

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

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In the Matter of

**Docket No. 98-153-SP**

**EVERGREEN BEAUTY COLLEGE,**  
Respondent.

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Student Financial  
Assistance Proceedings  
PRCN: 199740914105

Appearances: Alfred W. Wright, Esq., San Jose, California, for Respondent.

Denise Morelli, Esq., Office of the General Counsel, U.S. Department of Education,  
Washington, D.C., for Student Financial Assistance Programs.

Before: Frank K. Krueger, Jr., Administrative Judge.

**DECISION**

The Student Financial Assistance Programs (SFAP), U.S. Department of Education, conducted a program review at the Evergreen Beauty College during August and September 1997. SFAP concluded that Evergreen lacked the administrative capability to continue participation in the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, as amended, and imposed an emergency action immediately terminating the school's authority to award Title IV assistance. The school did not appeal the emergency action and voluntarily withdrew from the Title IV programs.

On November 4, 1998, SFAP issued a final program review determination in which it concluded as follows:

Due to the institution's practice of providing false certifications on Ability to Benefit [ATB] tests and on statements regarding high school graduation, the Department questions the veracity of all documents presented in support of students' eligibility for Title IV funds. Although the ATB tests were certified by the test administrator, Ms. Ethie Campagna, the tests were actually given by school officials, who in some cases, provided answers to the students. In the case of high school graduation certifications, many of the students verified that they had not provided such information to the school and that many times school officials gave them blank forms to sign. Many of the students were not aware of the contents of the information that was reported on the certifications.

Based to [sic] the serious violations and acts of fraud committed by the institution, the Department has determined that all Title IV funds the institution received since its initial participation in the Title IV programs, February 13, 1996, [\$206,998] are liabilities which

must be repaid to the Department. This blanket liability is due to the institution's inability to provide valid, correct, and complete records to support the eligibility of the students for whom the institution disbursed Title IV Federal funds. Due to the numerous instances of fraud and lack of valid documents, it is not possible to determine the exact amount of the liability under each finding.

ED Exhibit 4-2 to 4-3.

Attached to the final program review determination is the program review report. The program review report makes a number of additional findings which are not the basis for SFAP's liability determination, except that the program review report concluded that Evergreen was giving its ATB tests in languages other than English, i.e., Vietnamese and Spanish, which it was not authorized to do. This latter allegation is discussed and relied on by the SFAP brief, although it is not cited in the final program review determination letter. To the extent that the other alleged violations are not relied on by SFAP in its liability determination, and are not addressed in its brief, I will not address them in this decision.

As discussed below, the law and the evidence does not support all of SFAP's liability determinations. Thus, I find in part for SFAP and in part for Evergreen.

## DISCUSSION

SFAP alleges that the facts of this case establish a clear pattern of fraud and deceit. @ SFAP brief at 8. Because of this pattern of fraud and deceit, SFAP argues that Evergreen is liable for all Federal student assistance it awarded since becoming eligible to participate in the Title IV programs. SFAP cites no authority for this position. My independent research has uncovered no such authority, and I question the legality of SFAP's position.<sup>[1]</sup> It is not necessary for me to reach a conclusion regarding the validity of SFAP's legal theory, however, since the record does not reveal a clear pattern of fraud and deceit. @

According to SFAP, the school improperly administered the ATB test to five students (Students 30, 31, 49, 50, and 53); the certifications in three of these student files indicate that the tests were given by the school's certified test administrator but that the tests were actually given by a school employee;<sup>[2]</sup> school employees allowed five students (Students 31, 37, 50, 54 and 55) to take the ATB tests in Spanish and Vietnamese in violation of Federal regulations; and the school fabricated high school documentation for three students (Students 30, 40, and 46). Thus, according to SFAP's brief, there were a net total of ten student files with irregularities identified.<sup>[3]</sup>

### **Alleged Improper Administration of ATB Test by School Employees and False Certifications by Independent Test Administrator.**

