible for a "closed school loan discharge" if they are unable to complete the program of study for which the loan was made because the school at which they were enrolled closed, or if the student withdrew from the school within 120 days prior to its closing and the student did not complete their educational program through a teach-out at another school or by transferring academic credits to another school. 34 C.F.R. § 685.214(c)(1)(i)(B)(2015).

A student applies for a closed school loan discharge by filing an application, sworn under penalty of perjury, attesting that they meet the requirements for discharge. 34 C.F.R. § 685.214(c)(1)(2015). For the Federal Direct Loan Program, the Secretary reviews the application and, if it meets the requirements for discharge, the Secretary discharges the obligation and the

borrower is relieved of the obligation to repay the loan. 34 C.F.R. §§ 682.102(a), 685.212(d), and 685.214(2015).

Upon discharge of a loan, the borrower whose loan has been discharged is deemed to have assigned to the Secretary the right to a loan refund from the institution, its principals, affiliates, and their successors in the amount of the discharged loan. 20 U.S.C § 1087(c)(2).

### D. The Department's Authority to Seek Recovery for Discharged Student Loans

In the PRR and FPRD, FSA relies on the Department's authority under 20 U.S.C. §§ 1087(c)(1) and(c)(2), and 34 C.F.R. §§ 685.214(b)(2015),685.214(c)(1)(i)(2015), and 685.214(e)(2015) for the Department's authority to seek recovery for discharged student loans. Exh. ED-1 at 4-5.

Drake acknowledges that the Secretary is authorized to discharge loans for students who cannot complete their programs due to an institution's closure but contends that the Secretary lacks the authority to demand that repayment of closed school loan discharges simply because the Department discharged the loans. Drake argues that the statute only permits the Department to "pursue any claim available to the borrowers against the institution," and only gives the Department a "subrogation right," subject to applicable defenses under state law, not a new claim that can be adjudicated through an administrative proceeding. In support of this argument, Drake asserts the statute's plain meaning and as that plain meaning is reflected in 34 C.F.R. § 685.214.

In response, FSA argues that the law does not require anything more than showing that closed school loan discharges were granted to eligible students and that the amount of the associated liability established by the Department as a result of a program review or audit determination does not exceed the amount discharged and relies on 20 U.S.C. § 1087, 34 C.F.R. §685.214(2015), and OHA decisions. The Department further asserts that it does have an assignable claim – from the borrowers - a broken promise to provide an education of sufficient duration that the students can finish their programs.

Section 1087(c)(1) provides as follows:

> If a borrower who received, on or after January 1, 1986, a loan made, insured, or guaranteed under this part and the student borrower, or the student on whose behalf a parent borrowed, is unable to complete the program in which such student is enrolled due to the closure of the institution or if such student's eligibility to borrow under this part was falsely certified by the eligible institution or was falsely certified as a result of a crime of identity theft, or if the institution failed to make a refund of loan proceeds which the institution owed to such student's lender, then the Secretary shall discharge the borrower's liability on the loan (including interest and collection fees) by repaying the amount owed on the loan and shall subsequently pursue any claim available to such borrower against the institution and its affiliates and

> principals or settle the loan obligation pursuant to the financial responsibility authority under subpart 3 of part H.

The regulations relied upon by FSA in the FPRD, 34 C.F.R. §§685.214(b)(2015),685.214(c)(1)(i)(2015), and 685.214(e)(2015), set out the relief extended to borrowers pursuant to discharge, the mechanics for borrowers to seek loan discharges, and also the borrowers' transfer of right of recovery, respectively. The cited regulations do not address the Secretary's authority to demand repayment for closed school discharges from the closed school .

However, the plain language of the 20 U.S.C. § 1087(c) clearly provides for an automatic assignment of the borrower's rights and requires the Secretary, following discharge, to pursue any claim available to such borrower against the institution and its affiliates and principals or settle the loan obligation pursuant to his or her financial responsibility authority under subpart 3 of part H. 20 U.S.C. § 1087(c)(1). Subpart 3 of part H refers to the Program Integrity Process, 20 U.S.C. Chapter 28, Subchapter IV, Part H, subpart 3, which encompasses the program review and administrative appeal processes.

