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

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In the Matter of

EURO HAIR DESIGN INSTITUTE,

Respondent.

Docket No. 03-95-SA

Federal Student Aid Proceeding

FINAL ORDER

Appearances: Gerald M. Ritzert, Esq., Ritzert & Leyton, 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

Before: Judge Ernest C. Canellos

Euro Hair Design Institute (Euro) was located in Tallahassee, Florida, and offered programs of study in hair design.[1] It ceased operations in 2002. On June 27, 2003, the United States Department of Education (ED), 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. a*nd 42 U.S.C. § 2751 *et seq.* The FAD 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 I issue an order entering default judgment against Euro for failure to comply with my Order Governing Proceedings requiring Euro to submit a brief supporting its challenge to the findings of the FAD by October 30, 2003. In its motion, FSA stated that as of November 25, 2003, Euro had neither filed a brief nor requested additional time for filing and a brief.

In accordance with my obligation to regulate the course of this proceeding and the conduct of the parties, I have 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 my orders. On December 30, 2003, I 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. Merely contesting the findings of a FAD is not enough. Euro must affirmatively offer relevant proof that it disbursed Title IV funds in compliance with Title IV and ED’s regulations; however, before concluding that Euro did not satisfy its burden of proof, the tribunal must be persuaded that the condition precedent to the institution’s obligation to meet its evidentiary burden also has been sufficiently satisfied. In other words, the FAD must be reviewed for sufficiency of notice.[4]

Our cases have long held that due process requires that FSA must identify facts and laws that support the findings in the FAD.[5] 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.[6] 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.[7]

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. Thereafter, the FAD was issued. The FAD indicates that Euro’s close-out audit revealed that the auditor found “no instances of non-compliance” for the period at issue; that notwithstanding, FSA determined 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	$643,612.50	$598,653.27	$44,959.23
SEOG	$30,525.00	$31,880.00	$1355.00

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 appears substantially larger and in favor of the institution. In other words, on its face, the discrepancies identified in the FAD appear internally inconsistent. On one hand, the FAD identifies what appears to be nearly $45,000 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 $1,355 in SEOG funds as not accounted for by the independent auditor, but presumably transferred from FSA to Euro. If both discrepancies were 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 a Title IV program

requirement 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 Hair Design & Institute is DENIED. It is FURTHER ORDERED that the above-captioned proceeding is DISMISSED.

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Ernest C. Canellos
Chief Judge

Dated: April 8, 2004

SERVICE

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

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[1] There are two institutions in Tallahassee, Florida, which share the same name and also are challenging actions in Federal Student Aid proceedings; the specific location of the institution in this proceeding is: 2525 S. Monroe Street.

[2] For reasons not revealed, the Respondent must have concluded that no independent obligation existed to inform the tribunal that neither the Order Governing Proceedings, nor, apparently, any other order issued by the tribunal would be complied with. 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] Our cases rarely, if ever, discuss the condition precedent to the institution's burden of proof *unless* notice is found lacking, *sua sponte*, or the issue is raised by the institution.

[5] *See, e.g.*, *Liberty Academy of Business*, Dkt. No. 96-132-SP, U.S. Dep't 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 Educ. (September 26, 1991) (Decision of the Secretary).

[6] *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).

[7] 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).