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

In the Matter of	**Docket No. 15-60-SP**
Elite Academy of Beauty Arts	Federal Student Aid Proceeding
Respondent	PRCN: 201140227650

Appearances: Aaron Lacey and Jeffrey Fink, Thomas Coburn LLP for Elite Academy of Beauty Arts

Denise Morelli, the Office of the General Counsel, U.S. Department of Education, Washington, D.C., for Federal Student Aid

Before: Daniel J. McGinn-Shapiro, Administrative Law Judge

DECISION

This matter involves whether the Elite Academy of Beauty Arts (Elite or the school) must return federal funds for its alleged improper administration of Ability to Benefit examinations (ATB examinations) and related to an alleged failure to address conflicting information in student files. This opinion concludes that Elite improperly administered ATB examinations for four students and must return federal funds disbursed to those students. This opinion further concludes that Elite failed to address conflicting information for six students and must return federal funds disbursed to those students, but is not liable for a failure to address conflicting information in other student files. Finally, this decision concludes that because the liabilities in both Findings at issue arise from less than eleven students, the estimated loss formula should not be applied to either

liability.

Elite is a private proprietary postsecondary institution offering non-degree one-year programs.[1] The school is appealing a portion of the liability assessed in the U.S. Department of Education's (Department or FSA[2]) Final Program Review Determination (FPRD) that was issued on July 31, 2015. Until Elite lost eligibility and closed in 2015,[3] it participated in student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV).[4] In the FPRD, FSA assessed a liability for Elite to return $1,284,497 in Title IV program funds.[5] Specifically, the Department made five findings in the FPRD resulting in liabilities owed by Elite, Findings 2, 3, 4, 12, and 13.[6] The liabilities in Findings 2, 4, and 13 have either been agreed to by the parties, are uncontested, or have been withdrawn by the Department for this proceeding and are not at issue. Currently, FSA asserts that Elite owes a liability to return $1,108,376.56 to the Department.[7] The parties contest the amount of liabilities owed for Findings 3 and 12 in this proceeding.

Facts and Procedural History

Between 2011 and 2014, FSA conducted a program review of Elite's administration of Title IV programs.[8] Initially, FSA reviewed a sample of 30 student files that were randomly selected from the population of students receiving Title IV program funds during the 2009/2010

[1] Final Program Review Determination (July 31, 2015) (FPRD) at 2.
[2] Within the Department, the office providing oversight over these programs is the Office of Federal Student Aid (FSA).
[3] FPRD at 3, Letter from Aaron Lacey to Mary Gust (Oct. 13, 2015) (Request for Review) at 1.
[4] 20 U.S.C. § 1070 *et seq.*
[5] FPRD at 25.
[6] FPRD at 24.
[7] Response Brief of Federal Student Aid (Feb. 10, 2017) (FSA Response Brief) at 2.
[8] Program Review Report (PRR) at 3.

and 2010/2011 award years.[9] An additional three files were selected from the 2010/2011 award year to examine whether Elite was complying with Ability to Benefit (ATB) regulations.[10] When reviewers made a follow-up visit to Elite on July 16, 2013, the reviewers obtained an additional 36 student files from the 2010/2011 through 2012/2013 award years that were selected using a "judgmental sample" for examination following a referral from the Department's Office of the Inspector General (OIG) related to the admission of students with sworn statements that the students had graduated from foreign high schools.[11]

At the completion of its review, FSA issued a Program Review Report (PRR) asserting 13 findings, to which Elite filed a response.[12] On July 31, 2015, FSA issued a final program review determination (FPRD), asserting liabilities of $1,284,497.00 based upon five findings.[13]

Elite filed a request for review on October 13, 2015. The school challenged the liabilities assessed in Findings 2, 3, 12, and 13 of the FPRD, but did not challenge the liabilities asserted in Finding 4. Initially, the case was assigned to the then Chief Administrative Law Judge Rod Dixon. The parties filed briefs in the matter and continued discussions about the correct amount of liability. In its brief, FSA agreed to recalculate the liabilities in Finding 2 using the cohort default rate requested by Elite.[14] For the "purpose of this proceeding," FSA also withdrew the liabilities assessed in Finding 13.[15] Based on those changes, FSA revised the liabilities asserted to $1,108,376.56 and only Findings 3 and 12 remained contested.[16]

On November 27, 2017, Judge Dixon issued a decision affirming the challenged liabilities

[9] PRR at 3.
[10] PRR at 3.
[11] PRR at 3, 24.
[12] Response to Program Review Report (hereafter Response to PRR) at 1.
[13] FPRD at 24.
[14] FSA Response Brief at 2.
[15] FSA Response Brief at 2.
[16] FSA Response Brief at 2.

in Findings 3 and 12.[17] On December 27, 2017, Elite appealed Judge Dixon's decision to the Secretary of Education (Secretary). In its appeal, Elite specifically challenged the liability upheld related to 125 students in Finding 12. Elite argued that for 119 of the 125, it should not owe a liability.[18]

On June 21, 2018, while this matter was pending before the Secretary, the United States Supreme Court issued a decision in *Lucia v. Securities and Exchange Commission*.[19] In *Lucia*, the Supreme Court held that federal Administrative Law Judges are "Officers of the United States," and, as such, must be appointed by the President of the United States, a court of law, or the head of a federal agency or department.[20] The Court ruled that in administrative cases where a decision has been issued by an Administrative Law Judge who was not properly appointed, the proper remedy is a new hearing before a different judge.[21] On July 16, 2018, Elite filed an addendum to its appeal with the Secretary.[22] In its addendum, Elite argued that, pursuant to the *Lucia* decision, Judge Dixon did not have a proper appointment under the U.S. Constitution's appointments clause when he issued his decision on November 27, 2017. Elite argued that Judge Dixon's decision must be "set aside" and that Elite was "entitled to a new hearing before a different ALJ who has been properly appointed." On August 22, 2018, FSA filed a response to Elite's addendum, stating that "Federal Student Aid does not object to the remand of this case for appointment to a different judge for resolution."[23] On November 20, 2018, the Secretary ordered that Judge Dixon's decision be "set aside" and that the "case is remanded to OHA for reassignment to a new ALJ for

[17] *In re Elite Academy of Beauty Arts*, Dkt. No. 15-60-SP, U.S. Dep't of Educ. (Nov. 27, 2017) at 2.
[18] Elite's Petition for Appeal (Dec. 27, 2017) at 1.
[19] 138 S.Ct. 2044 (2018).
[20] 138 S.Ct. at 2049, 2051, 2055 (2018).
[21] 138 S.Ct. at 2055.
[22] Elite's Addendum to Appeal (July 17, 2018).
[23] FSA Response to Appointment Challenge (Aug. 23, 2018).

rehearing."[24]

This matter was reassigned to another Administrative Law Judge.[25] That Judge issued an Order Governing Proceedings directing the parties to file briefs supplementing their earlier briefing in this matter.[26] Both parties responded to the order by filing statements that they would rely on their briefing previously filed before Judge Dixon and on appeal to the Secretary and would not be filing additional briefing.[27]

Later, this matter was reassigned to the undersigned.[28] The parties were then provided the opportunity to file supplemental briefing to address three specific questions, including whether the parties agreed that the rehearing is a *de novo* review of the matter.[29] The parties filed their responses,[30] and the undersigned later ordered FSA to submit copies of documents cited in its brief to the Secretary, which were filed.

I. Finding 3

A. PRR

In Finding 3 of the PRR, FSA concluded that Elite improperly administered ATB examinations for some students. FSA asserted that under 34 C.F.R. § 668.143, for a student to be eligible for Title IV program based upon a passing ATB examination score, among other factors, the test must be independently administered.[31] Providing the standard for determining whether a test was independently administered in the regulation, FSA concluded that Elite did not independently administer the ATB exam. Specifically, FSA asserted in the PRR that the person

[24] Order to Set Aside and Remand (Nov. 20, 2018).
[25] Reassignment Letter (June 26, 2019).
[26] Order Governing Proceedings (July 12, 2019).
[27] Elite Academy of Beauty Arts Brief on Remand (Aug. 26, 2019); FSA Brief on Remand (Sept. 23, 2019).
[28] Reassignment Letter (April 12, 2021).
[29] Order for Supplemental Briefing (April 28, 2021).
[30] Supplemental Brief of Respondent Elite Beauty Academy (June 28, 2021) (Elite Supp. Brief); FSA's Supplemental Response to Tribunal Question (June 29, 2021) (FSA Supp. Brief).
[31] PRR at 13.

who administered the ATB examinations was an employee of a law firm where the president and owner of Elite is a partner. FSA, therefore, concluded that the ATB examinations used to establish the eligibility of four students were invalid and those students were not eligible for Title IV program funds.[32]

FSA also directed Elite to conduct a full file review to identify all students who were admitted using an ATB examination that was not independently administered in the 2008/09, 2009/10, and 2010/11 award years.[33]

B. Elite's Response

In its response, Elite stated that it performed the directed full file review. The school did not find any additional students beyond the four students identified in the PRR and noted that it stopped enrolling students using the ATB examinations when it received a May 31, 2011 letter from the State Department of Education informing Elite that the test administrator did not meet the requirements of an independent administrator.[34] Elite also noted that it had returned all Title IV program funds for one of the students identified in the PRR. For the other three students, Elite noted that the students had success at Elite and asked that the Department reconsider and accept the students' Title IV program eligibility.[35] Finally, Elite asserted that the woman who administered the ATB examinations did not know that she was not allowed to serve in that role, and that she had submitted a statement to the Department in May 2011 stating that she was unbiased towards Elite's students.[36]

[32] PRR at 13.
[33] PRR at 13.
[34] Response to PRR at 11-12; FPRD at 10.
[35] Response to PRR at 12.
[36] Response to PRR at 12.

C. FPRD

In the FPRD, FSA noted that it accepted Elite's response and corrective action plan. It determined that for the four students identified in the PRR, Elite owed a total liability of $31,177.45, of which $72.60 was duplicative of liabilities owed in Finding 2.

D. Elite's arguments

Elite denies the liabilities assessed in Finding 3. In the alternative, Elite argues that the liabilities assessed should be reduced using the estimated loss formula.

First, Elite argues that the person who administered the ATB examinations was independent under the regulations and so the tests were proper. Elite contends that the test administrator was only a temporary employee of the law firm where Elite's president was a partner.[37] Elite asserts that Elite's president is an attorney who practices law through the Law Office of Yuriy Prakhin, P.C., a New York professional corporation, and the test administrator was a temporary employee of that professional corporation and not an employee of Elite's owner personally.[38] The school argues that the test administrator did not meet any of the disqualifying factors articulated by 34 C.F.R § 668.151(b)(2) that would have prevented her from being an independent administrator.[39]

Next, the school argues that even if the ATB examinations were not independently administered, Finding 3 should be reversed because FSA has not proven or even indicated that the ATB test were improperly administered or that the test results were compromised.[40] Elite additionally contends that neither the test administrator nor the school knowingly violated a

[37] Brief of Respondent Elite Academy of Beauty Arts (Dec. 2, 2016) (Elite Initial Brief) at 2.
[38] Elite Supp. Brief at 3.
[39] Elite Supp. Brief at 2-4.
[40] Elite Initial Brief at 2.

Department regulation regarding ATB test.[41]

Elite also argues that even if the students in Finding 3 were ineligible for Title IV program funds because their eligibility was based upon invalid ATB tests, the students demonstrated another alternative basis for eligibility for Title IV funds. Specifically, Elite asserts that at the time the students were enrolled at Elite, the Department's regulations at 34 C.F.R. § 668.32(e)(5) provided that a student without a high school diploma or equivalent could be eligible for Title IV if the student showed the ability to benefit from the education offered by the institution through the satisfactory completion of six semester hours.[42] Two of the students graduated from Elite with grade-point averages above 90% and a third student attended classes for 769 hours with a grade point average above 90%. Elite, therefore, argues that since each of these students demonstrated an ability to benefit separate and apart from the ATB test, Elite should not be assessed a liability.[43]

Elite also asserts that if the tests were administered improperly, its liability under Finding 3 should be reduced using the estimated loss formula. Elite asserts that the estimated loss formula should be applied to the ineligible student loans in accordance with the general rule that the Department established in a July 17, 1996 memorandum[44] regarding the use of the formula to calculate a school's liability. Elite argues that the Department must apply its general rule and apply the formula rather than requiring the school to repurchase all loans unless it meets one of four exceptions, none of which apply.[45] Elite additionally argues that since the Department failed to provide in Finding 3 the basis or justification for requiring Elite to repurchase all the ineligible loans, then the Department is bound to follow its default policy of applying estimated loss formula

[41] Elite Initial Brief at 2.
[42] Request for Review at 4; Elite Initial Brief at 2-3.
[43] Request for Review at 4.
[44] Memorandum from Shirley Brown, Acting Chief of Institutional Review Branch (IRB) and Institutional Monitoring Division (IMD) to All Regional Directors and IRB Chiefs (July 17, 1996).
[45] Request for Review at 4.

to ineligible loans. Elite relies on *In Re Nettleton Junior College*, Dkt. No. 93-29-SP, U.S. Dep't of Educ. (June 8, 1994) for the proposition that the Department must justify not applying the formula to ineligible loans in the FPRD or the Hearing Official should apply the estimated loss formula to the ineligible loans.