To the extent that there is any ambiguity in § 1087(c) regarding the Secretary's authority, legislative history confirms that Congress intended to confer authority on the Secretary to seek repayment for loan discharges from closed schools. Upon passing the Higher Education Amendments of 1992, Congress amended 20 U.S.C. §1087(c), effective October 1, 1992, to require the Secretary to discharge the borrower's liability on loans made where the student was unable to complete their program of study due to closure of the school. Pub. L. 102-324, Title IV, 428, 106 Stat. 448 (July 23, 1992). The stated purpose of portions of the Amendments of 1992 on Integrity, including the amendment adding closed loan discharges, was to restore integrity to student aid programs and also to restore public confidence in the integrity of the programs, following numerous scandals that had undermined the public's commitment to the programs. S. Rep. 102-204 at *43. "(T)he whole effort towards strengthening the TRIAD[3] is aimed at assuring that federal aid can only be used at schools that provide quality instruction. Further the bill provides for the Secretary to repay loans for any students who were attending a school that closed during their studies or whose loan eligibility was fraudulently certified. *The Secretary is then required to pursue these claims against the schools*." *Id*. at *48-49 (emphasis added).

The plain language of the statute and legislative history make clear that the Secretary has authority to seek reimbursement for closed school loan discharges from closed schools. Indeed, Congress tasked the Secretary with pursuing claims available to borrowers whose schools have closed. 20 U.S.C. § 1087(c)(1). Section 1087(c) expressly authorizes the Secretary to pursue those claims through the program review and administrative appeal process. *Id*. Contrary to Drake's argument, the Department's right of recovery is statutorily grounded.

Drake correctly points out that the decisions relied upon by FSA are not precedence but were issued by OHA. Previous OHA decisions, issued between 2010 and 2022, have upheld FSA's

[3] "TRIAD" refers to the accrediting agencies, the States, and the Federal Government. S. Rep. 102-204 at 4.

assessments of liabilities to closed schools for closed school loan discharges upon concluding that once the student loan is discharged, the statute directs the Secretary, as the subrogee to the students' rights, to pursue recovery against the closed school for the amounts discharged. *In re Hawaii Business College*, Dkt. No. 10-09-SP, U.S. Dep't of Educ. (Aug. 16, 2010); *In re College of Visual Arts*, Dkt. No. 15-05-SP, U.S. Dep't of Educ. (July 20, 2015); *In re Pennsylvania School of Business*, Dkt. No. 15-04-SA, U.S. Dep't of Educ. (Oct. 27, 2015); *In re Cosmetology Career Institute*, Dkt. No. 21-48-SP (May 27, 2022). A review of Secretary decisions indicates that the Secretary has not issued a decision that addresses the issue concerning the Secretary's authority to seek repayment for closed school loan discharges as raised here.

### E. Authority to pursue claims for discharged loans in administrative proceeding

Drake advances three arguments in support of its contention that OHA is an improper venue. First, Drake argues that FSA cannot pursue its claims against Drake through an administrative proceeding because its Program Participation Agreement with the Department terminated and, therefore, OHA is an improper venue. Second, Drake argues that the Secretary's claims for discharged loans are subrogated claims that derive from state law and thus cannot be pursued by the Department in an administrative proceeding but must be litigated in a state or federal court. Third, Drake argues that it has a right to a jury trial under the Seventh Amendment and in support thereof cites *Jarkesy v. SEC*, 34 F.4th 446, 452 (5th Cir. 2022)[4] for this proposition.

In opposition, the Department asserts that the HEA makes clear that the appropriate venue for recovery of closed school loan discharges is the agency's tribunal and not the myriad of state courts Drake argues should hear the case.

Neither of Drake's arguments that FSA cannot pursue its claims through an administrative proceeding, but must do so in state or federal court, is convincing. The Department's regulations provide for transfer to the Secretary of the student borrower's right of recovery against third parties after the Secretary discharges the student's loans and make clear that they preempt any provisions of state law that would otherwise restrict transfer or exercise of those rights. 34 C.F.R. § 685.214(e). Further, once a student's loan discharge is granted, the Secretary, as the subrogee of the student's rights, is directed to pursue recovery against the closed school for the amounts forgiven. 20 U.S.C. § 1087(c); 34 C.F.R. § 682 .214(e). Finally, 20 U.S.C. § 1087(c) expressly provides that after discharging a loan the Secretary shall pursue any claim available to the borrower under subpart 3 of part H. Subpart 3 of part H refers to the Program Integrity Process, which encompasses the program review and administrative appeal processes.

