

NEW YORK STATE  
DEPARTMENT OF ECONOMIC DEVELOPMENT  
633 THIRD AVENUE  
NEW YORK, NY 10017

In the Matter

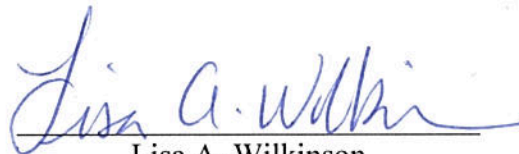
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the Application of **Personal Education Trainers, Inc.**  
**DBA Sylvan Learning and Technology Centers**  
for Certification as a Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59904

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson  
Administrative Law Judge

June 8, 2017

## SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development (“Division”) of the New York State Department of Economic Development to deny Personal Education Trainers, Inc. DBA Sylvan Learning and Technology Centers (“PET” or “applicant”) certification as a women-owned business enterprise<sup>1</sup> (“WBE”) be affirmed, for the reasons set forth below.

## PROCEEDINGS

This matter involves the appeal by applicant, pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”) Parts 140-144, challenging the determination of the Division that PET does not meet the eligibility criteria for certification as a WBE.

PET submitted an application to certify its business as a WBE on June 6, 2015 (Exhibit 1). The Division denied PET’s application by letter dated November 25, 2015 (Exhibit 2). The Division identified two grounds under 5 NYCRR 144.2 for the denial: (1) applicant failed to demonstrate that the woman owner enjoyed the customary incidents of ownership and shared in the risks and profits in proportion to her ownership interest in the enterprise; and (2) applicant failed to demonstrate that the woman owner is able to make business decisions without restrictions.

Scott Steron, treasurer of PET, filed a timely notice of appeal from the denial on December 17, 2015 (*see* Exhibit 3). Carol Steron, president and CEO of PET, submitted a written appeal to the Office of Hearings and Mediation Services dated March 21, 2016 (*see* Exhibit 4). Applicant’s submission consisted of a letter response with attached exhibits A through G, including applicant’s certificate of incorporation; consent in lieu of first meeting of Personal Educational Trainers, Inc.; minutes of the first meeting of the board of directors of Personal Educational Trainers, Inc.; bylaws of Personal Educational Trainers, Inc.; issued stock certificates of Personal Educational Trainers, Inc.; applicant account information; and the lease executed by Personal Educational Trainers for the learning center (*see* Exhibit 4).

Phillip Harmonick, Assistant Counsel, filed a response on behalf of the Division on May 19, 2017 and this matter was assigned to me. The Division’s response included the license

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<sup>1</sup> The term “women-owned business enterprise” applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (*see* 5 NYCRR Section 140.1(tt) (defining a women-owned business enterprise as one that is, inter alia, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”)).

agreement between Sylvan Learning Systems, Inc. (Sylvan) and Personal Education Trainers, Inc.; the June 12, 2015 application for WBE certification; the Division's denial letter; the 2014 Federal S Corporation Income Tax Returns for applicant; and the 2014 New York State S Corporation Franchise Tax Return.

A list of exhibits is attached to this recommended order.

### **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and any interviews that the Division's analyst may have conducted.

### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of PET's application for WBE certification is not supported by substantial evidence (*see* State Administrative Procedure Act Section 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

### **POSITIONS OF THE PARTIES**

#### Applicant

Ms. Steron states that she is "the president, CEO, and sole owner and 100% shareholder of PET" and she enjoys the customary incidents of ownership and shares in the risks and profits of PET in proportion to her ownership interest in the business enterprise (*see* Exhibit 4 at 2). As the owner of all 100 issued shares of common stock, Ms. Steron states that she retains 100% ownership status and 100% of the voting rights of the business (*id.*).

Ms. Steron also maintains that as the president, CEO and sole shareholder of PET she is able to make decisions for the business enterprise without restriction. She acknowledges the involvement of Sylvan in the business enterprise, but contends that applicant's status as a

franchisee “does not confer actual ownership and control of the franchised operation to [Sylvan]” (Exhibit 4 at 2). Ms. Steron states that she has the sole power to terminate the license agreement with Sylvan at any time and “can make the discretionary decision to take PET into a completely different area of business operations” or “elect to wind down or dissolve PET” (Exhibit 4 at 3). As to PET’s status as a franchisee, Ms. Steron states that “[w]hile [Sylvan] provides a franchise model which includes certain programs, techniques, materials, etc., and therefore has some guidance over how each Sylvan Learning Center is operated, [Sylvan] has no ability to control or restrict the operations of PET” (*see* Exhibit 4 at 3-4).