E. FSA's arguments

The Department contends that if Elite chose to establish a student's eligibility for Title IV program funds through an ATB test, then the test administrator must be independent of Elite in accordance with the regulations at 34 C.F.R. §§ 668.142 and 668.151.[46] FSA asserts that it is undisputed that the test administrator for the four ATB test was an employee at a law firm where Elite's president/owner was a partner in the firm.[47] Based on the two persons' positions at the law firm, the Department determined the law firm was "an affiliate of [Elite] for purposes of [the applicable] Title IV provisions."[48] In documents submitted to the Department, the test administrator confirmed that she was employed by the owner of Elite.[49] The Department contends that the test administrator, therefore, was not independent of Elite when the ATB test were administered, the students in Finding 3 were ineligible for Title IV program funds, and Elite is liable for those improperly disbursed Title IV funds.[50]

The Department argues that the regulation only requires a showing that the test administrator was not independent; FSA does not need to also show that the tests were compromised or that the violation of the regulation was intentional.

The Department additionally disputes that the liabilities in Finding 3 should be dismissed

[46] FSA Response Brief at 4; FSA Supp. Brief at 3.
[47] FSA Supp. Brief at 3.
[48] FSA Supp. Brief at 3.
[49] FSA Response Brief at 4.
[50] FSA Response Brief at 4.

because the identified students retroactively met an alternative eligibility requirement available during the award years in question.[51] The Department argues that the Secretary has "made clear" in *In re Galiano Career Academy*[52] and *In re Fortis*[53] that an institution cannot retroactively establish eligibility under the regulation when the basis initially used to establish eligibility is invalid.

The Department additionally argues it did not err by not applying the estimated loss formula to the liabilities assessed in Finding 3.[54] FSA asserts that, although the Department has a "long established policy" of applying the estimated loss formula, that policy does not apply where the students at issue are eligible for a false certification discharge.[55] The Department argues that these false certification discharges are available to students whose loans were certified by the institution based upon the students' ability to benefit from the program, if the students did not meet the applicable requirements pursuant to 34 C.F.R. §§ 682.402(e)(1)(i)(A) and 685.215(a)(1)(i). The Department argues the students in Finding 3 are eligible for a discharge based on the invalid ATB tests, and therefore, estimated loss formula should not be applied.[56]

The Department also argues that Elite's reliance on *In Re Nettleton* is misplaced. FSA asserts that in *Nettleton,* this tribunal determined that the Department should have used the estimated loss formula, as requested by the institution, because there was a lack of an established standard or guidance in the Department for when the formula should be used and because it did not provide any findings or analysis to support its decision not to use the estimated loss formula. FSA contends that, subsequent to that decision, the Department has established published guidance

[51] FSA Response Brief at 5.
[52] Dkt. No. 11-71-SP, U.S. Dep't of Educ. (July 10, 2015) (Dec. of Sec.)
[53] Dkt. No. 12-55-SP, U.S. Dep't of Educ. (March 17, 2015) (Dec. of Sec.)
[54] FSA Response Brief at 5.
[55] FSA Response Brief at 5.
[56] FSA Response Brief at 6.

in the memorandum as to when to use the estimated loss formula and, in this case, the Department made findings that justify the use of the formula.[57]

II. Finding 12

A. PRR

In Finding 12 of the PRR, the Department contended that Elite failed to meet its obligation to "reconcile all information [that it] received" and resolve any conflicts as required by 34 C.F.R. §§ 668.16(a) and (f).[58] Specifically, FSA argued that Elite did not reconcile information related to whether students had high school diplomas or a recognized equivalent as required by 34 C.F.R. §§ 668.32(e)(1) and 600.5(a)(3).[59]

In the PRR, FSA reported that OIG had received a complaint from a former Elite student and referred the complaint to FSA on January 15, 2013.[60] The complaint to OIG alleged that Elite had admitted ineligible students who did not have a high school diploma or GED and who had not passed an ATB exam. In the PRR, the Department stated that OIG's investigation indicated that a former secretary at Elite "may" have directed at least two students to complete notarized sworn statements of the students' graduations from a foreign high school containing false information to be placed into the students' financial aid files.[61] Although the sworn statements were used for the students' eligibility, the Department determined that neither student had a high school diploma or GED or had passed an ATB exam. FSA contended that OIG requested ten random student files and discovered that nine of the student files contained sworn statements that the students graduated from a foreign high school. The matter was referred to FSA because it was conducting a program

[57] FSA Response Brief at 6.
[58] PRR at 24.
[59] PRR at 24.
[60] PRR at 24.
[61] PRR at 24.

review at that time, and FSA stated that it confirmed that the two students identified by OIG did not graduate from a high school in their home countries.[62] The Department reported in the PRR that both students claimed that they told a secretary at Elite (Elite Secretary) that they did not have a high school diploma and that she gave the students sworn statements to sign that falsely indicated that they did have diplomas.[63] FSA contends that, because it believed that these allegations called into question Elite's admission practices, FSA reviewers then obtained 36 additional student files to be used for a judgement sample. From the sample, FSA found that 25 students were admitted with a sworn statement attesting to their graduation from a foreign high school.[64]

The sworn statement form at issue is New York State's BPSS-115 form (Sworn Statement).[65] The Sworn Statement requires the student's attestation that the information is true and requires the school director's attestation that the student was not encouraged or directed to make a false statement.[66] In the PRR, FSA asserted, echoing a statement from a representative from the New York State Education Department, that the failure to have the Director's signature on the Sworn Statement violates Section 126.1(g) of the New York State Commissioner of Education's Regulations.[67] FSA also contended in the PRR that none of the Sworn Statements were translated into the students' native languages, nor were any efforts taken by Elite to obtain students' educational records. FSA also identified eight students whose Institutional Student Information Records (ISIRs)[68] indicated that they had a high school diploma from a high school

[62] PRR at 24-25.
[63] PRR at 25.
[64] PRR at 25-26.
[65] PRR at 26.
[66] *See* Dep't. Exhibit 5: BPSS-115 Forms.
[67] *See* PRR at 26; Dep't Exhibit 4: Emails between Lydia Gonzalez and Richard Cohen (March 27, 2014). In Department's Exhibit 4 the NYSED employee also states that the school and the student are required to take some effort to obtain the student's diploma and must specify what efforts they have taken.
[68] The ISIR is the collection of all student information records that are processed and sent to institutions participating in Title IV programs by FSA after the Department receives the student's financial aid application and information. *See* ISIR Guide: 2020-2021, U.S. Dep't of Educ. (July 2019) at 1.

in a foreign county, but who either told FSA reviewers that they did not complete high school, or for whom the circumstances indicate that they did not actually have a high school diploma.[69] For many of these students, FSA noted that the attestations on the Sworn Statements were completed by the same Elite employee who signed the student enrollment form, and/or that there is no indication that Elite took any efforts to obtain educational records for the students. FSA also listed 15 other students who all: 1) had ISIRs indicating that they had high school diplomas; 2) were admitted using a Sworn Statement that the student graduated from a foreign high school; and 3) Elite did not "undertake any efforts in obtaining the educational records as required by New York State Education Department['s] Bureau of Proprietary School Supervision."[70] FSA also noted that some of the forms for those 15 students were partially or completely filled out by someone other than the student, were attested to by the same Elite employee who signed the enrollment agreement, and, in one instance, the owner of Elite notarized the statement.[71]

In the PRR, FSA concluded that the student files addressed in the finding "indicate significant deficiencies with [Elite's] admission practices, including apparent falsification of records."[72] FSA directed Elite to conduct a full file review and identify all Title IV recipients who were admitted using a Sworn Statement that the student graduated from a foreign high school from the 2009/10 award year through March 2014, when the PRR was issued. For all of the students, including those students specifically identified in the PRR, Elite was directed to obtain and submit to FSA copies of the student's high school diploma or the high school transcript confirming that the student did in fact graduate, along with official English translations of those documents.[73]

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[69] PRR at 26-28.
[70] PRR at 27.
[71] PRR at 27.
[72] PRR at 28.
[73] PRR at 28-29. Elite was also directed not to allow any employees, including the Director and the Elite Secretary at issue in the OIG complaint, to work on the file review. FSA also instructed Elite to provide FSA with procedures it had implemented to ensure "no reoccurrence of this finding."

B. Elite's Response

In its response to the PRR, Elite acknowledged that it admitted students with Sworn Statements that were only in English.[74] Elite asserted, however, that it translated the documents verbally to Russian and Spanish speaking students and "[d]ue to the plain language on the form," the other students had enough knowledge of English to understand the contents of the sworn statement form.[75] Elite also stated that, to its knowledge, no Elite employee coached any potential student to provide false information in order to receive Title IV student aid based upon sworn affidavits from the Elite Secretary, the Spanish teacher, and the Director.[76] Elite also responded that, to the best of its knowledge, the students identified by FSA and other students admitted based upon the Sworn Statement had all indicated to school officials that they completed high school in foreign countries.

Elite also explained in detail its efforts and the challenges it faced in attempting to obtain diplomas from foreign governments and foreign high schools. The school asserted that many of its students were from countries from which it is often not possible to get records. Elite also noted that it had contacted both schools and governments with limited success in acquiring diplomas and other relevant documents.[77]

Elite further noted that there was no federal or state requirement at the time mandating that Elite verify the information provided by the students.[78] Elite argues that, because it enrolls adults, any information and oaths provided by students on the form is "solely their responsibility."[79] Elite further argues that, under the Department's policy in place at the time, it was entitled to rely on

[74] Response to PRR at 42.
[75] Response to PRR at 42.
[76] Response to PRR at 42.
[77] Response to PRR at 44.
[78] Response to PRR at 45.
[79] Response to PRR at 45.

the students' certifications and, absent the school having conflicting information, the student, not the school, is liable to return Title IV program funds if, contrary to the student's certification, he or she did not have a high school diploma.[80]

In addition to its narrative response, Elite provided the Department with a list of 131 students admitted using a Sworn Statement.[81]

C. FPRD

FSA, in the FPRD, concluded that Elite's response to Finding 12 was "not acceptable."[82] Specifically, FSA concluded that the full file review response showed that Elite accepted 131 students using invalid Sworn Statements stating that the student graduated from a foreign high school.[83] FSA also noted that Elite submitted what FSA considered to be "valid documentation of high school completion" for six of the 131 students at issue and that Elite had informed FSA months later that no other documentation was forthcoming.[84] FSA, therefore, concluded that the 125 students who were admitted based upon a Sworn Statement, but for whom Elite did not produce "valid documentation" in response to the PRR, were not eligible for Title IV program funds.[85] FSA used the National Student Loan Data System to calculate the total liability Elite owed for those students, and did not apply the estimated loss formula to reduce that liability.

[80] Brief of Respondent Elite Academy of Beauty Arts to Secretary of Education (Dec. 27, 2017) (Elite Appellate Brief) at 1, 6-7.
[81] FPRD at 19.
[82] FPRD at 19.
[83] FPRD at 19.
[84] FPRD at 19.
[85] FPRD at 19-20.

D. Elite's Arguments

Elite argues that it should not be required to return most of the liability assessed in Finding 12 because the liability is unrelated to the school's obligation to resolve conflicting information. The school notes it only had an obligation to resolve conflicting information in the information that it actually received, and for the vast majority of student files, there were no discrepancies to resolve.[86] Elite asserts that of the 125 students at issue,[87] FSA presented only six instances where the school was presented with discrepancies and failed to address those discrepancies.[88] The school also contends that for each of the students at issue, it is undisputed that each student had self-certified in their FAFSA that they had a high school diploma or a GED.[89] Elite argues that under the Department's policy and the law in place at that time: (1) the school could rely on the students' self-certifications; (2) Elite was not required to obtain copies of the students' diplomas or GEDs or otherwise verify the students' high school completion status; and (3) Elite is not liable to return funds disbursed to the students, even if the students had not completed high school, unless the school had conflicting information about the students' completion status when it disbursed the funds.[90]

In the alternative, Elite argues that if it is held liable for failing to resolve conflicting information, the school should not be liable for the total amount of the loans. Rather, Elite argues that the estimated loss formula should be applied to reduce the liability asserted.

