

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
BUREAU FOR PRIVATE POSTSECONDARY EDUCATION
STATE OF CALIFORNIA**

In the Matter of the Citation Against:

TANNY DIEP dba SWAY BROWS

11688 South Street, 2nd Floor, Suite 204

Artesia, CA 90701

Citation No.: 2021255

OAH Case No.: 2021080646

Respondent.

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of the Department of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall become effective on _____ "July 23" _____, 2022.

It is so ORDERED _____ "June 15" _____, 2022.

"Original Signature on File"

RYAN MARCROFT
DEPUTY DIRECTOR, LEGAL AFFAIRS DIVISION
DEPARTMENT OF CONSUMER AFFAIRS

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FOR THE BUREAU FOR PRIVATE
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TANNY DIEP dba SWAY BROWS, Respondent.

Agency Case No. 2021255

OAH No. 2021080646

PROPOSED DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 21, 2022, by videoconference.

Vinodhini Ramagopal, Deputy Attorney General, represented complainant Christina Villanueva, Discipline Manager of the Bureau for Private Postsecondary Education (Bureau), Department of Consumer Affairs.

Michael J. Khouri, Khouri Law Firm, APC, represented Tanny Diep (respondent), sole owner, manager, and Chief Executive Officer (CEO) of Sway Brows.

Oral and documentary evidence was received. The record remained open until April 11, 2022, for respondent to submit her closing brief and until May 2, 2022, for complainant to provide a responsive brief. Both respondent and complainant timely

submitted their briefs, which were marked as Exhibits 14 and G, respectively. The record was closed, and the matter was submitted for decision on May 2, 2022.

FACTUAL FINDINGS

Jurisdictional Matters

1. On May 13, 2021, while acting in her official capacity, complainant issued respondent Citation Number 2021255 (Citation) for operating a private postsecondary educational institution without the Bureau's approval in violation of Education Code section 94886. Complainant assessed a fine in the sum of \$25,000 and ordered respondent to cease operating as a private postsecondary educational institution until an approval is obtained from the Bureau.

2. On May 21, 2021, respondent filed a timely appeal of the Citation and requested an administrative hearing. This hearing ensued.

Respondent's Business

3. Respondent is the sole owner of Sway Brows, a limited liability corporation registered with the California Secretary of State in 2019. According to Articles of Incorporation filed with the California Secretary of State on June 19, 2019, and signed by respondent, Sway Brows is a "Microblading Academy & Studio." (Exh. 6, p. 3.) Sway Brows' academy and studio is located in Artesia, California.

4. Microblading is a technique where permanent makeup is applied to the eyebrows. Pigment is deposited on the eyebrows, under the skin using a microblade, a tool with tiny needles. Although a microblading practitioner is not required to be licensed to perform microblading in California, microblading is considered a body art,

and practitioners are required to be registered with the local enforcement agency and show completion of Occupational Safety and Health Act (OSHA) bloodborne pathogen training. (Health & Saf. Code §§ 119301, 119306, subds. (b) & (c)(2).) Respondent is a registered body art practitioner with the Los Angeles County Department of Public Health (LACDPH), and she has also completed the requisite OSHA bloodborne pathogen training. (Exs. B, C.) Sway Brows provides microblading services to its clients, and it also offers to train students, through both online and in-person courses, to perform the microblading procedure.

Bureau's Investigation

5. Brandon Lovette (Lovette) is an Enforcement Analyst in the Bureau's Licensing Unit. He has been employed by the Bureau since October 2018.

6. Lovette was assigned to conduct an investigation of an anonymous complaint the Bureau received on February 18, 2021, that Sway Brows was "[c]harging too much money for 2 day class." (Ex. 3, p. 7.) Lovette prepared a written report which summarized the findings of his investigation. (Ex. 3.) Lovette also testified at the hearing regarding the investigation.

7. On March 9, 2021, Lovette conducted an on-line research of Sway Brow's active website. He found that respondent is featured on the website as a "Master Trainer" certified by Beauty Angels Academy. (Ex. 4, p. 23.) She has trained over 200 students worldwide, and her skills include microblading, shading, powdering, and removal. (*Ibid.*)

8. According to Sway Brow's website, it offers both online and in-person training. All of Sway Brow's online courses cost less than \$2,500. Two in-person courses are listed on the website: (1) microblade and shade, and (2) powder brows.