Contrary to Drake's contention, termination of its Program Participation Agreement upon closure of the school did not curtail the Department's right to pursue claims against Drake through an administrative proceeding. Upon entering into the Program Participation Agreement, Drake agreed, among other things, that it would comply with all applicable statutory and regulatory requirements for Title IV of the HEA. 20 U.S.C. § 1087d(a); 34 C.F.R. § 668.14(b). Those

[4] The United States Supreme Court granted the SEC's Petition for a Writ of Certiorari in SEC v. Jarkesy, Dkt. No. 22-859, on June 30, 2023.

regulations cover final disposition of all program funds that Drake administered. 34 C.F.R. §§ 668.24(d)(4) and (e) (retention of records); 34 C.F.R. § 668.26(b) (close-out audit); and, 34 C.F.R. § 668.14(b) (recovery of closed school loans). The fiduciary duty created by 34 C.F.R. § 668.14(b) governing program participants covers not only the final disposition, but all aspects of the administration of federal program funds. *In re Puerto Rico Technology and Beauty College and Lamer, Inc. d/b/a Puerto Rico Barber and Technical College*, Dkt. Nos. 90-34-ST and 90-38-ST, U.S. Dep't of Educ. (Decision of the Secretary) (Oct. 7, 1991) at 5.

Nor is Drake's argument that it has a Seventh Amendment right to a jury trial or its reliance on *Jarkesy* persuasive. The Seventh Amendment preserves the "right of trial by jury" in "suits at common law, where the value in controversy shall exceed twenty dollars." The Seventh Amendment is not a bar to adjudication by a non-jury factfinder in a non-Article III tribunal when Congress has assigned that function to an administrative forum. *Oil States Energy Services LLC v. Greene's Energy Grove, LLC*, 138 S.Ct. 1365, 1379 (2018); *Granfinanciera, S.A. v. Nordberg*, 109 S.Ct. 2782 (1989); *Atlas Roofing Co v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977). In *Jarkesy*, the Fifth Circuit ruled that the SEC's administrative proceeding process for enforcement of Dodd Frank civil penalties for securities fraud violated the Seventh Amendment's guarantee of a jury trial because the case involved common law claims (fraud) and civil penalties, to which remedies the Seventh Amendment attaches. Here, unlike in *Jarkesy*, the Department has not asserted common law claims or sought civil penalties but seeks a return of Title IV monies. In any event, it does not appear that Fifth Circuit law is controlling here as any appeal by Drake likely would be lodged in the Second or Third Circuit, based on the locations of Drake and its owner.

### F. Forfeiture of Claims for Repayment based on Settlement Agreement

Drake contends that the Department forfeited any claim to repayment of closed school loan discharges loans by failing to reserve that right in the Settlement Agreement, in which agreement the Department reserved only its right to pursue criminal or civil fraud actions.

FSA counters that there is nothing in the language of the Settlement Agreement that suggests liabilities resulting from Drake's closure would not be recouped.

Settlement agreements are contracts and therefore governed by contract law. *Goldman v. C.I.R.*, 39 F.3d 402, 405 (2d Cir. 1994); *In re Columbia Gas System*, 50 F.3d 233, 238 (3d Cir. 1995). It is a basic principle of contract interpretation that where the language of a contract is unambiguous, courts should subscribe its plain meaning to it. *Krumme v. Westpoint Stevens, Inc.,* 238 F. 3d 133, 139 (2d Cir. 2000). The language of a contract is ambiguous if it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *Seiden Assocs. v. ANC Holdings*, 959 F.2d 425, 428 (2nd Cir. 1992); *Emerson Radio Corp. v. Orion Sales, Inc*., 253 F.3d 159 (3d Cir. 2001).

Turning to the language of the Settlement Agreement in this case, it is clear from the plain language of the agreement, when read in its entirety and in context, that closed school loan

discharges were intentionally not addressed in the Settlement Agreement but remained to be addressed. At the beginning of the Settlement Agreement, the parties expressly agreed, without ambiguity, that the purpose of the agreement was to resolve the recertification denial regarding IBS and the previously conducted open program reviews concerning IBS and Drake. The agreement makes no mention that its purpose was to resolve any other issues related to Drake's closure. Consist with the expressed intent of the parties to resolve only the recertification denial and then-open program reviews, the Settlement Agreement does not contain a term that addresses liabilities or recovery for closed school loan discharges. Rather, under paragraph C.2 of the Settlement Agreement, Drake specifically agreed that it would "not conceal, misconstrue, or otherwise misrepresent any student's eligibility for a closed school loan discharge," clearly and unambiguously indicating that closed school loan discharges had not been resolved, but were yet to be addressed.

