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

In the Matter of Docket No. 03-94-SA
EURO HAIR DESIGN INSTITUTE[1], Federal Student Aid Proceeding
Respondent.

FINAL ORDER

Appearances: Gerald M. Ritzert, Esq., of Fairfax, VA, for Euro Hair Design Institute.

Russell B. Wolff, Esq., of the Office of the General Counsel, United States Department of Education, Washington, D.C., for Federal Student Aid Programs

Before: Judge Richard I. Slippen

Euro Hair Design Institute (Euro) was located at 937 West State Road #436, Suite 1119 in Tallahassee, Florida, and offered programs of study in hair design. Euro ceased operations in 2002. On June 27, 2003, the United States Department of Education's (Department) Federal Student Aid (FSA) office issued a Final Audit Determination (FAD). The finding against Euro concerning the institution's administration of Federal Student Aid Program funds, as governed by 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., seeks to recover Title IV funds it alleges Euro expended, but did not account for in a close-out audit submitted to ED after Euro ceased operations.

On November 25, 2003, FSA filed a motion requesting that the tribunal issue an order entering default judgment against Euro for failure to comply with my Order Governing Proceedings. That order required Euro to submit a brief statement supporting its challenge to the findings of FSA's FAD. FSA stated that as of November 25, 2003, Euro had neither filed a brief nor requested additional time for filing a brief. Pursuant to my order, Euro's brief was due on or before November 3, 2003.

In accordance with my obligation to regulate the course of this proceeding and the conduct of the parties, the tribunal has the authority and the discretion to terminate the hearing process and issue a decision against a party if that party does not meet time limits or otherwise fails to comply with the instructions established pursuant to the tribunal's orders. The tribunal ordered Euro to show cause why entry of judgment against it for failure to prosecute its appeal is unwarranted. In response, counsel for Euro disclosed that its client had concluded that it cannot "justify" the legal fees in this case - - though the institution has the "ability" to do so - - because those fees are likely to exceed the amount FSA seeks to recover.2

As an initial matter, it is well established that in Subpart H -- audit and program review -- proceedings, the institution has the burden of proof. Consequently, to sustain its burden the institution must establish, by a preponderance of the evidence, that Title IV funds were lawfully disbursed.3 Applying that standard to this case, it is abundantly clear that the institution's failure to submit evidence in support of its position impairs its ability to meet its burden of proof. Notwithstanding that Euro has not satisfactorily complied with the tribunal's orders, which, itself, could warrant dismissing this case, the tribunal first must be persuaded that the FAD contains sufficient notice before the institution's obligation to meet its evidentiary burden need be evaluated.

Our cases have long held that FSA must identify facts and laws that support the findings in the FAD. Institutions are not required at risk or peril of a property interest to speculate as to the meaning of the allegations or findings against it. Our cases have amplified this standard and indicated that FSA could meet this standard by issuing a FAD that provides sufficient notice of the facts and law that form the basis of the FAD's findings.4

Prior to formally commencing an action that will affect an interest in property protected by due process, the proponent or charging party must provide "notice reasonably calculated, under all the circumstances, to apprise an interested party of the pendency of the action and afford the interested party an opportunity to present pertinent objections."5 The 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.6

In its "Motion for Default Judgment," FSA reiterates the findings of the FAD, and summarily states that the "FAD satisfies its burden of production."7 As a result of its failure to reconcile the alleged discrepancies, FSA required Euro to return to ED $8,687 in Federal SEOG program funds. The facts leading to the issuance of the FAD are not disputed.

Upon closing its institution, Euro filed a close-out audit with FSA prepared by an independent certified public accountant. Subsequently, FSA requested additional information regarding the audit, but Euro failed to supply any material other than the audit. The FAD indicates that Euro's close-out audit revealed that the auditor found "no instances of non-compliance" for the period at issue. FSA determined, however, that the close-out audit did not reconcile with expenditures reported under an accounting system simply referred to as "GAPS." Specifically, the finding alleged that " [i]nternal accounting records do not agree with GAPS" . The FAD identified a difference between the amounts accounted for in the audit
and from the GAPS system. The amount reported by the auditor did not agree with the GAPS accounting system. The discrepancies were identified as the following:

Reporting Item Auditor GAPS Difference
Pell Grant $281,073.00 $242,140.00 $38,933.00
SEOG $10,013.00 $18,700.00 $8,687

As a result of the finding in the FAD, FSA required Euro to return to ED $8,687. The FAD did not contain any further explanation for these amounts.