#### **Student 30:**

In the case of Student 30, SFAP alleges that the school official administering the test gave her all of the answers. This allegation is based on ED Exhibit 12-1, which is presumably an English translation of a signed statement made by Student 30 in Vietnamese. However, the statement is not accompanied by any declaration or other statement as to who prepared the translation. The translation is not signed. The statement states that a Mr. Khiem (presumably, Mr. Khiem Quach, an officer and employee of Evergreen) gave her the ATB test and all of the answers because she did not know English. The statement is ambiguous as to whether Mr. Khiem actually gave her all of the answers, or told her where to place the answers on the English translation of the test after the student chose her answers on the Vietnamese version of the test. The school, of course, denies any wrongdoing, and states that a school employee administered the test, not as an ATB test, but as an admissions test since the student claimed to have a high school diploma. *See*

affidavits of Khiem Quach and Helena Tran contained in a document entitled AEvergreen Beauty College Program Review Finding #3. ED Exhibit 12-1 states that the school told the declarant to put down that she graduated from high school in Vietnam, but that she lost her diploma when she came to the U.S. The school argues that any statement from Student 30 is inherently unreliable since the student was suspended from the school. However, the student was suspended on November 5, 1997, but gave her statement to SFAP on October 24, 1997, before she was suspended. Notwithstanding, I find that the evidence submitted by SFAP too unreliable to conclude that the documentation in the school's file for Student 30 is false.

### **Student 31:**

Student 31 was interviewed by Ms. Martina Fernandez-Rosario, an institutional review specialist from SFAP's office in San Francisco. SFAP relies on Exhibit 10 in support of its position concerning this student. Exhibit 10 is a sworn declaration by Ms. Fernandez-Rosario stating that the student told her during the interview that Mr. Khiem gave her the test, even though the attached Wonderlic test for this student is signed by Ethie Campagna, the Wonderlic independent test administrator. Mr. Khiem submitted a sworn statement stating that he never administered the Wonderlic test unless the student in question was a high school graduate. Again I find that SFAP's evidence is unreliable, especially in light of Mr. Khiem's sworn statement to the contrary. The declaration by the SFAP institutional review specialist is dated March 17, 1999, and the interview on which the declaration is based took place several years before the declaration was prepared. The notes upon which the interviewer relied in preparing the declaration are not in the record.

### **Student 49:**

SFAP supports its contentions concerning Student 49 with a handwritten sworn statement by the student in English. The statement itself (ED Exhibit 11-1 to 11-2) is very difficult to read. In the statement the student states that she was given her ATB test by an individual identified only as AKim. The school states that the test was administered by the independent test administrator, and attaches a copy of the test signed by the administrator. Although the statement is somewhat confusing, in that it refers to a Kim as the test administrator, it does directly contradict the certification in the file signed by the administrator. The school has made no attempt to contradict the statement other than to state that the test certification speaks for itself. Since the school bears the burden of proof, I find that the statement raises questions, which remain unrebutted, as to who administered the test, and find that the school is liable for the Federal assistance awarded to this student.

### **Student 50:**

For Student 50, SFAP relies on a statement given by the student in Vietnamese and translated into English by Ms. Anhdoa Dang, a computer programmer with the Department. Ms. Dang is presumably fluent in English and Vietnamese, although the declaration is silent on this point. (Respondent never challenged the validity of the translations.) See Ed Exhibit 6-1, & 4, and 6-14 to 6-15. In the statement the student states that she was administered the test by Mr. Khiem, and not the person who signed the attached Wonderlic test. The test is certified by the Wonderlic tester, but it is impossible to tell which student took the test since the student's name is not legible<sup>[4]</sup> and the test does not appear to be signed. See Ed Exhibit 6-21. Again, we have conflicting declarations. Mr. Khiem states that he only gave tests to students who were high school graduates, but this student's application indicates that she was not a high school graduate. Although the SFAP exhibits are hard to read and poorly organized, they do contradict Mr. Khiem's statement. Since the school has the burden of proof, I find the school liable for this student.

### **Student 53:**

For Student 53, SFAP relies upon a declaration, dated May 18, 1999, signed by Ms. Martina Fernandez-Rosario, the institutional review specialist, which is based on notes she took during the interview in 1997. ED Exhibit 14-1. Ms. Fernandez-Rosario states that the student told her that she was not a high school graduate, and that an instructor, Mr. Thompson, gave her the test. The school never rebuts this declaration other than to state that the test was administered

by the independent test administrator and states that the test certification is attached. Respondent=s brief at 3. However, there is no test or certification attached for this student in either the Respondent=s or SFAP=s exhibits. Since the Respondent bears the burden of proof, I resolve this dispute in favor of SFAP and find that the school is liable for the Federal funds awarded to this student.