Drake's argument that FSA forfeited any claim to repayment of closed school loan discharges loans by failing to reserve that right in the Settlement Agreement is not persuasive. In support of its argument, Drake points to the terms of the Settlement Agreement in which FSA expressly reserved its rights to pursue criminal or civil fraud actions against IBS and/or Drake, arguing that the Settlement's Agreement's silence as to reservation of rights to recoup for closed school loan discharges equates to forfeiture of that right. But FSA's express reservation of rights to pursue criminal or civil fraud actions in the Settlement Agreement was consistent with the pending administrative actions against IBS and Drake, recertification denial and open program reviews, which the parties expressly stated they were resolving in the Settlement Agreement.

By signing the Settlement Agreement, Drake agreed to the terms therein, including its provision that the agreement was entered in order to resolve the recertification denial for IBS and the then-open program reviews for IBS and Drake. Drake was represented by counsel during that time. Drake's dissatisfaction with the Settlement Agreement in hindsight is not grounds to justify the relief it now seeks.

Contrary to Drake's contention, the terms of the Settlement Agreement do not preclude FSA from recouping liabilities for closed school loan discharges.

### G. Record Retention and Laches

Drake has raised the defense of laches to the Department's action. In support of application of laches, Drake asserts that the Department first notified it of potential closed school loan discharges in January 2020. Drake argues that the Department unreasonably delayed notifying it that it had approved loan discharges and that it was prejudiced by FSA's delays because it lost access to the NSLDS when it closed, lacks resources, including employees, necessary to factually challenge the Department's asserted liabilities, and that the records are outside the three-year retention period required by 34 C.F.R. § 668.24.

In opposition, FSA asserts that it delayed in issuing the PRR for closed school loan discharges until January 2020, because it was still in dispute with Drake over liabilities resulting from a prior PRR, and that it issued the PRR in this case only after the issues in the earlier case

were fully briefed. FSA argues that since it has provided a basis for the delay, laches does not apply and that the defense of laches is an extraordinary remedy that should only be applied in extreme cases.

At the outset, before addressing the laches defense, the record retention period under 34 C.F.R. § 668.24, relied on by Drake to support its laches argument, requires clarification. Drake argues that it was prejudiced because the PRR was issued past the three-year record retention period. Notably, although Drake contends that the records concerning the discharged loans at issue fall outside the retention period, Drake does not state that it does not have the records. Drake is correct in stating that 34 C.F.R. § 668.24 sets a three-year retention period. But § 668.24 does not merely set a three-year retention period, it also requires that an institution keep all records involved in a program review, investigation, or other review *until the later of* resolution of that questioned loan, claim or expenditure *or* the end of the record retention period. 34 C.F.R. § 668.24 (e)(3) (emphasis added). As discussed below, record evidence establishes that Drake was aware well in advance of the three-year retention period that resolution of closed school loan discharges had not occurred, but would occur in the future, and also establishes that FSA instructed Drake that it was required to retain records until such resolution.

The doctrine of laches is a long-standing doctrine created by courts seeking to invoke considerations of fairness and equity based on recognition for speedy vindication or enforcements. The doctrine is typically, if not exclusively, raised as an affirmative defense by the party seeking its shield. *In re American Business College*, Dkt. No. 03-100-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 7, 2011) at 2, citing *Brundage v. United States*, 205 Ct. Cl. 502, 504 F.2d 1382, 1384 (1974). 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. *In re Bramson Ort College*, Dkt. No. 18-08-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Oct. 15, 2021) (issuance of FPRD three years after issuance of PRR was not legally deficient where institution was not prejudiced but able to provide specific information in the file review).

The affirmative defense of laches requires proof of (1) lack of diligence by a party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *In re American Business College*, Dkt. No. 03-100-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 7, 2011) at 2, citing *Costello v. United States*, 365 U.S. 265 (1961) (prejudice involves the inability to defend oneself against the claim of the government because of the passage of time). In considering proof of lack of diligence by the party against whom the defense is asserted, there is no case law to support invoking laches against the Secretary (or for that matter, any tribunal) as a result of the time required to adjudicate a case and issue a decision. *In re American Business College*, Dkt. No. 03-100-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 7, 2011) at 3 - 4. Time to adjudicate a case before the Department/Secretary should not be attributed as delay by the Department when considering lack of diligence. *Id*.