The powder brows course costs less than \$2,400. However, a two-day microblading and shading basic course (Basic Course) was offered for a total of \$2,999. (Ex. 4.) The Basic Course included two days of in-person training on live models, which lasts from 9:00 a.m. to 5:30 p.m. or 7:30 p.m., depending on the number of students. (Ex. 4, p. 21.) The course also includes a premium kit, consisting of tools and supplies required for microblading and shading. Although this premium kit is listed as an "option" when signing up for the course, the only payment option was for the full price of the course, \$2,999. (*Ibid.*) There is no option to purchase the premium kit and the course separately. (*Ibid.*) Sway Brows offered upcoming "Basic Course" classes on March 19 to 20, 2020, and April 16 to 17, 2020. (*Id.* at pp. 18-19.)

9. Sway Brow's website also featured the profiles of two former students who pursued careers in microblading after taking its courses. (*Id.* at pp. 28-29.) Lovette also search respondent's profiles on Yelp, LinkedIn, Facebook, and Instagram. On respondent's Facebook and Instagram profiles, Lovette found photographs of students graduating from the Basic Course and holding certificates from "Beauty Angels Academy." Additionally, on her Instagram account, respondent advertised, "If you are looking for a fun and exciting career in Microblading, visit swaybrows.com for our upcoming dates " (Ex. 9, p. A132.) She also writes, "Microblading is the hottest new trend in Permanent Makeup and Artists have the potential to earn a six-figure income their first year in business! If you are looking to make a career change, visit us at Swaybrows.com to find out how!" (*Id.* at p. A134.) According to respondent, courses at Sway Brows "cover business strategies and how to build your clientele through social media marketing." (*Ibid.*)

10. On March 15, 2021, Lovette, using the undercover alias Sammi Lopez, emailed respondent to inquire about the Basic Course. He asked respondent if any

experience is needed to take the Basic Course, whether the online classes are included or separate, and the prices for the in-person class. (Ex. 11, p.3.)

11. On the same date, respondent answered Lovette's inquiries, in relevant part:

If you sign up for the course, the online program is actually included so you get 2 days of live training and then after that you have to complete the online course.

The online program is required in order to get your certification because that is where you will practice your skills to prepare to work on your own models/clients. We provide trainer support throughout the 6 months where you will also get online access and feedback directly from me for every level of the 20 level curriculum.

The live course is \$2999 (includes 2 days in person training, the premium kit, 6 months access and support) The online course is \$1699 (includes everything above except the in person training)

Some students have opted to start with online and then pay the difference to join a live class if they need the guidance.

(Ex. 11, p. 2.)

12. On April 13, 2021, Lovette reviewed Sway Brow's website and found that it still offered the Basic Course for \$2,999, with courses scheduled for April, May, June, and July 2021.

13. Based on his research, Lovette concluded that respondent owned and operated Sway Brows, a business that offers instruction for the purpose of becoming a microblading or permanent makeup artist without Bureau approval and is not operating under an exemption under Education Code section 94874. Lovette's findings formed the basis of the Citation.

14. At the hearing and during cross-examination, Lovette conceded that he made no further inquiries regarding the Basic Course after his March 15, 2021 exchange with respondent. Lovette also testified that courses offered by Sway Brows, other than the Basic Course, are not regulated by the Bureau because they are under the \$2,500 threshold, and Education Code section 94874 exempts courses under that limit. However, according to Lovette, the Basic Course is under Bureau regulation because it costs more than \$2,500. Lovette was unsure whether the Basic Course would be subject to Bureau regulation if it were in fact two separate courses, with the online course costing \$1,699, and the in-person course costing \$1,300.

Respondent's Evidence

15. Respondent attended San Diego State University for two years before obtaining an associate degree in fashion design from the Fashion Institute of Design and Merchandising. Respondent worked for a fashion company, Coin 1804, for 10 years, starting as an intern and working her way up to sales, marketing, and product development.

16. In 2019, respondent became a permanent makeup artist and started her own business. She is currently the owner, manager, and CEO of Sway Brows. Sway Brows is fully insured. Respondent is also registered with LACPHD as a body artist, although for six-month period in 2021, respondent's body art permit with LACPHD

lapsed because she was pregnant and did not work. Respondent is associated with Beauty Angels Academy, where she completed her training in microblading.

Respondent is a Beauty Angels Academy ambassador and master trainer, who follows the Beauty Angels Academy curriculum and issues certificates from the Beauty Angels Academy to students completing her courses.

17. Respondent clarified that although the Basic Course costs more than \$2,500, it is in fact a combination of two courses, one online and the other in-person. The online course costs \$1,699, and it is required to obtain the Beauty Angels Academy certificate. The in-person live course costs \$1,300, and it is not required to obtain the Beauty Angels Academy certificate, but students may choose to take it for in-person training with a live model. Respondent testified that Lovette never contacted her to follow up on their March 15, 2021, email. Otherwise, she would have told him that she does not offer individual classes costing more than \$2,500.

