

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

In the Matter of

Docket No. 96-132-SP

LIBERTY ACADEMY OF BUSINESS,
Respondent.

Student Financial Assistance Proceeding

Appearances: Charlotte Matthews, of Philadelphia, PA, for Liberty Academy of Business.

Jennifer L. Woodward, Esq., Office of the General Counsel, United States Department of Education, Washington, D.C.,
for Student Financial Assistance Programs

Before: Judge Ernest C. Canellos

INITIAL DECISION

Liberty Academy of Business (Liberty) was a proprietary institution of higher education located in Philadelphia, Pennsylvania, which offered programs of study in business. On August 23, 1996, the Office of Student Financial Assistance (OSFA) of the U.S. Department of Education (ED) issued a final program review determination (FPRD) finding that Liberty had violated a number of regulations promulgated pursuant to Title IV of the Higher Education Act of 1965, as amended (Title IV), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* The FPRD had its genesis in an on-site program review of Liberty's Title IV compliance for the award years 1994-1995 and 1995-1996, which occurred on November 27 - December 1, 1995, and December 7 - 14, 1995. The school closed on February 21, 1996.

On December 8, 1997, I issued an Interim Decision and Order remanding these proceedings to OSFA. In doing so, I determined that the FPRD, as a matter of due process, lacked adequate notice. I made this determination on the basis that OSFA improperly had abandoned the finding in the FPRD for which it had sought its recovery of funds and, instead, attempted to require Liberty to repay all Title IV funds disbursed during the award years at issue on the basis of an allegation presented for the first time in the initial brief of OSFA's counsel. [See footnote 1](#) Consequently, I ordered OSFA to modify the FPRD if it intended to pursue this new allegation. In addition, I directed the parties to consider all of the issues outstanding in this case before returning the dispute to me for adjudication, including the specific questions raised in my interim decision.

On February 9, 1999, counsel for OSFA filed a motion for termination of the proceedings and entry of judgment against Liberty. In support thereof, counsel stated that OSFA had amended the FPRD to "alleviate the failure of notice" identified by my interim decision. In addition, OSFA noted that it had sent the amended FPRD to the "last known address" of Liberty via certified, U.S. mail. [See footnote 2](#) The amended FPRD was returned to OSFA by the United States Postal Service (USPS) marked "Forwarding Order Expired." According to OSFA, Liberty had an affirmative obligation to keep ED informed of the institution's "current address." In this regard, OSFA argues that the expired USPS

forwarding order is clear evidence of Liberty's failure to meet its obligation. [See footnote 3](#)

It is a fundamental requirement of due process [See footnote 4](#) that prior to formally commencing an action that will affect an interest in property protected by due process, the government must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." [See footnote 5](#) As the U.S. Supreme Court has directed, due process requires that a party be "given notice by mail or such other means as is certain to ensure actual notice." [See footnote 6](#) The entire purpose and effect of the due process notice requirement is to ensure that a party is offered a reasonable opportunity to defend itself against an action by the government, when such action may adversely affect that party's interest.

Applying those principles to the facts of this case, I find that the practicalities of the situation OSFA found itself facing, namely, that it had a mailing address of an institution that had been closed for at least two years, and that the first attempted mailing had been unsuccessful due to an expired forwarding order, required OSFA to do more than it has done here. The dictates of the notice requirement would be reduced to form over substance if due process merely required OSFA to mail the FPRD without *any* regard for whether the mailing contained the party's current or proper address. On this point, the Supreme Court has been instructive: "if [a party's] name and address are reasonably ascertainable," then the government is obliged to obtain it as a "minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party." [See footnote 7](#) Although due process does not demand actual, successful notice, it does require a reasonable effort to give notice. To comport with the principle that process "which is mere gesture is not due process," [See footnote 8](#) SFAP should have presented evidence of its affirmative attempts to ascertain Liberty's current or correct mailing address. The most compelling evidence that such an address exists or existed is the marking by USPS indicating that the forwarding order had expired. The marking creates a strong inference that the address OSFA used was not current, and that Liberty had attempted to have its mail redirected to its current address by executing a forwarding order through USPS. Although the order had expired, a significant amount of time had lapsed since the institution closed its doors and OSFA issued the amended FPRD. Most importantly, OSFA presents no reason to assume that Liberty's current or correct address could not be ascertainable through a normal course of diligent inquiry.