Further elaborating, Elite notes that at the time it was admitting the students and disbursing Title IV program funds, it had no obligation to obtain copies of the students' foreign credentials to

[86] Elite Initial Brief at 5.
[87] Although there were 131 student files reviewed in Finding 12, Elite provided documentation for 6 students and FSA assessed liability for 125 students, which is now being challenged. *See* FPRD at 19-20.
[88] Elite Initial Brief at 5.
[89] Elite Appellate Brief at 12.
[90] Elite Appellate Brief at 12.

substantiate their assertions of having graduated from high school or the equivalent.[91] The school argues that federal law and Department policy permitted institutions to use a student's self-certification to document the student's status as a high school graduate.[92]

Specifically, Elite contends that the applicable regulation, 34 C.F.R. § 668.32(e)(1), requires that to be eligible for Title IV program funds, a student must have "a high school diploma or its recognized equivalent" but the regulation does not specify how or whether the institution must verify that the student meets this requirement. Elite argues that in the absence of clear requirements, the school could rely on the guidance provided in the FSA's Federal Student Aid Handbooks. Elite contends that the guidance stated that: (1) unless a school requires that students submit diplomas for admission, the school only has an obligation to evaluate the validity of a student's high school completion if there is reason to doubt the validity or that the diploma came from an entity that provides secondary school education; but (2) it did not require the school to check every student's data against all other data it collects unless there is a reason to believe that the diploma is dubious.[93]

Elite notes that its policy at the relevant time did not require students to produce a copy of their credentials and the state of New York allowed students to use the Sworn Statement in lieu of high school diplomas or transcripts for students who completed high school in a foreign country.[94] The school contends that although it required all students to have a high school diploma or the equivalent, or to otherwise demonstrate the ability to benefit from Elite's training, Elite's policy was not to require students to submit a copy of their diplomas for admission.[95] Elite contends that

[91] Request for Review at 6.
[92] Request for Review at 6; Elite Appellate Brief at 1, 6.
[93] Request for Review at 7; Elite Initial Brief at 8; Elite Appellate Brief at 7-9.
[94] Request for Review at 6 (citing to BPSS Documentation of Entrance Requirements policy 2-0300 (*available at* http://www.acces.nysed.gov/bpss/schools/minimum-criteria-admission-private-career-school-pathways-and-evidence)).
[95] Request for Review at 4.

it did, however, in compliance with New York state law, obtain documentation substantiating students' graduation or the equivalent. Elite states, however, that if a student completed high school in a foreign country but was unable to produce a copy of their diploma, the student was instead asked to complete the Sworn Statement form.[96]

Elite asserts that for every student at issue in the Finding, the student's FAFSA form indicates that they had a high school diploma or equivalent and their attestation was supported by an executed Sworn Statement.[97] Elite contends that FSA did not establish that the "vast majority of the 131 student files in the cohort contained any inconsistent information that was unresolved."[98] Elite asserts that absent a showing of an actual violation of law, there can be no repayment liability.[99]

Elite additionally addresses its errors in completing the Sworn Statement forms raised by the Department. The school argues that these errors are not a failure to resolve conflicting information.[100] Elite asserts that the deficiencies in the students' Sworn Statements identified by FSA are not necessarily a violation of New York's state laws.[101] Elite contends that neither state law nor policy specify how the Sworn Statements must be completed, nor state that deficiencies are a "legal infraction."[102] Elite states that state policy only directs that "documentation containing inconsistencies is 'never acceptable.'"[103] Elite says FSA failed to provide any legal authority for many of the issues identified by FSA. Elite gives the example that it is "unclear" to the school why FSA objects to someone helping students fill out the Sworn Statement, so long as the student

[96] Request for Review at 4; Elite Initial Brief at 7-8.
[97] Request for Review at 6; Elite Appellate Brief at 12.
[98] Request for Review at 5-6.
[99] Request for Review at 6; Elite Initial Brief at 6.
[100] Request for Review at 8; Elite Initial Brief at 6; Elite Appellate Brief at 15.
[101] Request for Review at 9; Elite Initial Brief at 6.
[102] Request for Review at 9.
[103] Request for Review at 9 (quoting *Documentation of Entrance Requirements* policy (Policy Number 2-0300)).

is the person who executes the notarized attestation.[104]

Elite further stresses that even if FSA found errors or violations of state law, compliance with state law is irrelevant, and that what is material is that FSA did not find inconsistent information.[105] The school asserts that every one of the 131 students at issue in the Finding executed a Sworn Statement that was consistent with the information on the FAFSA form and attested to the fact that the student had a high school diploma. Elite argues there was no information that suggested that the student did not have a high school diploma or the equivalent.[106]

Elite also asserts that it should not be penalized for inconsistent information that was first discovered during the OIG and FSA investigations conducted years after it admitted the students in question.[107] The school notes that even if a small number of students provided new or different information to FSA program reviewers and OIG investigators, there is no evidence that Elite had this conflicting information at the time of enrollment.[108] Elite further asserts it did not know of the inconsistent information discovered during the program review at the time it enrolled the students and Elite did not coach the students to provide false information.[109]

Elite stresses that the stated basis for liability in Finding 12 is that the school failed to resolve conflicting information. The school notes that of the 131 students at issue, FSA includes information about only 10, but for the other 121 students, "offers no evidence, nor makes any assertion, that Elite possessed conflicting information at the time of their enrollment."[110] Elite further asserts that FSA only identified nine cases suggesting that Elite had conflicting information

[104] Request for Review at 9.
[105] Elite Initial Brief at 6; Elite Appellate Brief at 13-14.
[106] Request for Review at 9.
[107] Elite Initial Brief at 7.
[108] Elite Initial Brief at 7.
[109] Elite Initial Brief at 7; Request for Review at 10.
[110] Request for Review at 10; *see also* Elite Initial Brief at 10-11.

in its possession at the time of enrollment.[111] The school further contends that only six of those nine students involved an issue with the actual documents, as opposed to allegations made by the students during interviews with OIG and FSA.[112] Elite argues that FSA did not make any findings, did not identify any deficiencies in the students' Sworn Statements, and did not determine that any of these students had not completed high school or had conflicting information in their files when they received Title IV program funds for 100 of the students.[113] Elite further asserts that for 15 other students, FSA did not find any information in the Sworn Statements that was inconsistent with the self-certifications on the FAFSA forms or that the students did not complete high school.[114]

Elite alternatively argues that, if it is liable to return Title IV program funds in Finding 12, the estimated loss formula must be applied, rather than requiring it to repurchase every student loan at issue. Elite contends that that the general rule is to apply the formula when there are more than ten ineligible loans at issue and not to require the repurchase of every loan.[115] The school asserts that none of the four exceptions to this general rule apply in this case.[116] Elite further notes that guidance from the Department states that the estimated loss formula must be used when the Department uses a projection from a statistical sample, which Finding 12 "effectively" does.[117] The school contends that FSA did not analyze each of the 125 students at issue in Finding 12, but rather assumed that all 125 student files had conflicting information based on its having found

[111] Request for Review at 10.
[112] In its appeal of Judge Dixon's original decision, Elite states that while it denies the findings related to the six students, Students 41, 46, 52, 56, 57, and 59, it was not challenging the findings related to those students on appeal. Elite Appellate Brief at 12. Because Judge Dixon's decision was set aside, Elite is not held to that concession. In the appeal, Elite asserts that there are only three students whose Sworn Statements contain discrepant information. Elite Appellate Brief at 12. However, in its request for review, Elite indicates that there were six students whose files contain inconsistent information. Request for Review at 10-11.
[113] Elite Appellate Brief at 12-13.
[114] Elite Appellate Brief at 13.
[115] Request for Review at 11; Elite Appellate Brief at 19-20.
[116] Request for Review at 12. Elite Appellate Brief at 21.
[117] Elite Appellate Brief at 20.

discrepancies in six of the files.[118]

E. FSA's Arguments

FSA notes that, in general, a student is not eligible for Title IV program assistance unless the student has a high school diploma, the equivalent, or has passed an independently administered ATB exam.[119] FSA argues that Elite failed to meet its burden to establish that it complies with Title IV program requirements.[120]

The Department asserts that the school had two obligations: (1) to resolve any conflicts in the information that it collected pursuant to 34 C.F.R. § 668.16(a) and (f); and (2) to "ensur[e] that the documentation it has supports the Title IV disbursements made" pursuant to 34 C.F.R. § 668.24(a)(3).[121] FSA contends that Elite had information, both from the student records and from what students told Elite employees, that established that the student attestations of having high school diplomas were false and so the school could not rely on those statements.[122] FSA argues that it had a responsibility not to accept falsified and invalid state forms as evidence of students' eligibility or Title IV program funds and that the Department found sufficient issues in the samples it collected to question the validity of the affidavits and documentation as a whole. Based on these findings, FSA asserts that the Department had every right to request that the school establish that the students at issue had high school diplomas. The Department asserts that when Elite was unable to supply copies of valid diplomas and transcripts for 125 of the 131 students, it failed to meet its burden and had to return all Title IV moneys for those students.[123]

Going into detail, FSA notes that OIG investigated a complaint it received from a former

[118] Elite Appellate Brief at 20-21.
[119] FSA Response Brief at 7.
[120] Appeal Response of Federal Student Aid (Jan. 26, 2018) (FSA Appellate Brief) at 5.
[121] FSA Response Brief at 7.
[122] FSA Appellate Brief at 12.
[123] FSA Appellate Brief at 12-13; FSA Response Brief at 9-10.

student alleging that Elite admitted ineligible students who did not have a high school diploma, the equivalent or a passing ATB exam.[124] FSA contends that OIG's investigation "revealed that a former secretary at Elite directed at least two students to obtain sworn statements that they had foreign high school diplomas when they did not actually have a high school diploma," and that the statements were placed in the students' financial aid files.[125] The Department then notes that as a result of the OIG investigation, FSA reviewed an additional 36 files and found that for 25 of the files, the students were admitted using the Sworn Statement form.[126] FSA reviewers contacted the New York State Department of Education (NYSED) and a representative from NYSED told FSA reviewers that both the student's and the school director's signatures need to be notarized and that the form must be completed in English and in the student's native language, and finally that efforts must be taken by the school and/or the student to obtain education records.[127] The FSA reviewer discovered that all of the Sworn Statement forms in the student files only had the student's signature notarized, but none had the Elite's director's signature notarized, which FSA argues violates New York State regulations.[128] FSA also argues that the reviewer found that none of the forms were translated into the students' native languages and no efforts were taken by the school to obtain educational records. FSA asserts that the Sworn Statement forms in the students' files "would not be accepted as valid for admissions purposes by the State of New York."[129]

FSA contends that it found additional issues with the Sworn Statement forms, including that there was evidence that the forms were filled out by someone other than the students, that on

[124] FSA Response Brief at 7.
[125] FSA Response Brief at 7; *see also* FSA Appellate Brief at 2. In the PRR and FPRD, FSA used less definitive language, stating that the OIG inquiry "revealed that a former secretary at Elite may have directed at least two students to have obtained sworn statements that they had foreign high school diplomas when they did not." PRR at 24, FPRD at 14.
[126] FSA Response Brief at 7-8.
[127] FSA Response Brief at 8.
[128] FSA Response Brief at 8.
[129] FSA Response Brief at 8.

some forms the "efforts taken to obtain diploma" section was left blank, and that all the forms were in English even when the enrollment form was in the students' native language, calling into question whether the students knew what they were signing.[130]

FSA also asserts that there was "questionable" information on the Sworn Statements themselves.[131] Specifically, FSA provides the examples of Student 41, whose documentation shows that the student would have graduated at age 9, and Student 40, for whom FSA argues the documentation establishes that the diploma was for a junior high school not a high school, and Student 52, whose attendance dates listed on the form were before the student was born.[132]

FSA states that, because of the reviewers' findings, the Department interviewed additional students. FSA asserts that reviewers interviewed Students 46, 62, and 64, all of whom had affidavits in their files stating that they had a foreign high school diploma and all of whom confirmed that they did not have a diploma but that the school had them sign affidavits to receive grant money.[133]

FSA argues that because of the "falsification and issues identified," the Department concluded that it could not accept the affidavits to "establish student eligibility" without additional verification from the school or student.[134] FSA asserts that Elite was provided the opportunity to obtain the information needed to verify the students' diplomas and submitted it in response to the PRR, but the school did not provide the necessary documentation for 125 of the 131 students at issue.[135] FSA argues that because Elite did not resolve the issues and provide documentation, the students were unable to meet Title IV program eligibility requirements and the Department

[130] FSA Response Brief at 8-9.
[131] FSA Appellate Brief at 8.
[132] FSA Appellate Brief at 8.
[133] FSA Response Brief at 9.
[134] FSA Response Brief at 9.
[135] FSA Response Brief at 9.

properly assessed liabilities for the Title IV program funds disbursed for those students.[136] FSA asserts that it discovered sufficient issues with the information in the student files to call into question the validity of the Sworn Statements and documentation as a whole and had "every right" to require Elite to establish that the students in question had valid diplomas.