18. Respondent admitted that in 2021, if customers accessed her website, there was no option to purchase the Basic Course as two separate classes. However, if customer a had emailed her in 2021, respondent would have allowed the consumer to take either the \$1,699 online course or the \$1,300 in-person course by itself. Respondent's testimony on this issue is credible, as she testified in an open and sincere manner. Additionally, respondent's testimony is corroborated by her email to Lovette, in which she noted that the price of the online course is \$1,699 and that some of her students have chosen to take only the online course, with the in-person course as an optional add-on should they need more guidance. (*Ante*, Factual Finding 11.)

19. Respondent has never heard of the Bureau before receiving the Citation. After receiving the Citation in 2021, respondent changed Sway Brow's website to clarify that the Basic Course is in fact two separate courses. On the current website,

customers now have the option of taking the online course and the in-person courses separately. Respondent averred that she wants to be able to continue operating Sway Brows, as the business provides a livelihood for her family, which includes her mother, her husband, and her young son.

LEGAL CONCLUSIONS

Governing Law

1. Private Postsecondary Education institutions are governed by the California Private Postsecondary Education Act of 2009 (Act). (Ed. Code, § 94800 et seq.) Generally, the Act prohibits the operation of a private postsecondary educational institution in California without obtaining an approval to operate under the Act. (Ed. Code, § 94886.)

2. An institution is exempt from obtaining the Bureau's approval to operate if it does not award degrees and solely provides educational programs for total charges of \$2,500 or less when no part of the total charges is paid from state or federal student financial aid programs. (Ed. Code, § 94874, subd. (f).)

3. Notwithstanding any other provision of law, the Bureau must cite any person for operating an institution without proper approval to operate issued by the Bureau pursuant to the Act. (Ed. Code, § 94944.) The Bureau Chief, or his or her designee, or the Director's designee, is authorized to issue citations containing orders of abatement and administrative fines not to exceed \$100,000 against persons who are without proper approval to operate a private, postsecondary institution. (Cal. Code Regs., tit. 5, § 75020, subd. (b).)

4. The Bureau bears the burden of proof in this matter. (Evid. Code, § 500.) In reviewing a citation, the applicable standard of proof is the “preponderance of the evidence.” (*Owens v. Sands* (2009) 176 Cal.App.4th 985, 994.) “Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations] The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant.” (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324–325.) (Emphasis in original.)

Definitions

5. Unless the context requires otherwise, the definitions set forth in the Act govern its construction. (Ed. Code, § 94810.) The Act defines the following terms applicable to this case.

6. A “private postsecondary educational institution” is a private entity with a physical presence in the state of California that offers postsecondary education to the public for an institutional charge.

7. “Postsecondary education” means a formal institutional educational program whose curriculum is designed primarily for students who have completed or terminated their secondary education or are beyond the compulsory age of secondary education, including programs whose purpose is academic, vocational, or continuing professional education. (Ed. Code, § 94857.)

8. “Approval to operate” or “approval” means the authorization pursuant to the Act to offer to the public and to provide postsecondary educational programs, as well as the written document issued to an institution signifying its approval to operate. (Ed. Code, § 94817.)

9. "Approved to operate" or "approved" means that an institution has received authorization pursuant to the Act to offer to the public and to provide postsecondary educational programs. (Ed. Code, § 94817.5.)

10. "To offer to the public" means to advertise, publicize, solicit, or recruit. (Ed. Code, § 94868.)

11. "To operate" means to establish, keep, or maintain any facility or location in this state where, or from which, or through which, postsecondary educational programs are provided. (Ed. Code, § 94869.)

12. At the time of the issuance of the Citation on May 13, 2021, "educational program" meant a planned sequence composed of a single course or module, or set of related courses or modules, that provides education, training, skills, or experience, or a combination of these. (Ed. Code, § 94837.) Effective January 1, 2022, Senate Bill 802 revised the definition of an educational program under Education Code section 94837 to exclude a single course, workshop, seminar, continuing education course, or other instruction that consists of 32 hours of instruction or less that is not designed to lead to employment. (Stats. 2021, ch. 552, § 2.)

13. "Degree" means a recognized educational credential awarded by an institution that signifies satisfactory completion of the requirements of a postsecondary educational program at the associate's level or above. (Ed. Code, § 94830.)

Bureau's Jurisdiction Over Sway Brows

14. In its closing brief, respondent contends that the Bureau lacks the jurisdiction to issue the Citation to Sway Brows because it is not a private

postsecondary educational institution as defined by the Act, as its purpose is not to provide academic, vocational, or continuing professional education. (Ex. G, p. 4.)

Respondent writes, "The microblading courses are akin to a course a private piano teacher might provide to those wanting to learn a new skill. The piano teacher's purpose is to teach the student how to play the piano rather than to become a professional musician, although the instruction could lead to a career in music." (*Ibid.*)

This argument is not persuasive.