In early 2021, the Secretary stated that the defense of laches does not apply to the Department's program reviews and audits. *In re Hair California Beauty Academy*, Dkt. No. 18-13-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 15, 2021). In late 2021, the Secretary rejected the Institution's defense of laches, noting that enforcement of laches against the government is disfavored where the government is acting in the public's interest and that '(a)s a general rule laches or neglect of a 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.' *In re Bramson Ort College*, Dkt. No. 18-08-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Oct. 15, 2021), citing *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. 384, 409) (1917)).

However, as early as 1990, the Secretary also has indicated that the defense of laches is available in Subpart H proceedings. In *In re Platt Junior College*, Dkt. No. 90-2-SA, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 19. 1990), the Secretary disagreed with the holding in the initial decision that laches could not be asserted against the United States in its sovereign capacity to enforce a public right or protect the public interest, in view of more recent case law than that cited by the ALJ, saying the Government may be subjected to laches and remanded the case for further consideration. On remand, this tribunal determined that the defense of laches could be raised in an FSA proceeding. *In re Platt Junior College*, Dkt. No. 90-2-SA, U.S. Dep't of Educ. (Decision on Remand) (Oct. 31, 1991).

In subsequent decisions, this tribunal has allowed assertion of and considered the defense of laches. *See In re Pennsylvania College of Straight Chiropractic*, Dkt. No. 90-8-SA, U.S. Dep't of Educ. (Order Sua Sponte Amending Initial Decision) (Feb. 21, 1990); *In re City University of New York (CUNY)*, Dkt. No. 93-3-O, U.S. Dep't of Educ. (Mar. 30, 1994); *In re Mary Holmes College*, Dkt. No. 94-90-SA, U.S. Dep't of Educ. (May 3, 1995); *In re National Training Service*, Dkt. No. 92-101-SP, U.S. Dep't of Educ. (Oct. 6, 1995); *In re Belzer Yeshiva*, Dkt. No. 95-55-SP, U.S. Dep't of Educ. (June 19, 1996) at FN 3; *In re OIC Vocational Institution*, Dkt. No. 98-12-SP, U.S. Dep't of Educ. (Sept. 23, 1998); *In re American Business College*, Dkt. No. 03-100-SP, U.S. Dep't of Educ. (Decision on Remand) (Aug. 10, 2005); *In re Ednet Career Institute*, Dkt. No. 07-41-SP, U.S. Dep't of Educ. (Aug. 31, 2009) at 4; *In re Denver Academy of Court Reporting*, Dkt. No. 05-26-SP, U.S. Dep't of Educ. (Sept. 27, 2005); *In re Community College System of New Hampshire*, Dkt. No. 09-35-SA, U.S. Dep't of Educ. (June 21, 2010); *In re Hawaii Business College*, Dkt. No. 10-09-SP, U.S. Dep't of Educ. (Aug. 16, 2010); *In re University of Cincinnatti*, Dkt. No. 11-34-SP (Aug. 30, 2011); *In re Hiwassee College*, Dkt. No. 17-54-SP, U.S. Dep't of Educ. (Dec. 31, 2018); *In re Hair California Beauty Academy*, Dkt. No. 18-13-SP, U.S. Dep't of Educ. (July 2, 2019); *In re Salon and Spa Institute*, Dkt. No. 18-16-SP, U.S. Dep't of Educ. (April 27, 2020) at 15; *In re Bramson Ort College*, Dkt. No. 18-08-SP, U.S. Dep't of Educ. (July 30, 2020); *In re Estate of Decker College*, Dkt. No. 21-02-SA, U.S. Dep't of Educ. (July 6, 2021) at 15-16.

The Secretary, too, subsequently indicated that laches is a viable defense in FSA proceedings. *See In re American Business College*, Dkt. No. 03-100-SP, U.S. Dep't of Educ. (Decision of the Secretary) ( Jan. 7, 2011) (ALJ improperly raised the defense of laches sua sponte); *In re Institute of Medical Education*, Dkt. Nos. 12-59-SA and 13-58-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Aug. 18, 2014) (PRR issued eight months after program review and five months after institution responded to the PRR was not unreasonable or unexplained or unfairly prejudicial to institution's ability to respond).

Even in the 2021 Secretary decisions that indicated the defense of laches is not available, the Secretary, suggested, by implication, that laches is a viable defense when he next considered application of laches to the facts of each case. In *Hair California Beauty Academy, supra* at 5, the Secretary discussed whether the delay was unreasonable, unexplained, or prejudicial. In

*Bramson Ort College*, *supra* at 5-6, after noting that, as a general rule, laches is no defense to a suit brought by the Government to enforce a public right or protect a public interest, the Secretary went on to rule that the Judge properly considered and rejected the institution's claims of prejudice resulting from the delay.