FSA additionally contends that Elite's argument that it could rely on the self-certification of high school completion absent conflicting information "must fail."[137] First, FSA argues that, like a school that collects diplomas, the policy in place throughout the relevant time required that if the school collects Sworn Statement forms, the school was required to rely on that documentation, and the school could not solely rely on the information in the FAFSA.[138] FSA further contends that there were inconsistencies in the documents themselves that call into question the certification statements and that Elite's assertion that there were no inconsistencies that would lead the staff to question the validity of the self-certifications is "patently false."[139] Further elaborating, the Department argues that faced with inconsistencies on the documents themselves, like a student graduating at age nine, Elite has a fiduciary duty to question the validity of all student certifications of high school completion.[140] FSA additionally asserts that Elite could not rely on student certifications and claim to be unaware of inconsistencies "in light of the fact that Elite employees were clearly complicit in manufacturing falsified documents."[141] In support of this argument, FSA points to five students who told OIG or FSA employees that Elite employees knew that they did not have diplomas but directed the students to falsely certify that they had completed high school and to the fact that the Sworn Statements were filled out by someone other than the

[136] FSA Response Brief at 9.
[137] FSA Appellate Brief at 9.
[138] FSA Appellate Brief at 9-10.
[139] FSA Appellate Brief at 10.
[140] FSA Appellate Brief at 10-11.
[141] FSA Appellate Brief at 11.

students.[142]

In response to arguments that FSA improperly relied upon "state law and requirements when determining that the [Sworn Statements] were not valid for purposes of establishing Title IV eligibility," FSA asserts that the liabilities assessed in Finding 12 are based on Elite's failure to comply with Title IV eligibility requirements. Elaborating, FSA contends that the review of New York State requirements is "solely" for the purpose of "determining whether New York State generated forms provided to the [D]epartment to support Elite's Title IV eligibility determinations were valid." FSA also asserts that the Department relied upon other factors articulated in FSA's arguments when making final determinations regarding the veracity of the documents submitted by Elite.[143] In response to Elite's argument that the proper recourse when a school relies upon a certification that the student completed high school and the certification is false is to seek repayment from the student, FSA agrees that "Elite is correct that the Department will not seek repayment for liabilities resulting from a student's false certification of high school completion under certain circumstances," but says this policy only applies when the institution does not have reason to believe that a certification was falsified.[144]

FSA further adopts its earlier argument about the application of the estimated loss formula. FSA asserts that it is the Department's policy not to apply the formula where a student is eligible for a false certification discharge, for which FSA contends these students are eligible.[145] FSA argues that the Department has always interpreted "ability to benefit" for a program in the discharge regulations to include a high school diploma, GED, or passing a valid ATB exam.[146]

[142] FSA Appellate Brief at 11.
[143] FSA Appellate Brief at 11-12.
[144] FSA Appellate Brief at 12.
[145] FSA Response Brief at 10.
[146] FSA Response Brief at 13.

FSA offers no support for this assertion other than to say it is consistent with 34 C.F.R. § 692.402(e)(13).[147]

Issues

The issues to be addressed are:

1. **After the Initial Decision was set aside and this matter was remanded by the Secretary of Education for a rehearing, should this matter be reviewed *de novo*?**

2. **Did Elite properly administer the ability to benefit examinations to the four students identified in Finding 3? If the ability to benefit examinations were improperly administered, did the students otherwise become eligible by showing the ability to benefit through the completion of six semester hours at Elite? And, if Elite is unable to substantiate the eligibility of the four students at issue in Finding 3, should the estimated loss formula be applied to reduce Elite's liability for that Finding?**

3. **Is Elite liable in Finding 12 for the students who were admitted using a Sworn Statement when the school does not have documentation to substantiate that the students graduated from a foreign high school?**

4. **Should the estimated loss formula be applied to calculate the liabilities assessed in Finding 12?**

Summary of Decision

This matter is reviewed *de novo*. The ability to benefit tests that were administered by a former employee of the law firm where Elite's owner is a partner were not independently administered and, therefore, the liability in Finding 3 is upheld. Because Elite is directed to repay the debts for less than 10 students in Finding 3, and those students may be eligible for their loan relief or discharged, the estimated loss formula should not be applied to reduce the liabilities assessed in that Finding. Elite is only responsible for the liabilities in Finding 12 specifically assessed for Students 40, 41, 44, 52, 57, and 66. The Department has not sufficiently showed that

[147] FSA Appellate Brief at 13.

Elite had an obligation to collect, retain, or submit copies of high school diplomas or transcripts for the remaining students at issue in Finding 12. If Elite had been liable to return the Title IV program funds for all students at issue in Finding 12 for whom the school did not produce copies of diplomas or transcripts, the estimated loss formula should have been applied to reduce the school's liability. Because Elite is only liable to return Title IV funds for six students in Finding 12, however, the estimated loss formula should not be applied.

Statement of Law

I. Finding 3

34 C.F.R. §§ 668.32(e)(2)-(5) sets forth the provisions by which a student who has neither a high school diploma nor its recognized equivalent may also become eligible to receive Title IV program funds. Pursuant to 34 C.F.R. § 668.32(e)(2), an institution may use the passing score on an independently administered examination specified in 34 C.F.R. §§ 668.141-156[148] to determine a student's eligibility to receive Title IV funds.

34 C.F.R. § 668.151(a)(2) provides that when the institution determines a student's eligibility to receive Title IV funds based upon an ATB test, the test must be independently and properly administered. A school is liable to return Title IV program funds disbursed to a student whose eligibility is determined using an ATB examination if the test was administered by a test administrator who was not independent of the institution at the time the test was given.[149] The Secretary considers a test is independently administered if the test was given by a test administrator

[148] The version of this regulation that was in effect before July 1, 2011 is used in this matter because the latest date that Elite administered an ATB examination was June 2, 2011. *See* Dep't. Exhibit 3 - Correspondence between Christopher Curry and Yuriy Prakhin (June 27, 2011 and July 12, 2011) at 3.
[149] 34 C.F.R. § 668.154 (2010).

who:

1. Has no current or prior financial or ownership interest in the institution, its affiliates, or its parent corporation, other than the interest obtained through its agreement to administer the test, and has no controlling interest in any other educational institution;

2. Is not a current or former employee of or consultant to the institution, its affiliates, or its parent corporation, a person in control of another institution, or a member of the family of any of these individuals;

3. Is not a current or former member of the board of directors, a current or former employee of or a consultant to a member of the board of directors, chief executive officer, chief financial officer of the institution or its parent corporation or at any other institution, or a member of the family of any of the above individuals; and

4. Is not a current or former student of the institution.[150]

A partner in a law firm can be considered an employer if the person "owns and manages the enterprise."[151] Specifically, an employer is someone who has the authority to "hire and fire employees," "assign tasks to employees and supervise their performance," and to "decide how the profits and losses of the business are to be distributed."[152]

A student must qualify for Title IV program funds prior to the institution's disbursement of those funds. If a student is initially awarded Title IV eligibility and the basis of the eligibility is later determined to be invalid, the student cannot obtain Title IV eligibility retroactively using 34 C.F.R. § 668.32(e)(5).[153]

[150] 34 C.F.R. § 668.151(b)(2).
[151] *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 450 (2003); *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 2009 WL 3602008, (W.D. Pa. Oct. 28, 2009).
[152] *Clackamas Gastroenterology Assocs.*, 538 U.S. at 450.
[153] *In re Bramson ORT*, Dkt. No. 18-08-SP, U.S. Dep't of Educ. (Oct. 15, 2021) (Decision of Sec.) at 3-5; *In Re Fortis College*, Dkt. No. 12-55-SP, U.S. Dep't of Educ. (March 17, 2015) (Decision of Sec.) at 7-8.

II. Finding 12[154]

During the relevant time, 34 C.F.R. § 668.16(a) required schools that participated in Title IV programs to administer those programs in compliance with relevant laws, policies, and agreements that were in place. 34 C.F.R. § 668.16(f) then further required a school to have a system in place to identify and resolve discrepancies in the information that the school received from different students. This would include all of the documentation submitted by the students and other information that the school learned.

As noted, 34 C.F.R. § 668.32(e) requires that a student have a high school diploma or the equivalent to be eligible for Title IV program funds. That regulation, however, does not specify what evidence is required to prove that a student has a diploma or the equivalent. In the absence of clear regulatory requirements, a school can reasonably rely upon the Department's issued guidance if the guidance does not contradict any regulation or statute that is in place. FSA's Federal Student Aid Handbook for the 2009-2010 and 2010-2011 award years directed, other than

[154] FSA, in its brief, appears to assert two justifications for liability, the failure to resolve conflicting information pursuant to 34 C.F.R. § 668.16, and the failure to ensure that it collected sufficient information pursuant to 34 C.F.R. § 668.24. In the PRR, FSA stated that its reason for its finding of non-compliance and the imposition of a potential liability on Elite to return Title IV program funds was the school's failure to ensure the consistency of information provided to it and ensure resolve any conflicts and cites to the obligations imposed by 34 C.F.R. § 668.16. The PRR does not refer to any additional obligations imposed by 34 C.F.R. § 668.24.

As the U.S. Supreme Court has instructed, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfg. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 50 (1983); *In re Nettleton Junior Coll.*, Dkt. No. 93-29-SP, U.S. Dep't of Educ. (June 8, 1994) at 8. This is in line with the statute governing program reviews. 20 U.S.C. § 1099c-1(b)(6) directs that the Department must "provide to an institution of higher education an adequate opportunity to review and respond to any program review report and relevant materials related to the report before any final program review report is issued." In other words, the Department must provide the school with a clear understanding of the basis for holding the school liable for returning program funds so that the school has an "adequate opportunity" to respond to the allegations. As noted, beginning in 2011, an additional requirement was imposed upon institutions by section 668.16, to verify a student's high school graduation status where there is reason to doubt the veracity of an attestation that the student graduated. By citing to the regulation, Elite was provided notice of this basis. To the extent the obligation to collect relevant information informs what could have presented a conflict, it is relevant. Similarly, to the extent the obligation to collect relevant information is the obligation to collect information to verify a high school diploma when required by Section 668.16(p), it is relevant to the basis for liability in Finding 12. To the extent FSA argues that the liability should be upheld based on Elite's failure to meet the distinct obligation to collect additional information from the students, Elite was not provided notice of this basis for liability in the PRR and was not provided an adequate opportunity to respond to this basis of liability and, therefore, the liability cannot be sustained.

in the context of a Title IV program that is not relevant to this case, that:

> A student may self-certify on the FAFSA that he has received a high school diploma or GED or that he has completed secondary school through homeschooling as defined by state law. If a student indicates that he has a diploma or GED, your school isn't required to ask for a copy**, but if your school requires one for admission, then you must rely on that copy of the diploma or GED and not on the student's certification alone.[155]

In 2009, the Department began rulemaking to amend some of the Title IV regulations, and following notice and comment, issued final regulations on October 29, 2010.[156] The changes went into effect on July 1, 2011. Among the changes, the Department added subsection (p) to 34 C.F.R. § 668.16. The new language required a school to establish "procedures to evaluate the validity of a student's high school completion if the institution or [the Department] has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education."[157]

In the 2011-2012 FSA Handbook, the Department added new language that reiterated the new requirement imposed by subpart (p). The new language stated that if an institution or the Department "has reason to believe that the high school diploma is not valid or was not obtained from an entity that provides secondary school education, the college must evaluate the validity of the student's high school completion."[158]

In both the published final regulations and the updated FSA Handbook for 2011-2012, the Department informed schools that the Department would not expect the institutions participating in Title IV programs to check the "high school data for every student against other information

[155] 2009-2010 FSA Handbook, p. 1-6; 2010-2011 FSA Handbook at 1-6.
[156] *Association of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427, 434 (D.C. Cir. 2012).; 75 Fed. Reg. 66832 *et seq*.
[157] 34 C.F.R. § 668.16(p); 75 FR 66832-01 (Oct. 29, 2010).
[158] 2011-2012 FSA Handbook at 1-6. The new language also noted that students who claimed to possess a high school diploma were now required to provide the name, city, and state of the high school and provided schools information about which documents and processes could be used to verify the validity of a student's high school completion.