The FAD identifies discrepancies for both the Pell Grant and the SEOG programs, however, it is unclear why the institution owes a liability under the SEOG program since the Pell Grant program discrepancy, on its face, appears substantially larger and in favor of the institution. In other words, the discrepancies identified in the FAD appear internally inconsistent. On one hand, the FAD identifies what appears to be nearly $39,000 in Pell Grant funds accounted for by the independent auditor - and, therefore, expended by Euro - - but not presumably transferred from an FSA account to Euro. On the other hand, FSA clearly identifies $8,687 in SEOG funds not accounted for by the independent auditor, but presumably transferred from FSA to Euro. If both discrepancies are facially correct as derivative liability calculations, FSA's liability would necessarily be subsumed by the greater amount owed Euro. The FAD, however, does not indicate this result. If different meaning is to be ascribed to the two distinct discrepancies, there is no basis in the FAD to do so. Indeed, on the basis of the entire record, the tribunal is unable to determine what the significance of GAPS is in identifying a larger or smaller amount than accounted for by the independent audit. Notwithstanding that there may be a reasonable basis for how and why FSA calculated the liability in the manner shown

in the FAD or, that the basis may be known to the parties, the tribunal can neither infer that basis from the record, nor speculate upon what an adequate basis might be.

Accordingly, I am not convinced that the findings contained in the FAD sufficiently state allegations in a manner that demonstrate the existence of a prima facie showing that the institution failed to comply with Title IV program requirements as determined therein. My finding is based upon the narrow grounds that, consistent with the dictates of due process, the FAD in this case lacks adequate notice. Accordingly, despite the failure of Euro to comply with the tribunal's orders, the institution's obligation to meet its burden of proof does not attach. Therefore, this case must be dismissed.

ORDER

On the basis of the foregoing, it is HEREBY ORDERED that FSA's motion for entry of judgment against Euro is DENIED. It is FURTHER ORDERED that the above-captioned proceeding is DISMISSED.

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Judge Richard I. Slippen

Dated: February 11, 2004

SERVICE

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

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1 This case was originally captioned as Avanti Hair Tech.
2 For reasons not revealed, the Respondent must have concluded that no independent obligation existed to inform the tribunal that it would comply with either the Order Governing Proceedings, or, apparently, any other order issued by the tribunal. It was only after the time for filing a response had lapsed by at least 20 days, and upon an order to show cause why I should not enter judgment against its client, did counsel inform the tribunal by letter, dated December 12, 2003 that Euro "is not going to provide any further response in this matter."
3 See In re National Training, Inc., Dkt. No. 93-98-SA, U.S. Dep't of Educ. (October 18, 1995).

4 See, e.g., Liberty Academy of Business, Dkt. No. 96-132-SP, U.S. Department of Educ. (April 7, 1999) (Judge Canellos denying OSFA's motion for entry of judgment and dismissing case); see also In the Matter of Sinclair Community College, Dkt. No. 89-21-S, U.S. Dep't of Education (September 26, 1991) (Decision of the Secretary).
5 Mennonite Board Of Missions v. Adams, 462 U.S. 791, 799 (1983); compliance with the notice requirement in cases of administrative adjudication is so fundamental that notice has been viewed as a standard or principle "usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand." Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 230 (1938); though it is viewed as a constitutional standard, the roots of due process as a procedural safeguard can be traced to the Magna Carta. Poe v. Ullman, 367 U.S. 497, 541 (1961).
6 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).
7 In a typical case the tribunal will not look beyond the FAD (or what properly constitutes the determination letter) to construe whether sufficient notice of the matters alleged has been accomplished. This is so because the notice requirement, if unmet, cuts off the reach of the tribunal's jurisdiction. In this case, FSA's reference to "burden of production" is presumed to refer to the notice requirement.