The clear statements in the recent Secretary 2021 decisions that the defense of laches is unavailable in audit and determination proceedings readily lead to the conclusion, at first reading, that Drake's defense of laches should be rejected. However, the long line of cases in which laches has been applied by OHA since 1990, following the Secretary's order stating that the Government may be subjected to laches under then recent developments in case law, together with indication in the same 2021 decisions regarding application of laches, lead me to conclude that the Secretary continues to recognize the defense of laches in Subpart H proceedings. The reasonable interpretation of the Secretary's statements, and that which is consistent with his earlier decisions, is his recognition that applying laches against the Government has been disfavored historically, that its application is reserved only for the most extreme cases of delay, and that OHA should continue to recognize it as a viable defense when raised and consider it. *See In re Platt Junior College*, Dkt. No. 09-02-SA, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 19, 1990) at 2; *In re American Business College*, Dkt. No. 03-100-SP, U.S. Dep't of Educ. (Decision of the Secretary) ( Jan. 7, 2011) at 2-4. Accordingly, Drake's assertion of laches will be considered.

Drake has not proven either lack of diligence on the part of FSA or prejudice to Drake as a result of FSA's delay, both of which must be proven to prevail on a laches defense. Record evidence establishes that FSA delayed issuing the Program Review Report in this case because it was awaiting resolution of the FPRD it had issued in January 2019, which was preceded by a PRR issued in 2016.[5] FSA issued a Program Review Report in this case on January 31, 2020, to which Drake responded on May 28, 2020. FSA then issued the FPRD in this case on September 30, 2022. Thus, while there was a period of four to five years before FSA issued the PRR in this case and although FSA's purported reason for its delay in issuing the PRR may appear unreasonable, there was a continuum of actions on FSA's part during that time, and the reason supplied by FSA for its delay in issuing the PRR is supported by other actions underway.

Even if Drake had demonstrated that FSA's delay was attributed to FSA's lack of diligence, Drake's argument that the delay worked prejudice to it because the records are outside the three-year retention period and that it now lacks resources to challenge the liabilities is unconvincing. It is clear that Drake was aware from at least the time it executed the Settlement Agreement in December 2014 that it was subject to closed school loan discharges, as evidenced by the term in the Settlement Agreement under which Drake agreed that it would "not conceal, misconstrue, or otherwise misrepresent any student's eligibility for a closed school loan discharge," clearly indicating Drake's awareness of school loan discharges that would occur following its closure.

Additionally, FSA, through its issuances to Drake starting in 2016, within less than one

[5] FSA's Program Review Guide for Institutions (2009) does not contain a time frame for the Department's issuance of a PRR.

year of Drake's closing, and continuing through 2022, continuously maintained it had claims to press against Drake. In FSA's February 22, 2016 letter to Drake regarding the close-out audit Drake submitted, FSA informed Drake that liabilities for closed school loan discharges could be assessed it through a program review process and that the Department would seek to recover those liabilities from Drake. FSA instructed Drake that it must retain all records until the end of the applicable retention period as required by 34 C.F.R. § 668.24. In both the 2016 Program Review Report and the 2019 FPRD, FSA advised Drake that program records must be retained until resolution of loans, claims, or expenditures. Yet again in the 2022 Program Review Report and the 2022 FPRD, FSA advised Drake that program records must be retained until resolution of loans, claims, or expenditures.

Upon consideration of this contextual history, the chronology of events, and the evidence as presented, Drake has not proven that FSA's lack of diligence or resulting prejudice to Drake disabled it from defending itself because of the passage of time. Therefore, Drake's affirmative defense of laches is unavailing.

### H. Burden of Proof

The notice provided to Drake, the FPRD, stated that students who received loans filed claims for discharges and that Drake was subject to the Department's claim of restitution on discharged Title IV, HEA loans based on its Program Participation Agreement, Title IV of the HEA, and all applicable regulatory provisions. Attached to the FPRD as Appendix A is a list of closed school loan discharges that comprised the $758,531 in liabilities. Exh. ED-1 at 12-17. The list contains the names of all 72 students, the last four digits of their social security numbers, the type of loans they received, the discharge post dates, and the amounts discharged. *Id*.

FSA contends that it met its prima facie burden through the information provided on Appendix A, together with the declarations of an FSA staff member on the established procedures for processing loan discharges and his certification that the information on loan discharges in the FPRD was obtained from loan servicers. FSA Brief at 8. FSA argues that it satisfied its prima facie burden but that Drake failed to provide any argument or evidence regarding individual borrowers.