obtained by the institution during the admissions process," but noted that "if an institution has reason to believe (or the Secretary indicates) that a high school diploma is not valid, the institution must follow its procedures to evaluate the validity of the diploma."[159] The Department provided examples in the Federal Register and in the 2011-2012 FSA Handbook of when an institution might have reason to believe that a high school diploma is not valid. They include: coming "across information that suggests that the applicant's diploma or transcript was purchased with little work expected of the student," or "receiv[ing] conflicting information from students themselves, typically as remarks that cast doubt on some element of the students' application information;" or that "institutions may have reason to believe that a high school diploma is invalid if they recognize the name of the high school as an entity that they identified in the past as being a high school diploma mill."[160] The Department kept this same language in the 2012-2013 FSA Handbook and the 2013-2014 FSA Handbook.[161] This new requirement placed an obligation on schools only where there was reason to believe from the documents the school already collected or knowledge the school had in its possession, that the student's diploma or high school graduation status was invalid.[162]

Regulations, and changes in regulations, cannot be retroactively applied unless Congress gives a federal agency the authority to issue retroactive regulations and the language of the regulation clearly indicates that the regulation is intended to be retroactively applied.[163] The

[159] 75 Fed. Reg. 66889; 2011-2012 FSA Handbook at 1-6 – 1-7.
[160] 75 Fed. Reg. 66892; 2011-2012 FSA Handbook at 1-7. Department also made clear that if there is a question about the validity of a diploma, a certified statement that the student completed high school is not sufficient. 75 Fed. Reg. 66891; 2011-2012 FSA Handbook at 1-7.
[161] 2012-2013 FSA Handbook at 1-6; 2013-2014 FSA Handbook at 1-6 – 1-7.
[162] The 2013-2014 FSA Handbook added additional instructions that diplomas and transcripts from foreign countries are acceptable only if the diploma is the equivalent of a high school diploma in the United States. 2013-2014 FSA Handbook at 1-6. Although this may clarify that evidence that a student's high school diploma is inferior to a high school diploma in the United States would call into question the validity of the diploma, the general guidance remains in place that schools are only required to investigate the validity of a student's attestation of having a valid diploma if there remains something on the face of the documents that calls this into question.
[163] *See Ervin v. Shinseki*, 24 Vet.App. 318, 322 (Vet. App. 2011); *Scamihorn v. General Truck Drivers*, 282 F.3d 1078,

Supreme Court has explained this:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal. In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.[164]

The addition of subpart (p) to 34 C.F.R. § 668.16 did not indicate that it should be retroactively applied. To the contrary, in its final regulations, the Department specifically stated that the new requirement to validate attestations when the validity of the diploma was in question was only intended to be applicable to students who completed their FAFSA form beginning with the 2011-2012 award year.[165]

In summary, between 2009 and 2011, schools had an obligation to address conflicts in the information that the school received. At that time, schools could rely upon a student's attestation that he or she had a high school diploma without asking for a copy of the diploma if the school did not already require students to submit a copy of their diplomas. Beginning with the 2011-2012 award year, schools had an additional obligation to verify that a student completed high school if the school or the Department had "reason to believe" the student's high school diploma was invalid or was not obtained from an entity that provided an adequate secondary school education.

III. Estimated Loss Formula

"The estimated loss formula has been adopted as a fair method of calculating the extent of the Department's losses when an institution has violated Title IV program requirements."[166]

1083 (9th Cir. 2002).

[164] *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (internal citations omitted)

[165] 75 Fed. Reg. 66889.

[166] *In re Kelsey-Jenney College*, Dkt. No. 96-138-SP, U.S. Dep't of Educ. (May 1, 1998) at 3.

Therefore, the use of the estimated loss formula is favored to recoup the Department's actual loss.[167] The formula is not applicable to all cases, however.

To ensure consistent determinations by the Department during a program review, the Department is required to establish guidelines designed to provide uniformity of practice in the conduct of program reviews. 20 U.S.C.A. § 1099c-1(b)(1). In 1996, the Department issued a memorandum[168] promulgating standards and guidance for when to use the estimated loss formula.

The Department's policy dictates that, as a general rule, the estimated loss formula must be used in any case that involves calculating a liability by making a projection from a statistical sample. In that situation, the Department does not know which specific students received ineligible loans. Therefore, instructing the school to purchase the loans would not be feasible and formula is the only realistic alternative.

The policy further instructs that, if ten or fewer ineligible loans are involved, however, the estimated loss formula should generally not be used. When such a relatively small number of loans is involved, estimates of subsidy and default costs based on generalizations may be significantly less reliable as estimates of costs with respect to these particular loans, and purchasing the loans is not overly burdensome to the institution.

The policy also lists four specific instances in which the estimated loss formula should not be applied. The first exception is that the formula is not applied when the reviewer knows that all the loans in question are in default. The second reason is that the estimated loss formula is inapplicable to refund situations. The third basis where the Department will not apply the estimated loss formula is where the institution certifies loans that it knows are ineligible. And the

[167] *In re Christina Bros. Univ.*, Dkt. No. 96-4-SP, U.S. Dep't of Educ. (Jan. 8, 1997) at 3.
[168] Memorandum from Shirley Brown, Acting Chief of Institutional Review Branch (IRB) and Institutional Monitoring Division (IMD) to All Regional Directors and IRB Chiefs (July 17, 1996).

final exception is where the loan is eligible for discharge for false certification of eligibility.

Analysis

I. Standard of Review

The parties disagree whether Elite is entitled to *de novo* review in this proceeding.[169] While Elite argues that it is entitled to *de novo* review, FSA has argued that because the remand was not due to an error in Judge Dixon's decision but a "technical error" in Judge Dixon's appointment, "Judge Dixon's findings and rulings should be given significant weight by the Tribunal when issuing a new decision . . . ."[170]

In its *Lucia* decision, the U.S. Supreme Court addressed the proper remedy for a decision issued by an Administrative Law Judge without a proper appointment. It held that not only is "the 'appropriate' remedy for an adjudication tainted with an appointments violation [granting] a new 'hearing before a properly appointed' official, . . . [t]hat official cannot be [the same judge who previously heard the case and issued the decision], even if he has by now received (or receives sometime in the future) a constitutional appointment."[171] The Court explained that the judge who already issued the decision "has already both heard [the relevant] case and issued an initial decision on the merits . . . [and] cannot be expected to consider the matter as though he had not adjudicated it before."[172] Following the Court's instructions, the Secretary remanded this case, ordering that Judge Dixon's decision be "set aside" and that the "case is remanded to OHA for reassignment to a new ALJ for rehearing."[173]

[169] Elite Supp. Brief at 1-2; FSA Supp. Brief at 2.
[170] FSA Supp. Brief at 3.
[171] 138 S.Ct. at 2055.
[172] 138 S.Ct. at 2055.
[173] Order to Set Aside and Remand (Nov. 20, 2018).

As the Court instructed, and the Secretary ordered, this case is before us on a rehearing, with the initial decision set aside. A case where the initial decision has been set aside and the matter is set for a rehearing is not a review of the prior decision that gives deference to that decision. Rather, it is a new decision giving no deference to the prior decision. The Court directed that a new judge be assigned to prevent having a situation where the judge is unable to truly act as if he or she has not adjudicated the case before, or in other words provide a completely new review.

Other federal agencies faced with appointment challenges based on *Lucia* have, therefore, provided *de novo* review in these circumstances; where administrative decisions were vacated, and the matter was remanded and reassigned to a different Administrative Law Judge. For example, although USDA's OALJ does not necessarily allow for the submission of new evidence, it has explicitly stated that the matter be reviewed *de novo* by the reassigned ALJ.[174] Similarly, the Securities and Exchange Commission has stated that when its ALJs conduct new hearings after a case is remanded based upon *Lucia*, the reassigned ALJ does not "give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter."[175] In short, the proper standard of review in this matter is *de novo.*

II. Finding 3

At issue in Finding 3 is the affiliation between Elite's president, Yuriy Prakhin (Prakhin), and the ATB test administrator. Elite has the burden in this matter to prove that disbursements to the students in question were proper and complied with program requirements.[176] Elite must show that the test was independently administered and either that Prakhin, despite being the president of

[174] *See In re Stearns Zoological Rescue and Rehab*, U.S. Dep't of Agric. (Feb. 7, 2020), 2020 WL 836672, *2; *In re Steven C. Finberg*, U.S. Dep't of Agric. (Feb. 6, 2020), 2020 WL 836674, *5; *see also In re Saul Ortega*, Office of the Comptroller of the Currency (June 16, 2020), 2020 WL 8919756 at *5 (noting that the Administrative Law Judge properly applied *de novo* review of orders previously ruled upon by the former ALJ before a *Lucia* challenge).
[175] *In re Alexandre S. Clug*, Securities and Exchange Commission (Nov. 9, 2020), 2020 6585907 at *3.
[176] *See* 34 C.F.R. § 668.116(d).

Elite, was not a member of the board of directors, chief executive officer or chief financial officer for Elite or that the ATB test administrator was not a current or former employee of Prakhin.[177] Absent a statutory or regulatory exception, the length of employment or type of employment affiliation between the parties in question is irrelevant.

It is reasonable to believe that Prahkin, in his role as President, also acted as the chief executive officer or chief financial officer of the school, or sat on its board of directors. Elite has failed to prove that this is not true.

Elite has also failed to show that the ATB test administrator was not Prakhin's employee. Elite states that Prakhin is the president of Elite and that he "practices law through the Law Office of Yuriy Prakhin, P.C., a New York professional corporation."[178] Elite asserts that the person who administered the test was a "temporary short term employee of [the law firm], not Mr. Prakhin personally."[179] If the test administrator was an employee of the law firm, she is also Prakhin's employee if he has the authority in the law firm to hire and fire employees, assign tasks to employees and supervise their performance, and decide how the profits and losses of the business are to be distributed.[180]

In this case, Elite has conceded that the test administrator was an employee of the law firm that bears Prakhin's name. Prakhin informed FSA that "I hired her [ATB test administrator] as a part-time assistant/secretary for my law practice."[181] That Prakhin had the authority to make hiring decisions at the law firm indicates that he acts as an employer of the employees of the law firm. It is also reasonable to assume that if Prakhin hired an assistant, he would also have the authority to

[177] *See* 34 C.F.R. § 668.151(b)(2)(iii).
[178] Elite Supp. Brief at 3.
[179] Elite Supp. Brief at 3.
[180] *Clackamas Gastroenterology Assocs.*, 538 U.S. at 450.
[181] Dep't. Exhibit 3 at 3.

assign tasks to that person. In short, Elite has failed to meet its burden to show that Prakhin did not act as the employer of the employees of the law firm bearing his name.

Because Elite has failed to prove that the test administrator was not an employee of Elite's chief executive officer, board member, or chief financial officer, it has failed to prove that the test was independently administered. Therefore, Elite is liable to return Title IV funds disbursed to the four students at issue in Finding 3.[182]

Elite is incorrect that even if the ATB test were not independently administrated, Title IV funds were still properly disbursed because the Department did not determine the ATB tests were compromised or because the test administrator and Elite did not knowingly violate the regulations and use an administrator who was not independent. 34 C.F.R § 668.151(a)(2) requires that an ATB test meet two requirements. Similarly, 34 C.F.R § 668.154 requires a school to return Title IV program funds if one of two requirements is not met. The first requirement is the ATB test be independently administered. The second requirement is the ATB test be properly administered and not compromised. By failing to show that the test was independently administered, Elite has not demonstrated that the questioned ATB tests met both requirements. Elite offers no authority that would contradict the plain reading of the regulations nor provides a basis for not requiring the school to return Title IV program disbursements to students whose eligibility is based on ATB examinations that were not independently administered.

Contrary to Elite's argument, if the students were admitted based upon an improperly administered ATB examination, the school cannot retroactively establish the students' eligibility for Title IV funds by having the students complete six credit hours using 34 C.F.R. § 668.32(e)(5). This tribunal is bound by the decisions of the Secretary of Education. As he has recently stated, a

[182] *See* 34 C.F.R. § 668.154(a).

school is liable to return Title IV program funds disbursed to students "based on its erroneous eligibility determination whether such disbursements occurred before or after the students completed six credit hours of instruction."[183] Accordingly, since the ATB tests were invalid, and the identified student received Title IV funds to which they were not eligible to receive, the liabilities in Finding 3 are affirmed.