OSFA's conduct is inconsistent with the safeguard of minimal due process. The means employed by OSFA to provide Liberty with notice of the amended FPRD were not sufficient to reasonably satisfy the agency's responsibility. A reasonable person presented with a letter that has been returned to the sender will ordinarily attempt to resend the mailing, if it is at all practicable to do so. Therefore, OSFA's motion for entry of judgment against Liberty is denied.

My finding is based upon the narrow grounds that OSFA failed to make an affirmative showing in its motion to dismiss that it complied with the direction set forth in my interim decision that it amend the FPRD and serve it upon the institution consistent with the dictates of due process. My decision to dismiss this case is the result of my determination that the rationale once justifying my retention of jurisdiction over this case is no longer applicable. The lapse of over two years since OSFA commenced this action is palpable proof that the prospect of judicial economy is remote. Likewise, it is perplexing why counsel for OSFA moved for entry of judgment against Liberty without responding, first, to the critical weaknesses in its own effort to present a prima facie case. Although OSFA counsel has ostensibly, but perhaps inadvertently, thwarted my attempt at judicial economy, it is worth noting that had I reached the merits of this case, for the reasons mentioned in my interim decision, it is doubtful whether OSFA would have ultimately prevailed by obtaining the liability it sought.

ORDER

On the basis of the foregoing, it is **HEREBY ORDERED** that OSFA's motion for entry of judgment against Liberty Academy of Business is **DENIED**. The above-captioned proceeding is **DISMISSED**.

Ernest C. Canellos
Chief Judge

Dated: April 7, 1999

SERVICE

A copy of the attached document was sent to the following:

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***Footnote: 1** I also noted that apart from the due process issue raised in this case, there were issues regarding OSFA's calculation of proposed liability that were serious enough to preclude my consideration of the merits of the case until OSFA addressed those issues in subsequent pleadings.*

***Footnote: 2** My interim decision was issued on December 8, 1997. For reasons unexplained by counsel, OSFA did not issue the amended FPRD until October 6, 1998. Although counsel for OSFA sent a FPRD to the tribunal in an envelope without cover letter or motion, the amended FPRD has not been filed in a manner that allows it to be duly entered into the record of these proceedings. Counsel's submission was not filed as an exhibit. Counsel also failed to attach a letter or brief explaining the purpose for which it had sent the tribunal its document.*

***Footnote: 3** Curiously, OSFA apparently adopted its position despite its awareness that the institution ceased operating for at least two years before OSFA attempted to deliver the amended FPRD. Although OSFA does not make explicit reference to the ED's own records, I will assume that OSFA's position is based on its good faith belief that the ED's current records do not reflect a more up-to-date address of Liberty or of its owner.*

***Footnote: 4** At least one federal court has recognized that the Higher Education Act, (HEA) seems to infuse a "reasonable notice" requirement in some or all HEA administrative proceedings, despite the fact that HEA proceedings are not fully governed by the procedural requirements of the Administrative Procedure Act. See, *Continental Training Services, Inc. v. Cavazos*, 893 F.2d 877 (7th Cir. 1990). ED's cases have never retreated from the Seventh Circuit's instruction, and I see no reason to do so in this case.*

***Footnote: 5** *Mennonite Board Of Missions v. Adams*, 462 U.S. 791, 799 (1983). The Court has also noted that it "is true that particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence." *Id.* As I noted in my interim decision, Liberty is represented by its owner, a non-lawyer. In this regard, any procedural irregularities that a pro se litigant may make by failing to represent itself in a manner that would be commonplace for a competent lawyer rarely, if ever, should be strictly held against the party acting on its own behalf.*

[Footnote: 6](#) *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 483 (1988).

[Footnote: 7](#) *Mennonite Board Of Missions v. Adams*, 462 U.S. at 799.

[Footnote: 8](#) *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).