Drake contends that the FPRD fails to make a prima facie case and argues that the Department's failure to provide any evidence supporting its assessed liabilities violates its right to due process. In support thereof, Drake points to the lack of evidence provided by FSA regarding the loan discharges: no evidence that any of the students applied for a closed school loan discharge; no evidence that the students who received closed school loan discharges were enrolled at Drake within 120 days of its closure; no evidence that the students did not complete their programs of study at alternate schools; and, no certifications by the students that they did not complete their education elsewhere. Drake asserts that the Department's mere assertion that there is no evidence in NSLDS that these students completed their studies is not sufficient.

Record evidence establishes that Drake responded to each of FSA's actions seeking

liabilities for closed school loan discharges by requesting that FSA provide it with information on underlying data relied on by FSA to determine its liability for loan discharges. In its response to the PRR on May 28, 2020, Drake requested the underlying data in order to respond to the Department's findings. In its Request for Review and brief, Drake noted the Department's failure to provide it with applications and records the Department relied on to assess discharge liabilities.

On this record, FSA did not respond to Drake's requests for underlying data on which the Department relied to determine Drake's liability for loan discharges.

In its brief, FSA explains why it did not provide Drake with underlying data and argues that its procedures for processing discharge applications, coupled with the information on student discharges provided to Drake in the FPRD, satisfied its burden. FSA explains that the Department did not submit the individual student discharge applications due to the number of students involved in the case and because doing so would create an undue and unnecessary burden on the Department. FSA Brief at 8. FSA argues this constitutes good reason for not providing more information concerning the discharged loans to Drake and that Drake failed to provide any argument or evidence regarding individual borrowers whose loans were discharged.

In the Program Review process, which is a part of the Subpart H process that precedes the appeal of a final program review determination, FSA is supposed to provide the institution an adequate opportunity to review and respond to any program review report and relevant materials. 20 U.S.C. §1099c-1(b)(6). In Subpart H appeals of final program review determinations, FSA bears the burden of production, while the institution bears the burden of proof. 20 U.S.C. §§ 1234a(a)(2), 1234a(b)(3); 34 C.F.R. § 668.116(d). This means that FSA must present evidence that when considered alone would lead the factfinder to the inference that a violation occurred. *In re Sinclair Community College*, Dkt. No. 89-21-S, U.S. Dep't of Educ. (Decision of the Secretary) (Sept. 26, 1991). The institution's burden of persuasion does not relieve FSA of its burden of production. FSA has the burden of providing adequate notice of its demand. *In re Housatonic*, Dkt. No. 15-36-SP, U.S. Dep't of Educ. (July 26, 2016).

In most Program Review Reports and Final Program Review Determinations, such as those based on compliance or closed school audits, the sort of information that FSA has provided Drake would constitute sufficient notice and provide Drake with an adequate opportunity to review and respond. The provided information would allow the institution to compare FSA's records with its own records and then to respond with rebuttal information. But in closed school loan discharges, much of the information relied upon by FSA to determine whether to grant a discharge and to assess any liabilities resulting from the discharges to the school does not allow the institution the opportunity to compare records relied upon by FSA to determine loan discharges with its records. That is because the information related to closed school loan discharges does not reside within the records of the closed school. Rather, it is information and documentation collected by loan servicers after the school closed and accessible only by student applicants, loan servicers, and FSA.

FSA outlined the seven-step application process for loan discharges in its brief. During that process, information and documentation relied upon to discharge loans is gathered by various loan servicers. That process occurs only after the school closes, when students apply for loan discharges. The closed school is not party to the process or privy to information collected during

the process. Only the student, the loan servicer, and FSA have access to the application and supporting documentation.

Without information on the underlying loan discharges, Drake is placed in an untenable position of not being fully informed of the liabilities assessed it. Without that information and having lost access to NSLDS once it closed, Drake is unable to review and question documentation that underlies the liabilities assessed it and, resultingly, unable to determine or submit proof that rebuts liabilities assessed it for loan discharges. Instead, under the circumstances here, Drake could only respond to a spreadsheet manually created from computer data, with no supporting documentation, that may or may not be based on accurate input and data extrapolation. Moreover, any facts or information that served as the basis for the data generated by the computer would have been collected after Drake's closure and is not documentation or information that would have been maintained in records Drake was charged with retaining. In short, without being provided with information by FSA in the notice on the underlying loan discharges, Drake is unable to meaningfully respond to the liabilities for which it has been assessed.