III. Finding 12

Elite contends that federal law and Department policy permitted institutions to use a student's self-certification to document the student's status as a high school graduate.[184] FSA responds that under the circumstances, the Sworn Statements themselves were unreliable, inconsistent, and invalid. The Department further argues that based on these problems with the Sworn Statements and allegations by students to FSA and OIG, the Department was justified in demanding that the school provide copies of diplomas to verify that students had valid diplomas. Elaborating, the Department claims that faced with inconsistencies on the documents themselves, like a student graduating at age nine, Elite had a fiduciary duty to question the validity of all student certifications of high school completion.[185]

Under the Department's published guidance, if it was a school's policy to require students to submit diplomas, the school had to rely upon the diplomas that were submitted and could not rely on the students' attestation. Elite asserts that it did not have a policy that required every student to submit a copy of his or her high school diploma.[186] The school submitted copies of their admissions policies in this matter. The submitted policies state that, prior to August 2012, non-citizens were required to submit proof of a minimum of an elementary school education, but "when

[183] *In re Bramson ORT*, Dkt. No. 18-08-SP, U.S. Dep't of Educ. (Oct. 15, 2021) (Decision of Sec.) at 5.
[184] Request for Review at 6.
[185] FSA Appellate Brief at 10-11.
[186] Request for Review at 4.

such documentation is impossible to provide an affidavit of the same [may be provided]."[187] The policies provided by Elite starting in August 2012 changed and stated that if a student cannot provide proof of at least an elementary school education, then the student must prove to the school the ability to benefit by completing 250 hours with a minimum grade point average of 75%.[188] For citizens, the policies required students to submit proof of a minimum of an elementary school education.[189] The policies submitted show that, for all students, Elite only requires proof of an elementary school education, but does not specify that a diploma must be submitted.

The Department argues that the documentation obtained by the Department "undermines" Elite's claim that it did not require students to submit diplomas.[190] FSA notes that the student files obtained by the Department contain both high school diplomas and the Sworn Statement form. That some of the student files contained a diploma, however, is not evidence that Elite required a diploma as a requirement for admission.

FSA also asserts that Elite must have had a requirement that students provide copies of high school diplomas because both Elite's accreditor and the state licensing body required institutions to do so.[191] In support of its statement, the Department cites to Section 126.11(a)(8) of the State Commissioner Regulations, which requires "documentation of entrance requirements for each course or curriculum for which the student has enrolled."[192] The regulation further clarifies that the "documentation of entrance requirements" includes **"**a copy of a student's high school diploma or transcript" but also includes "other approved documentation as determined by

[187] Respondent's Exhibit 3 - Elite Catalog (Oct. 1, 2009) at 2; Respondent's Exhibit 4 – Elite Catalog (March 9, 2011) at 2; Respondent's Exhibit - 5 Elite Catalog (Sept. 4, 2011) at 2; Respondent's Exhibit 7 - Elite Catalog (Feb. 5, 2012) at 1.
[188] Respondent's Exhibit 6 – Elite Catalog (Aug. 8, 2012) at 1; Respondent's Exhibit 8 - Elite Catalog (Oct. 14, 2012) at 1.
[189] *See* Respondent's Exhibits 3 through 8.
[190] FSA Appellate Brief at 10, n 7.
[191] FSA Appellate Brief at 10, n. 7.
[192] *See* FSA Supplemental Submissions at 34, 38, 41, 44, 46, 48, and 50 (8 NY ADC § 126.11(a)(8)).

the commissioner."[193] This language requires some documentation to support a student's eligibility for a course, but nothing in the language of the State's regulation indicates that it necessarily requires the school to accept copies of diplomas or GEDs as a requirement for enrollment. That the State provides the Sworn Statement form as an alternative to a copy of a diploma indicates that a copy of a diploma is not required by the State. Rather, Sworn Statement forms would logically be other documentation approved by the State's Commissioner of Education.

The Department also cites to Section 5002 of the New York State Education Laws. This law echoes the requirement imposed by 34 C.F.R. § 668.32(e), that a student have a high school diploma or the equivalent. The versions of the law filed by FSA in this matter, however, do not state that a school must collect and retain copies of high school diplomas as a condition of students' enrollment.[194]

In addition to referring to New York state law, the Department cites to Standard 4 from Elite's accrediting agency's standards and criteria as evidence that Elite must have had a policy requiring the submission of high school diplomas. In response to an order from this tribunal, the Department submitted copies of the policy from the relevant time. The documents submitted by FSA that are dated before 2012 state that the accreditor requires that: (1) the school "have in place an admissions policy that identifies all requirements that a prospective student must meet prior to enrolling in, and beginning a specific program of study;" and (2) that "[r]equired documents must be maintained in each student's file."[195] The policy further directs that a school's admission policy must require that a student have a high school diploma or the equivalent, mirroring the

[193] *See* FSA Supplemental Submissions at 53, 57, 61, 64, 68, 71, and 74 (8 NY ADC § 126.1(g)).
[194] *See* FSA Supplemental Submissions at 12-33.
[195] FSA Supplemental Submission at 8-11.

requirements to 34 C.F.R. § 668.32(e). Although the policy requires that a school maintain required documents and have an admission policy that requires a student have a high school diploma or equivalent prior to enrolling, nothing in the submitted documents dated before 2012 direct that a school must have a copy of a high school diploma or transcript in the student file if it is not otherwise required.

The documents submitted by FSA that are dated 2012 through 2014 direct that an institution's policies must require a student to "meet one of the following" and then provides a list that includes "[h]ave successfully completed high school or its equivalent as evidenced by any of the items on the following **non-exhaustive list**: copy of diploma, copy of GED certificate, copy of transcript . . . ."[196] The Standard explicitly states that the examples it provides that includes a high school diploma is non-exhaustive. It is, therefore, reasonable to understand this language to include a Sworn Statement as a document that could evidence completing high school. In short, the documents submitted by the Department do not state that, as FSA represented, the accreditor's policy required a school to have a policy in place requiring an enrolling student to submit a copy of the student's diploma.

The evidence submitted in this matter does not disprove Elite's assertion or submitted evidence that it did not require students to submit copies of their diplomas. Therefore, under the published regulations and policies in effect at that time, Elite was able to rely on attestations that its students had high school diplomas with two caveats. First, throughout the relevant period, if Elite had information that conflicted with these attestations, the school had an obligation to address those conflicts. Second, beginning with the 2011-2012 award year, if Elite had reason to believe that a student's diploma was invalid, the school had to obtain information to verify the existence

[196] FSA Supplemental Submission at 2-7.

of a valid diploma.

The Department argues that based upon the Secretary's decision in *In re Fortis College*,[197] even before the promulgation of subsection (p), schools had an obligation to review all information before the school to determine whether a high school diploma is valid.[198] To the extent the Department is arguing that schools have an obligation to address any conflicting information they receive, the Department is correct. But, the Department is incorrect to argue that Elite had an obligation before that time to collect additional information if a student's information, while not contradictory, gave the school or the Department reason to doubt the validity of the statement that the student had a high school diploma. The Secretary made clear in his decision in *In re Fortis College* that the school's specialized knowledge that the diplomas of the students in question came from a diploma mill and the fact that the school admitted that it did not rely upon the students self-certifications was essential to that decision.[199] As the Secretary stated,"[t]he issue in this case is not what every institution should have done with every student application, but what [the school] should have done regarding [the specific] students' applications based on the actual evidence before it."[200] The Secretary concluded that, under the circumstances of that case, the school had reason to know that every one of the students at issue had an invalid diploma, and had an obligation not to disburse Title IV program funds to students who it knew were not eligible. In this case, Elite has consistently stated that, unlike the school in *In re Fortis College*, it did rely on self-certifications. And, unlike in *In re Fortis College*, the evidence does not show that Elite knew all of the diplomas at issue were likely invalid or that the students' foreign high schools provided invalid high school diplomas and were the equivalent of diploma mills. In short, *In re Fortis*

[197] Dkt. No. 12-55-SP, U.S. Dep't of Educ. (March 17, 2015).
[198] FSA Supp. Brief. at 5.
[199] *In re Fortis College*, Dkt. No. 12-55-SP, U.S. Dep't of Educ. (March 17, 2015) at 5-6.
[200] *In re Fortis College*, Dkt. No. 12-55-SP, U.S. Dep't of Educ. (March 17, 2015) at 5.

College stands for the proposition that, even before subpart p was added to 34 C.F.R. §668.16, schools could not fail to resolve the conflict between a self-certification that the student had a valid diploma and the school's knowledge that a diploma was invalid. Here, FSA and OIG were only able to conclude that an Elite employee **may** have coached a small number of students. This disputed possibility is not akin to the actual or constructive knowledge of the school in *In re Fortis College* that the diplomas at issue came from a diploma mill.

Even though Elite did not ask for copies of students' diplomas, it is accountable for the information in the Sworn Statements it received from the 131 students at issue in Finding 12. Based on the clear intent of the policy, where Elite collected Sworn Statements as an alternative to diplomas or GEDs, Elite could not ignore the contents of the Sworn Statements. Under a plain reading of 34 C.F.R. § 668.16, and in line with the intent of the Department's policy, Elite had an obligation to address conflicting information in all the information it collected, including the Sworn Statements.

As noted, the Department argues that although the students at issue in Finding 12 self-certified that they had high school diplomas, those certifications were not sufficient "in light of the issues identified by [OIG], the issues identified by the documents themselves, and the student statements to the Department that they did not have high school diplomas and that [Elite] had them sign the certifications in order to obtain funds."[201]

The Department specifically addresses the Sworn Statements as the documents that it believes had issues. FSA contends that the Sworn Statements are invalid for many reasons. One such reason the Department raises is that the attestations by Elite's director on the forms were not notarized.[202] More specifically, FSA echoed a statement from a representative from the New York

[201] FSA Supp. Brief at 5.
[202] PRR at 26; Dep't. Exhibit 4.

State Education Department, that the failure to have the Director's signature notarized violates Section 126.1(g) of the New York State Commissioner of Education's Regulations.[203] Additionally, FSA objects to the fact that, for many students, the same Elite employee who signed the attestation also signed the students' enrollment forms. Furthermore, FSA asserts that it found that the owner of Elite notarized the statement for one student.[204] FSA offered no basis to show that these supposed failures presented the school with conflicting information. And, FSA has not provided a rational basis in the PRR or in briefs to this tribunal how these alleged deficiencies by Elite's employees would have given Elite reason to call into question the validity of a student's statement to Elite that he or she possessed a high school diploma.

FSA also contends in the PRR that none of the Sworn Statement forms were translated into the students' native languages.[205] Furthermore, FSA asserted that it found instances where the students' sworn statement forms were partially or completely filled out by someone other than the student and that for one student, the owner of Elite notarized the statement.[206] These alleged deficiencies do not create inconsistencies in the information contained in the Sworn Statements. The Department has not provided sufficient evidence to Elite in the PRR or FPRD or to this tribunal that students did not know what they were signing. Presuming that the failure to translate the documents or that the student was assisted in filling out the Sworn Statement would give Elite reason to question the legitimacy of the students' statements that they had a valid high school diploma requires too much speculation.

The Department's other bases for arguing that Elite could not rely on the self-certifications

[203] PRR at 26; Dep't. Exhibit 4. Whether New York law required the Director's signature to be notarized is not before this tribunal. *See In re Empire Tech. Sch.*, Dkt. No. 91-53-SP, U.S. Dept' of Educ. (Dec. 13, 1993) at 25.
[204] PRR at 27.
[205] PRR at 26.
[206] PRR at 27.

for any of the 131 students at issue in Finding 12 are the statements made to OIG investigators and FSA reviewers, and the OIG investigation findings. FSA argues that because of the "falsification and issues identified," the Department concluded that it could not accept the affidavits to "establish student eligibility" without additional verification from the school or student.[207] As noted, the PRR addresses the OIG investigation and states that "OIG's inquiry revealed that a former Secretary at [Elite] ***may*** have directed as least two students to have a Sworn Statement of Student's graduation from a foreign high school containing false information notarized and placed in the students' financial aid files.[208] Similarly, the FPRD states that OIG's inquiry "revealed that a former secretary at Elite ***may*** have directed as least two students to have obtained sworn statements that they had foreign high school diplomas when they did not."[209] In its briefs, FSA alters OIG's findings, arguing in definite terms to this tribunal and the Secretary that OIG's inquiry revealed that the Elite Secretary directed at least two students to obtain sworn statements that they had a high school diploma when they did not.[210] A determination that an allegation "may" have occurred is not a conclusion that it happened. The definition of "may" is that something has the ability or power to occur or that it is a "possibility" or "likelihood."[211] That an employee of Elite had the ability to direct a student to lie in the student's documentation, or that it is a possibility or even a likelihood, is simply not the same as a finding that the employee at Elite coached the two students who filed complaints with OIG.