### **Alleged Improper Administration of ATB Tests in Vietnamese and Spanish.**

SFAP notes that Evergreen enrolled many students of Vietnamese and Hispanic descent who spoke little or no English. SFAP contends that classes are given only in English and thus the ATB test must be given in English. SFAP states that this is required by 34 C.F.R.

' 668.148(a)(2). School officials, according to SFAP, permitted students to take the test in their native language, or have a copy of the native language version with them when they took the test.

SFAP brief at 6.

There is no legal basis for SFAP=s position. The regulations relied on by SFAP provide as follows:

(2) In the case of a [ATB] test developed for a non-native speaker of English who is enrolled in a program that is taught in his or her native language, the test must be B

(i) Linguistically accurate and culturally sensitive to the population for which the test is designed, regardless of the language in which the test is written; . . . .

34 C.F.R. ' 668.148(a)(2) (1996). The regulation is inapposite to the case at hand. There is nothing illegal, or even inappropriate, to allow students to take ATB tests in their native language.

### **Alleged Fabrication of High School Documents.**

SFAP contends that Evergreen fabricated documentation regarding high school status for three students (Students 30, 40, and 46).<sup>[5]</sup>

#### **Student 30:**

The translated statement upon which SFAP relies states that Student 30 was not a high school graduate and that she was told by Evergreen officials to put down on her application that she was a high school graduate. As noted above, the statement relied on by SFAP is inherently unreliable.

#### **Student 40:**

The evidence concerning Student 40 includes the student=s signed registration application which indicates that this student completed high school, and a signed statement which states that the student lost her diploma. Both the application and the statement are of poor quality and hard to read. Ed Exhibit 6-42 to 6-44. In addition, the record contains a handwritten unsigned copy of a statement which SFAP says was given to them by Student 40. The statement was given in Vietnamese and, according to Ms. Kathleen Hochhater, an SFAP paralegal specialist, was translated into English by Ms. Dang, the Department=s computer programmer who also translated a number of other statements. Exhibit 7-1. (It is not clear why SFAP chose to establish the authenticity of this document through a paralegal specialist, rather than through the translator.) In the translated, unsigned statement, the student supposedly states that she never indicated in her application that she graduated from high school and that she never saw the statement that she lost her high school diploma. ED Exhibit 7-2 to 7-3. The statement asserts that the student was assisted in filling out the application by a Ms. Ann, the sister of the school=s owner. The school denies that it ever fabricated any documents concerning high school graduation for its students, and submitted a sworn declaration signed by Ms. Sophia Tran to that effect.<sup>[6]</sup> The school never specifically rebuts the alleged statements in Exhibit 7-2 to 7-3. Although I find Exhibit 7 unreliable, it does have the evidentiary value of shifting the burden onto the school to come forward with rebuttal

evidence. The school=s blanket denial, along with a declaration signed by someone other than Ms. Ann, is not enough to sustain the school=s burden of proof. Thus, I find that the school is liable to return the Title IV assistance it awarded to Student 40.<sup>[7]</sup>

**Student 46:**

For Student 46 SFAP submits a copy of what purports to be this student=s high school diploma which contains her picture. Also submitted is what purports to be a copy of this student=s driver=s license which also contains her picture. Ed Exhibits 6-38 and 6-39. SFAP submits a copy of this student=s statement, again translated by Ms. Dang, which states that although she completed the twelfth grade in Vietnam, she was not a high school graduate because she did not take the national test; that she has Alooked at both pages of Exhibit B and they are not mine. @ Ed Exhibit 6-33. The photo copy of the student=s high school diploma and the driver=s license are marked Exhibit B (presumably Exhibit B to her statement). Student 46 does not actually state that the school fabricated her high school diploma. In fact, there is nothing in the record which states where these documents came from. The quality of the copies is very poor, and one cannot tell, as presumably SFAP would argue, that the picture on the driver=s license and that on the high school diploma are the same. Thus, I am unable to conclude, as SFAP contends, that Evergreen fabricated the high school diploma by copying the student=s picture from her driver=s license and placing it on the high school diploma.