This is not to say that a closed school cannot be assessed liabilities for loan discharges. In other closed school loan discharge cases, OHA has found FSA's notice sufficient where FSA provided detailed information and supporting documentation on discharged loans. *See*, e.g., *In re Cosmetology Institute*, Docket No. 21-48-SP, U.S. Dep't of Educ. (May 27, 2022); *In re Pennsylvania School of Business*, Dkt. No. 15-04-SA, U.S. Dep't of Educ. (Oct. 27, 2015); *In re Tri-State College*, Dkt. No. 12-53-SP, U.S. Dep't of Educ. (Jan. 9, 2013). It is only by providing such information that FSA can satisfy its burden of production, establish a prima facie case, and, in so doing, provide Drake a meaningful opportunity to respond. *Id*.; 20 U.S.C. §§ 1234a(a)(2), 1234a(b)(3), §1099c-1(b)(6); 34 C.F.R. § 668.116(d).

Providing such detailed information and supporting documentation to the closed school to allow it a meaningful opportunity to respond is underscored by the evidentiary limitations imposed on parties in Subpart H proceedings:

> A party may submit as evidence to the hearing official only materials within one or more of the following categories:
> (i) Department of Education audit reports and audit work papers for audits performed by the department's Office of Inspector General.
> (ii) In the case of an institution, institutional audit work papers, records, and other materials.
> (iii) In the case of a third-party servicer, the servicer's audit work papers and the records and other materials of the servicer or any institution that contracts with the servicer.
> (iv) Department of Education program review reports and work papers for program reviews.
> (v) Institutional or servicer records and other materials (including records and other materials of any institution that contracts with the servicer) provided to the Department of Education in response to a program review.
> (vi) Other Department of Education records and materials.

34 C.F.R. § 668.116(e)(1).

While Drake has the burden of proof in this proceeding, FSA bears the burden of proving adequate notice of its demand. FSA has not demonstrated that it presented sufficient information to establish a prima facie case for its demand in the FPRD. A student must apply to be considered for a closed school loan discharge. In that application, the student must swear under penalty of perjury that he or she meets the requirements for the discharge. 34 C.F.R. §§ 682.402(d)(3) and 685.214(c). FSA has not shown that the students at issue certified in their applications for discharge that they met these requirements, did not complete their programs of study at Drake due to its closure, and did not complete such programs through a teach-out at or transfer to another institution. FSA provided no records to confirm these pre-requisites for the discharges were satisfied, but, instead, provided only a list of student loans that were discharged based on data it obtained from the loan servicers' data base and later, in this proceeding, an explanation of the application discharge process.

## VIII. Conclusion and Order

With respect to liability for Federal Direct Loan liabilities for closed school loan discharges for the 72 students who were granted loan discharges, the finding in the FPRD does not sufficiently demonstrate the existence of a prima facie showing that Drake is liable to the Department for the closed school loan discharges granted to the 72 students at issue. The liabilities that FSA assessed to Drake in the amount of $758,531 are not supported and, therefore, the FPRD cannot be upheld, and, accordingly, is reversed.

This Initial Decision automatically becomes the Secretary's final decision 30 days after it is issued and received by both parties unless, within that 30-day period, either party appeals the decision to the Secretary. 34 C.F.R. § 668.121 (b). Information on how to appeal this decision to the Secretary is contained on the next page of this decision.

Dated: August 3, 2023

_____
Elizabeth Figueroa
Chief Administrative Law Judge

# 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. A party appealing the decision may submit proposed findings of fact or conclusions of law to the Secretary. If a party submits proposed findings of fact, then the findings must be supported by admissible evidence that is already in the record, matters that may be given official notice, or stipulations of the parties. Neither party may introduce new evidence on appeal. 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 appeal shall clearly indicate the case name and docket number. The appealing party shall provide a copy of the appeal to the opposing party, simultaneously with its filing of the appeal. The opposing party will then have 30 days to file its response to the appeal to the Secretary and shall provide a copy of its response to the party who appealed the decision, simultaneously with its filing of the response.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system. Otherwise, appeals must be timely filed with 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<br>Office of Hearings and Appeals<br>U.S. Department of Education<br>550 12th Street, S.W., 10th Floor<br>Washington, D.C. 20024 | Secretary of Education c/o Docket Clerk<br>Office of Hearings and Appeals<br>U.S. Department of Education<br>400 Maryland Avenue, S.W.<br>Washington D.C. 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.