Similar to the students who spoke with OIG, Student 46 told FSA reviewers that he told the Elite Secretary that he has a 9th grade education, and the Elite employee did not tell him he

[207] FSA Response Brief at 9.
[208] PRR at 24 (emphasis added).
[209] FPRD at 14.
[210] FSA Response Brief at 7; FAS Appeal brief at 76.
[211] Webster's New World College Dictionary 889 (4th ed. 2004).

needed a high school diploma.[212] In support of the assertion that the students who spoke to OIG evidenced coaching by the Elite Secretary, FSA submitted notes from the OIG investigator and documentation showing that the students who spoke with OIG submitted Sworn Statements attesting to having a high school diploma.[213] Although FSA provided evidence that the students did not have high school diplomas and that the students falsely certified that they did have diplomas, FSA has not submitted evidence substantiating the allegations that the students were coached to lie.

Additionally, Elite has specifically denied allegations that it knew that the students' declarations that they had high school diplomas were false.[214] The school has also stated that to the school's "knowledge and based on sworn affidavits from the [Elite] Secretary [], Spanish teacher [], and Director [] no employee of the school has coached any potential students to provide false information in order to receive Title IV Federal Student Aid.[215]

Furthermore, the students who attested on their Sworn Statements that they had high school diplomas made those declarations "under the penalty of perjury."[216] Those same students represented on their FAFSA forms that they had a high school diploma. 20 U.S.C. § 1097 provides criminal penalties for providing false statements in order to obtain Title IV program funds.[217] Although Elite and its employees would be motivated to deny coaching students to lie on their FAFSA forms and Sworn Statements, students would have an equal motivation to shift blame when a false statement is found, or could be found, in their student assistance application materials.

As OIG concluded, the statements from students raise the possibility that employees of

[212] PRR at 26; FPRD at 16.
[213] Dep't. Exhibit 7 at 127, 139-140, 159-162, 168-170.
[214] Elite Initial Brief at 7.
[215] Response to PRR at 42.
[216] Dep't. Exhibit 7 at 140, 143, 170
[217] Criminal law matters are not within the jurisdiction of this tribunal and this decision in no way makes any findings or conclusions whether a crime has been committed.

Elite directed applicants to make false statements. That possibility, especially when Elite denies the allegations, and when students have motivation to shift responsibility for false statements in their materials, is not sufficient to impose additional obligations on Elite that the regulation and policies in place at that time did not impose. In short, without more concretely establishing that Elite employees coached students to lie on their Sworn Statements, FSA cannot require Elite to obtain additional documentation supporting the existence of a valid diploma where there is no conflicting information or evidence of a reason to doubt the validity of the students' diplomas.

In addition to the ten students whose files are specifically addressed in the PRR and FPRD, the Department also states that for fifteen other students, Elite failed to undertake efforts to obtain educational records, as required by the state of New York. The Department has not identified any specifics about these student files that points to conflicting information or a reason to doubt that the students had high school diplomas. Whether New York law added an additional requirement that when a student submitted a Sworn Statement, a school had an obligation to collect additional information is a matter of New York law and not before this tribunal. This appeal only addresses the obligations imposed by the federal regulation cited in the PRR and FPRD, 34 C.F.R. § 668.16.

As noted in the PRR and the FPRD, FSA does not allege that Elite had conflicting information about 121 of these students. Rather, it asserts that it cannot trust the Sworn Statements and that Elite should have discovered conflicting information. In a Subpart H proceeding, like this, Elite has the burden of showing that it properly disbursed Title IV program funds and complied with program requirements.[218] But the Department has a burden of providing adequate notice of its demand and providing Elite an adequate opportunity to respond to the alleged findings in the PRR.[219] FSA reviewed and provided specific information about ten student files which

[218] *See* 34 C.F.R. § 668.116(d).
[219] *See* 20 U.S.C. § 1099c-1(b)(6); *In re Housatonic Community College*, Dkt. No. 15-36-SP, U.S. Dep't of Educ.

provide a basis for Elite to respond and this tribunal to judge whether there was conflicting information or reason to doubt the validity of the sworn statements. For the other 121 files at issue in Finding 12, FSA argues that alleged deficiencies in those ten files gives a basis to assume that those 121 had information in them that was self-contradictory or gave reason to doubt the validity of the attestations of having diplomas. As noted below, there were apparent issues in many of the files reviewed which would seemingly justify a full file review. FSA has given notice that the basis for holding Elite liable is a failure to fulfill the obligations imposed by 34 C.F.R. § 668.16, to rectify conflicting information and, beginning in the 2011-2012 award year, the accompanying duty to examine further when there is reason to doubt that a student has a valid high school diploma. FSA, however, did not ask Elite to provide information to determine whether there was conflicting information in those files or reason to doubt the sworn statements. Rather, FSA assumed that there was a conflict or reason to doubt and directed Elite to produce information that it would only have an obligation to obtain if there had been a conflict or reason to doubt.

FSA found sufficient errors to justify a full file review. Elite acknowledges that FSA identified six instances where there may have been a discrepancy presented to the school that it failed to address.[220] FSA looked at 38 student files, the two student files referred to FSA from the OIG complaint as well as 36 additional files from three award years, as a judgment sample.[221] The six student files with unresolved discrepancies accounts for over 15% of the files in the sample, which would necessarily dictate that for at least one of the award years there was an error rate of at least 15%. The Department has an obligation to establish guidelines to "ensure uniformity of practice in the conduct" of its program reviews and to make those guidelines available to

(July 26, 2016) at 2.
[220] Elite Initial Brief at 5.
[221] PRR at 25-26.

institutions participating in Title IV programs.[222] The 2009 FSA Program Review Guide, which was the Program Review Guide in effect between 2009 and 2017, does not have a statement as to what error rate qualifies as a systemic problem warranting a full file review. The previous Program Review Guide, however, has a statement that "[g]enerally, an error rate of greater than 10 percent for any given award year would signal a systemic problem."[223] Applying that published standard, FSA is justified in requiring a full file review. It was not, however, justified in ordering Elite to produce documents without a showing that Elite had an obligation to collect and retain those documents.

In a Subpart H hearing, the hearing official is charged with issuing a written decision that "states and explains whether the . . . . final program review determination . . . . was supportable in whole or part." FSA holds Elite liable to return Title IV program funds for 125 students based on the school's failure to "reconcil[e] all information received."[224] FSA, in the FPRD makes specific findings related to ten students, but, for 121 of the students FSA has not identified any conflict in the information that Elite received for the school to reconcile nor has it shown that there was anything in the information collected regarding those students that at that time gave the school or the Department reason to doubt that the students had graduated from high school. The liabilities imposed in the FPRD that arose from Elite's failure to produce documents that the Department has not adequately shown the school had an obligation to obtain or retain is not supportable.

Moreover, pursuant to 20 U.S.C. § 1099c-1(b)(6), the Department is required to give Elite an "adequate opportunity" to respond to the PRR. For 121 of the students, FSA held Elite liable for failing to produce a copy of the students' high school diplomas or academic transcripts.[225] It

[222] 20 U.S.C. § 1099c-1(b).
[223] 2001 Program Review Guide at III-17.
[224] FPRD at 13.
[225] FPRD at 18.

did so based on finding "significant deficiencies with Elite's admission practices, including apparent falsification of records." As noted above, the finding that there was "apparent falsification of records" appears to be based on contested allegations and the fact that the Sworn Statements appear to have been filled out by someone other than the students. FSA may have been justified in ordering a full file review to address the question of whether there were additional files with unresolved conflicting information. The Department cannot assume that all 131 student files contained conflicting information or a basis for questioning the validity of the attestations. And, short of a showing that Elite had conflicting information or, for students admitted during the 2011-2012 award year or later, that Elite had information that called the students' claims of having diplomas into question, FSA has not shown that Elite had an obligation to collect the students' diplomas or transcripts. Elite had an obligation to retain documentation supporting each students' Title IV program disbursements.[226] The school, however, cannot be asked to retain documents that it had no obligation to collect. Elite's obligation to produce documents that support its disbursement of funds arises, in part, out of its status as "the only one that has at its disposal the files and records to justify the expenditure of Title IV funds."[227] If Elite had no obligation to collect or retain the students' high school diplomas or academic transcripts, it would not have these documents at its disposal and requiring the school to produce those documents years later as the only permissible response to Finding 12 in the PRR is not providing Elite an "adequate opportunity" to respond. Here, the evidence does not show that Elite had an obligation to ensure that it obtained a copy of a student's diploma when it enrolled the student, and Elite, therefore, cannot be held liable now for failing to fulfill an obligation it did not have at that time.[228] The

[226] *See* 34 C.F.R. § 668.24(c).
[227] *In re Chauffer's Training School*, Dkt. No. 92-113-SP, U.S. Dep't of Educ. (Nov. 23, 1999).
[228] *Cf. In re Beth Medrash Eeyun Hatalmud*, Dkt. No. 97-94-SP, U.S. Dep't of Educ. (June 16, 1998).

liabilities assessed in the FPRD for the student files for which FSA has made no specific findings that Elite had conflicting information or reason to doubt of the validity of the diplomas are unsupportable.

Applying the law and the Department's policies that were in place at that time, liabilities are supportable for some but not all of the ten students whom FSA specifically identified in the PRR and FPRD. For six of the ten students, Students 40, 41, 44, 52, 57, and 66, Elite concedes that the school was presented with conflicting information at the time of the students' enrollment that the school failed to address.[229] The other four students are two students referred to FSA from OIG, Students 56 and 59, as well as Students 46 and 65.

A. Students interviewed by OIG: Students 56 and 59

In the PRR and FPRD, FSA asserts that Student 56 told OIG investigators that she had explained to the Elite Secretary that she had an expired cosmetology license from Puerto Rico and that she did not have a high school diploma and the Secretary told her that the school would "fix that."[230] Similarly, FSA contends that Student 59 told OIG investigators that she informed the Elite Secretary over the phone that she did not have a high school diploma and that the Secretary continued to complete the paperwork and told her it was "okay."[231] FSA asserts that both students claimed that the Secretary either helped them fill out their documents or gave them documents with false information.[232] FSA further asserts that both students told OIG investigators that they did not finish high school.[233] FSA further states in the FPRD and PRR that it "appears" that both students' Sworn Statements were completed by someone other than the student and that Elite's

[229] Elite Initial Brief at 5.
[230] FPRD at 14; PRR at 25.
[231] FPRD at 14; PRR at 25.
[232] FPRD at 14-15; PRR at 25.
[233] FPRD at 14-15; PRR at 25.

Director, who does not speak Spanish, attested to the validity of both students' statements.[234] Finally, FSA asserts that there is no indication that Elite took any efforts to obtain educational records for either student.[235]

As noted above, whether the students filled out the forms or someone helped them fill out the forms does not create a conflict. It is also not proof that the information in the form is falsified. Additionally, that someone helped the students complete the form and that Elite's director signed the Sworn Statement does not create a reason for the school to doubt the validity of the students' assertions that they have diplomas. Also, the allegations by the students that they provided contrary information to Elite's employees and those employees coached the students to lie are unsubstantiated. OIG determined only that the allegations against the Elite Secretary "may" have occurred. The Department does not assert that any documents in the students' files contain conflicting information or would provide reasons for the school to doubt the validity of the students' statement that they had a diploma. Where OIG's investigation did not definitely determine that there was misconduct on behalf of the Elite Secretary, there is no clear basis for Elite to have collected the students' diplomas or transcripts. Therefore, Elite cannot be liable for failing to produce copies of those diplomas or transcripts.

B. Student 46

Similar to Students 56 and 59, FSA asserts that during an interview in December 2013, Student 46 claimed to have informed the Elite Secretary that he had a 9th grade education, and the Secretary did not inform him that he is required to have a high school diploma. FSA contends that the student additionally told the reviewers that the school listed on his sworn statement is the school where he obtained his 9th grade education and that the student's affidavit is signed by the same

[234] FPRD at 14-15; PRR at 25.
[235] FPRD at 14-15; PRR at 25.

school agent who signed the enrollment agreement.[236]

FSA has not substantiated or found any corroboration to support the statements by student 46. [237] It is not clear why having the same Elite employee sign the Sworn Statement and the enrollment form would indicate that Elite had conflicting information or reason to doubt the validity of the student's attestation that he had a diploma. FSA may have established that, having not complete schooling beyond 9th grade, the student was not eligible for Title IV funds, but it did not provide an adequate basis for concluding that Elite had a reason to identify the student's ineligibility when it disbursed Title IV program funds for the student.

C. Student 65

FSA notes that Student 65's ISIR indicates that she had a high school diploma and her Sworn Statement identifies the name of a high school in the Dominican Republic where the student claims to have attended between 1993 and 1998 and from which she graduated.[238] FSA contends that when its officials asked for a copy of the diploma to be sent, what was sent instead was a copy of a GED with a completion date in 2002 issued by the Secretary of Education, The National Council of Education, Santo Domingo, Dominican Republic. FSA asserts that the affidavit is signed by the same Elite employee who signed the enrollment form and there is no indication that Elite made an effort to obtain the student's educational records. FSA argues that this confirms that students are told to write the name of a foreign high school, but it does not "necessarily mean" that the students obtained a diploma from that high school.