**ORDER**

ORDERED, that Respondent reimburse SFAP for all Federal student financial assistance awarded by Respondent to Students 40, 49, 50, and 53.<sup>[8]</sup>

Dated: August 10, 1999

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Frank K. Krueger, Jr.  
Administrative Judge

**SERVICE**

A copy of the attached decision was sent by certified mail, return receipt requested, to the following:

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<sup>[1]</sup> This tribunal has suggested that systemic failure of a participating school to comply with program regulations can result in a liability for all funds awarded by the institution. *See, e.g., Long Beach College of Business*, Docket No. 92-132-SP (July 14, 1994) (lowering of ATB passing score from that stipulated by test publisher); *Chauffeur=s Training School*, Docket No. 92-113-SP (Sept. 9, 1994) (systemic failure to comply with ATB requirements may lead to total liability, although judge declined to impose such liability, finding that the violations were isolated). This tribunal has held that the failure of a participating school to comply with an SFAP request that the school conduct a full-file review may result in a total liability for all Federal assistance awarded during the period covered by the program review. Such reviews are often requested after SFAP discovers numerous violations upon reviewing a sample of student files. *See, e.g., Classic Beauty Colleges*, Docket Nos. 96-147-SP, 97-33-SP, 97-58-SP, & 97-59-SP, U.S. Dept. of Educ. (September 30, 1997). However, under both legal theories, a school can avoid total liability by demonstrating that specific individual awards were proper. In the present case, SFAP seeks to go further than the mere shifting of the burden of coming forward with evidence, and hold the Respondent liable for all funds awarded even if the school could show that they were properly awarded, because it does not trust the school=s veracity. Such a legal theory appears beyond my authority and the scope of a Subpart H proceeding. *Cf. Liberty Academy of Business*, 96-132-SP ( Interim Decision and Order, December 8, 1997) at 2, note 1.

<sup>[2]</sup> SFAP=s brief actually states that Athe tests in **most** of the student=s [sic] files have a certification from a Ms. Ethie Campagna stating that she personally administered the tests. ED Exs. 6 at 18-21; 10 at 2-6; 11 at 3-4. @ SFAP brief at 5-6; emphasis added. However, the evidence cited only concerns three students. ED Exhibit 6 at 18-21 is a Wonderlic test, but one cannot tell which student it belongs to, as the student=s name is obliterated and it does not appear to be signed. ED Exhibit 10 at 2-6 is Student 31. ED Exhibit 11 at 3-4 is Student 49.

<sup>[3]</sup> The record is silent on how many students Evergreen enrolled during the period covered by the program review. Appendix A of the program review report identifies fifty-seven students in SFAP=s sample. Thus, 17.5 percent of the files contained in the sample were defective. The record is also silent on how many files in the sample were reviewed. If SFAP reviewed all fifty-seven, then forty-seven presumably contained no problems. However, under SFAP=s theory, the school would still be liable because the school=s files are untrustworthy. As noted above, I have reservations concerning the legality of SFAP=s theory. Assuming the theory has some legal support, I do not find an error rate of 17.5 percent high enough to give rise to a presumption that all of Evergreen=s files are unreliable. The 17.5 percent may be sufficient to trigger a demand by SFAP that a school conduct a full-file review, which it did not do in this case.

[4] The Order Governing Proceeding issued on January 6, 1999, required that all exhibits be legible. There are several exhibits submitted by SFAP which do not comply with this order.

[5] SFAP actually suggests that these students are mere examples. SFAP brief at 7. SFAP never states how many students it contends the school fabricated documents for, but suggests that fabricated documents were found for ten other students. *Id.*, note 6 (note 6 refers to twelve students, but two of the students referred to are Students 30 and 40). The brief simply cites to the program review report, which simply makes the allegation repeated in the brief without attaching any supporting documentation.

[6] It is not clear from the record who owns Evergreen. SFAP=s final program determination letter is addressed to Ms. Sophia Tran and Ms. Helena Tran, as Aowner.@ In Ms. Sophia Tran=s affidavit, she states that she is Aan officer and employee of Evergreen Beauty College, Inc.@

[7] The evidence for this student demonstrates why SFAP=s theory -- that the appearance of alleged fabricated documents in Title IV files can lead to a determination that all of a school=s files are unreliable and thus the school is liable for all Title IV assistance awarded B is not appropriate for a Subpart H proceeding. Subpart H proceedings, in which there is no evidentiary hearing with live testimony, are not equipped to deal with issues in which witness credibility is at stake. The student statements relied upon by SFAP, in which the students contradict sworn statements by school officials, should be subjected to cross-examination, and the finder of fact should be given an opportunity to observe the witness testify under oath.

[8] SFAP put no evidence in the record concerning the precise amount of Title IV assistance awarded to each student. Consequently, I am unable to construct a dollar amount of liability.