15. Sway Brows is a private postsecondary educational institution because it is a private entity with a physical presence in Artesia, California, that offers microblading and shading skills to the public for an institutional charge. As set forth in Factual Finding 9, respondent's Instagram account advertises Sway Brows' courses as a school for its students to start a business or to have a career in microblading. Sway Brows' Facebook reviews also contain testimonials from students who took courses to advance a career in microblading. By marketing Sway Brows' classes as a course of study to become a professional microblading artist, the program is primarily designed for adults seeking vocational training. The publicized purpose of Sway Brows' courses is vocational in nature, even if some its students' objective may be avocational or recreational.

16. Respondent also contends that Sway Brows does not offer an "educational program" within the meaning of Education Code section 94837 because it offers a single course consisting of less than 32 hours of instruction. However, respondent cites to the current version of Education Code section 94837, rather than the former version of the same statute, which was in effect in 2021, when the Citation was issued. The former Education Code section 94837 did not define "educational program" to exclude courses of less than 32 hours of instruction. Furthermore, even

under the current definition of Education Code section 94837, Sway Brows is subject to the Bureau's jurisdiction because "educational program" excludes "a single course, workshop, seminar, continuing education course, or other instruction that consists of 32 hours of instruction or less that is not designed to lead to employment." However, as discussed above, although Sway Brows' courses may be less than 32 hours, they are designed to lead to employment. (*Ante*, Legal Conclusion 13.)

Exemption Under the Act

17. Nevertheless, Sway Brows is exempt from Bureau approval because it is "an institution that does not award degrees and that solely provides educational programs for total charges of two thousand five hundred dollars (\$2,500) or less when no part of the total charges is paid from state or federal student financial aid programs." (Ed. Code, § 94874, subd. (f).)

18. Here, Sway Brows does not award degrees. Sway Brows' students only receive a certificate from the Beauty Angels Academy showing that they have completed the online microblading training. The certificate is a vocational, not an educational, credential, and it does not signify completion of an education at the associate's level or above. Thus, the Beauty Angels Academy certificate does not fall within the meaning of "degree" as it is defined under Education Code section 94830. (*Ante*, Legal Conclusion 15.)

19. Additionally, the Basic Course, which is the course above the \$2,500 exemption limit in question, is in fact two courses that students may take separately. As credibly explained by respondent at the hearing and as corroborated by respondent's email to Lovette, in 2021, students at Sway Brow could take only the \$1,699 online course to obtain the certificate from Beauty Angel Academy, and then, if

they needed further guidance, they could also take the \$1,300 in-person course. (*Ante*, Factual Findings 11 & 17.) Thus, the \$1,699 online course and the \$1,300 in-person course do not constitute an education program of “a planned sequence composed of . . . [a] set of related courses” under Education Code section 94837, in that the \$1,300 in-person course is not mandatory for obtaining the Beauty Angel Academy certificate; it is optional. Respondent admittedly did not offer the Basic Course as two separate courses on her website, but she clearly offered it as such when Lovette emailed her to obtain more details about the course on March 15, 2021. (*Ante*, Factual Finding 11.) Moreover, since receiving the Citation, respondent has corrected her website so that students can now purchase the \$1,699 online course and the \$1,300 in-person course separately. (*Ante*, Factual Finding 19.)

Disposition

20. “In exercising its powers, and performing its duties, the protection of the public shall be the bureau’s highest priority.” (Ed. Code, § 94875.) Furthermore, the statutes relating to licensing of professions generally are designed to protect the public from dishonest, untruthful and disreputable licensees. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 451.) Such proceedings are not for the primary purpose of punishing an individual. (*Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165.)

21. At the hearing and during closing argument, complainant argued that citing Sway Brows is necessary to protect the public because there is a public interest in ensuring that its students, who go on to become permanent makeup artists, are well-trained in microblading. However, there is no allegation that Sway Brows is training its students in an improper or dangerous manner. The allegation of the anonymous complaint launching the Bureau’s investigation was that the price of a two-day course was too high. (*Ante*, Factual Finding 6.) Nevertheless, the Legislature,

under Education Code section 94874, subdivision (f), granted exemptions to institutions, such as Sway Brows, that do not award degrees and that solely provide educational programs costing below the \$2,500 threshold. Under these circumstances, there is no public protection issue involved in this case, and the Citation must be dismissed.

ORDER

Citation Number 2021255 against Tanny Diep doing business as Sway Brows is dismissed.

DATE: “06/01/2022”

“Original Signature on File”

JI-LAN ZANG

Administrative Law Judge

Office of Administrative Hearings