As with the other students, the fact that the same Elite employee signed the affidavit as the

[236] FPRD at 16; PRR at 26.
[237] In its brief, FSA asserts that the Department also interviewed Students 62 and 64. FSA does not provide any information in the FPRD or PRR about the interviews with Students 62 and 64. For all three of Students 46, 62, and 64, FSA has provided evidence that supports that the students made the allegations of coaching and that they stated on their Sworn Statements that they had a high school diploma. The Department, however, has not provided evidence that corroborates the allegations that an Elite employee directed the students to provide false information.
[238] FPRD at 17; PRR at 28.

enrollment form does not create a conflict of information or provide a basis for doubting the validity of the student's claim that she has a diploma. Additionally, although the information found by FSA may evidence that the student misrepresented information on her forms, it does not indicate that the school knew that this information was false. In short, the information provided in the PRR and FPRD about Student 65 does not provide an adequate basis for imposing an obligation on Elite to obtain or retain a copy of the student's diploma or transcript. The imposition of liabilities for failing to produce those documents is unsupportable and cannot be maintained.

Under the laws and policies in place at the relevant time, Elite had an obligation to address any conflicting information in its possession. Additionally, the laws and policies required Elite, beginning with the 2011-2012 award year, to verify that a student had a valid high school diploma, if there was some reason to doubt that fact. Elite has conceded that, in Finding 12, the Department found six student files that contained conflicting information that Elite failed to address. Elite did not resolve the conflicting information and substantiate the disbursement of Title IV program funds to those students. Therefore, Elite must return the Title IV program funds disbursed to those six students. Because of those identified instances of Elite's failure to meet its fiduciary duties, FSA could have directed Elite to conduct a file review to assess the extent of Elite's failures to meet its obligations under 34 C.F.R. § 668.16 and identify additional instances where Elite did not resolve conflicting information or verify an assertion that a student had a diploma when there was reason to doubt the assertion. The Department's conclusion that Elite owes a liability for any of the 125 other students at issue in Finding 12 for whom the school cannot produce a diploma or transcript unjustifiably requires an unsupported determination that all of the student files had either conflicting information or, for those files beginning with the 2011-2012 award year, Elite had reason to doubt that the student had a valid degree without directly addressing whether this

assumption is true. In short, that liability is not supportable.

I. Estimated Loss Formula

Based upon the guidance that the Department promulgated in its 1996 memorandum,[239] the estimated loss formula is generally used when the liability is calculated from a projection using a statistical sample but not when there are ten or less loans at issue. Additionally, there are four exceptions when the formula is generally not used; (1) when the reviewer knows that all the loans in question are in default; (2) refund situations; (3) where the institution certifies loans that it knows are ineligible; and (4) where the loan is eligible for discharge for false certification of eligibility.[240]

The liabilities upheld in Findings 3 and 12 are calculated based on the Title IV program funds given to four and six specific students respectively. Those liabilities are not calculated by projecting from a statistical sample and the liabilities in both Findings involve less than 11 loans. Therefore, the estimated loss formula should not be applied to the liabilities in the two findings.[241]

If Elite had been found to have been liable for Title IV program funds distributed to all 125 students at issue in Finding 12, the estimated loss formula should have been applied. The liability would have involved more than ten loans and would not have meet any of the four exceptions to the use of the formula that the Department disseminated.

Because FSA makes no claims that it knows that all of the loans at issue are in default or that this is a refund situation, two of the exceptions are clearly inapplicable. Additionally, the third example, where the institution certifies loans that it knows are ineligible, does not apply in this

[239] Dep't. Exhibit 8 - Memorandum from Shirley Brown, Acting Chief of Institutional Review Branch (IRB) and Institutional Monitoring Division (IMD) to All Regional Directors and IRB Chiefs (July 17, 1996).
[240] Dep't. Exhibit 8 - Memorandum from Shirley Brown, Acting Chief of Institutional Review Branch (IRB) and Institutional Monitoring Division (IMD) to All Regional Directors and IRB Chiefs (July 17, 1996).
[241] Elite's reliance on *In re Nettleton Junior College* is misplaced. In that case, this tribunal determined that there was no analysis or findings made that justified the Department's decision. Although the Department did not specify why it was not using the estimated loss formula, it did articulate findings and, when established policy was applied to those findings, it justified not using the formula.

case. As noted above, while there are unsubstantiated allegations of coaching, there is no definitive proof that Elite definitively knew that the students were ineligible and chose to certify the loans anyways. In the guidance, the Department provides as an example of that exception a school who continued to certify students for Title IV program eligibility after it had already been determined that the school's certifications were improper, and the school had already been ordered to return funds for certifying similar students. There are no substantiated allegations against Elite akin to a category of students who were certified after the school had already been specifically told that the category of students was ineligible or that the disbursement of a category of Title IV program funds was improper.

The final exception, where the loan is eligible for discharge for false certification of eligibility, is the exception provided by FSA in its decision not to use the estimated loss formula.[242] The exception states that estimated loss formula is not used where the students in question may be eligible for loan relief or loan discharge under 34 C.F.R. § 682.402(e), which applies to the discharge of loans made through the Federal Family Education Loan Program. That regulation provides for the discharge of a loan when a loan was falsely certified, which is further defined as:

> (i) Certified the student's eligibility for a FFEL Program loan on the basis of ability to benefit from its training and the student did not meet the applicable requirements described in 34 CFR part 668 and section 484(d) of the Act, as applicable and as described in paragraph (e)(13) of this section; or
>
> (ii) Signed the borrower's name without authorization by the borrower on the loan application or promissory note.
>
> (iii) Certified the eligibility of an individual for an FFEL Program loan as a result of the crime of identity theft committed against the individual, as that crime is defined in § 682.402(e)(14).

[242] FSA Response Brief at 10.

34 C.F.R. § 685.215 also provides for a student to discharge his or her loan based on false certification of the loan made through the William D. Ford Federal Direct Loan Program. That regulation[243] similarly provides that a "student's eligibility to borrow to have been falsely certified by the school if the school[:]"

> (i) Certified the student's eligibility for a Direct Loan on the basis of ability to benefit from its training and the student did not meet the eligibility requirements described in 34 CFR part 668 and section 484(d) of the Act, as applicable;
>
> (ii) Signed the borrower's name on the loan application or promissory note without the borrower's authorization; or
>
> (iii) Certified the eligibility of a student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary, would not meet the requirements for employment (in the student's State of residence when the loan was originated) in the occupation for which the training program supported by the loan was intended.
>
> (iv) Certified the individual's eligibility for a Direct Loan as a result of the crime of identity theft committed against the individual, as that crime is defined in § 682.402(e)(14).

The students at issue in this finding were deemed eligible based on an assertion that the students had a high school diploma or equivalent, not based on the alternative qualification of showing the ability to benefit. There are no substantiated allegations, nor any apparent allegations, that Elite signed any student's name without his or her permission, that there were any cases of identity theft, or that there are any issues with the students' ineligibility for employment.

Unlike the liability at issue in Finding 3, the liabilities assessed in Finding 12 were for the failure to address conflicting information regarding students whose eligibility was based on the students having a high school diploma or the equivalent, not based upon having passed an ATB exam. As noted, the loan discharge regulations apply to the certification of a student's eligibility "on the basis of ability to benefit from its training and the student did not meet the applicable

[243] Citation here is to the version of the regulation applicable between September 8, 2006 and June 30, 2014.

requirements described in 34 CFR part 668 and section 484(d) of the Act." FSA argues that the Department has always interpreted "ability to benefit" for a program in the discharge regulations to include a high school diploma, GED, or passing a valid ATB exam.[244] FSA offers no support for this assertion other than to say it is consistent with 34 C.F.R. § 692.402(e)(13).[245]

As noted above, subpart (e) of 34 C.F.R. § 692.402 addresses false certification by a school of a student's eligibility to borrow and unauthorized disbursements for FFEL loans. Within the section, paragraph (e)(13) then further defines the "[r]equirements for certifying a borrower's eligibility for a loan," that would have been falsely certified. That paragraph states that "[f]or periods of enrollment beginning on or after July 1, 2000," proper certification of a borrower's eligibility is if the student "[m]et either of the conditions described in paragraph (e)(13)(ii)(D) of this section;" or "[w]as home schooled and met the requirements of 34 CFR 668.32(e)(4)." There is no assertion in this case that any eligibility determinations were based on eligibility through home schooling. Paragraph (e)(13)(ii)(D) of this section states that eligibility for this section is determined based on whether the student obtained a passing score on an ATB exam within 12 months before the date the student initially receives Title IV program funds or if the student enrolled in an eligible institution that participates in a state process approved by the Secretary in subpart J of 34 C.F.R. part 668. The plain text of regulations on false certification discharges in place at that time do not include a certification that a student had a high school diploma or GED in the definition of a false certification. In short, based on the language of the Department's own policy, if Elite had been liable for all 125 of the loans at issue in Finding 12, none of the exceptions would have been applied, and FSA should have applied the estimated loss formula.

[244] FSA Response Brief at 13.
[245] FSA Response Brief at 13.

Findings of Fact and Conclusions of Law

1. This case, upon a remand for a rehearing, is reviewed *de novo*.

2. The Ability to Benefit tests were not independently administered to the students identified in Finding 3.

3. Elite must return Title IV program funds for the students in Finding 3 that are not duplicative of other liabilities owed or that have not already been returned.

4. The Department's decision not to apply the estimated loss formula to the liabilities assessed in Finding 3 is upheld.

5. For the 2009/10 and 2010/11 school years, under the laws and policies in place, Elite could reasonably rely upon the Sworn Statements, ISIR, and FAFSA forms it collected without obtaining additional information as long as it addressed any conflicts in the information it received.

6. For the 2011/12, 2012/13, and 2013/14 award years, Elite could reasonably rely upon the Sworn Statements, ISIR, and FAFSA forms it collected without obtaining additional information as long as it addressed any conflicts in the information it received and unless the information received gave the school or the Department reason to doubt the validity of the students' high school diplomas.

7. The Department did not make any specific findings about the information in 121 of the 131 student files at issue in Finding 12, and, therefore, did not adequately establish that Elite possessed conflicting information or reason to doubt the validity of the students' high school diplomas. Therefore, the evidence does not show that Elite had an obligation to collect or retain diplomas or other supporting documentation from these students, and the failure to produce that documentation in response to the full file review cannot be the basis of liabilities.

8. The Department did not adequately establish that Elite had conflicting information or otherwise had reason to doubt the students' assertion that they had valid high school diplomas for Students 46, 56, 59, and 65. The evidence does not show that Elite had an obligation to obtain the additional information for these students, including information that was later discovered by FSA that may have conflicted with the information Elite reasonably relied upon. The liability assessed for these students is not supportable.

9. Elite has conceded that the information provided by Students 40, 41, 44, 52, 57, and 66 contained unresolved conflicting information. Elite's failure to resolve this conflicting information requires that the school return Title IV program funds disbursed to these students.

10. The estimate loss formula should not be applied to the liabilities arising out of Students

40, 41, 44, 52, 57, and 66 in Finding 12.

11. If Elite had been liable for liabilities arising out of all 125 students at issue in Finding 12, the Department should have applied he estimated loss formula to more precisely identify the amount of Title IV program funds that must be returned.

Order

Based on the foregoing findings of fact and conclusions of law, it is **HEREBY ORDERED:**

1. The Elite Academy of Beauty Arts shall repay the liabilities assessed in Finding 2, calculated using the cohort default rate agreed to by the parties.

2. The Elite Academy of Beauty Arts shall repay any non-duplicative liabilities established in Finding 3 that have not otherwise been returned to the Department.

3. The Elite Academy of Beauty Arts shall repay the un-challenged liabilities established in Finding 4.

4. The Elite Academy of Beauty Arts shall repay the liabilities associated with students 40, 41, 44, 52, 57, and 66 in Finding 12.

5. The Elite Academy of Beauty Arts does not owe the liabilities assessed in Finding 13, which were withdrawn by the Department.

_____
Daniel J. McGinn-Shapiro
Administrative Law Judge

Dated: November 17, 2021

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. 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 appealing party shall provide a copy of the appeal to the opposing party. The appeal shall clearly indicate the case name and docket number.

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

Notice: Due to the consequences from the current COVID-19 event, OHA is unable to directly accept hand delivery or courier-delivered mail or parcels at the OHA's physical location and delivery by U.S. Mail to OHA will be delayed due to modifications to interoffice mail delivery.

Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.

SERVICE

This order has been sent by certified mail, return receipt requested and by OES automatic generated notice to counsel of record to:

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