### Division

The Division contends that the Minority Women’s Business Enterprise program (MWBE) is intended to serve a remedial purpose. Therefore, its regulations, specifically 5 NYCRR 144.2(c)(2) concerning the requirement that a woman owner share in the risks and profits of a business enterprise in proportion to her ownership interest, should be construed liberally to ensure that only members of protected classes receive program benefits. The Division points out that if PET is certified, Sylvan is guaranteed to receive approximately [REDACTED] through State contracts, whereas Ms. Steron will only receive [REDACTED]. The Division argues that this arrangement confers a disproportionate share of PET’s earnings to Sylvan and is not consistent with the legislative objectives of the MWBE program. (*See* Exhibit 5 at 2.)

The Division also contends that the license agreement between PET and Sylvan does not allow Ms. Steron to make business decisions without restrictions because it “dictates at a minute level [] the manner in which PET is to be operated.” Among other things, the license prescribes PET’s décor, design, and layout, the equipment and training materials PET must use, quantities of materials that are sufficient to service its students, the manner in which PET’s staff must be trained and who may train such staff, the ratio of instructors to students PET may employ, the advertising materials PET may use; where PET is allowed to advertise; the recorded content of voicemail answering systems employed by PET; and the computer hardware and software that may be utilized in the operation of PET. (*See* Exhibit 5 at 3.)

### **FINDINGS OF FACT**

1. Personal Educational Trainers, Inc. DBA Sylvan Learning and Technology Centers (PET) is located in at 3300 Monroe Avenue, Rochester, New York 14618 (Exhibit 1, § 1)
2. PET entered into the license agreement with Sylvan Systems, Inc. (Sylvan), on June 30, 1995 to provide educational services in the Rochester area using the Sylvan

System. The territory in which PET is licensed operate is designated as a “Territory A” (see Exhibit 1, § 3; Exhibit 5 at Bates 1-37 and Exhibit A).

3. PET’s WBE application describes the business as follows: “Sylvan is the leading provider of personal learning for students for students in grades K-12. As the leader in supplemental education, Sylvan is transforming how students learn, inspiring them to succeed in school and in life. Sylvan’s proven tutoring approach blends amazing teachers with Sylvan Sync, a technology on the iPad for an engaging learning experience. Sylvan programs include study skills, math, reading, writing and test prep for college entrance and state exams. Sylvan also provides educational services to public and nonpublic schools.” (See Exhibit 1, § 3.C.)
4. Carol Steron is the president and CEO of PET and owns 100% of the issued common stock of corporation (Exhibit 1, § 2).
5. PET’s Board of Directors includes Carol Steron, president and CEO, Susan Steron, vice president, and Scott Steron, treasurer, all of whom share responsibility for the managerial operations of the business (Exhibit 1, §§ 2 and 4).
6. The Steron family owns and operates other educational service companies in Western New York. Carol Steron is an owner and president of Personal Education Trainers of Greece, Inc., Personal Education Trainers of Webster, Inc., and Personal Education Trainers of Canandaigua, Inc. Scott Steron, Carol Steron’s son, is an owner and treasurer of Personal Education Trainers of Canandaigua, S&S Testing Inc., and S&S Education, Inc. Susan Steron, Carol Steron’s daughter, is an owner and vice president of Personal Education Trainers of Webster, Inc., Personal Education Trainers of Canandaigua, Inc., S&S Testing Inc., and S&S Education, Inc. (See Exhibit 1, § 6.)
7. For the last three years, PET’s largest active projects have been with the Rochester and Geneva City School Districts. PET’s current contract with the Rochester City School District is valued at \$267,000 and its contract with the Geneva City School District is valued at \$221,510. (See Exhibit 1, § 4.D.)

Licensee Fees and Payments

8. PET must pay Sylvan a monthly royalty fee of [REDACTED] (id. at Bates 10). [REDACTED]

[REDACTED] (See Exhibit 5 at Bates 10.)

9. PET must pay a fee of from [REDACTED], as established by Sylvan, to Sylvan's National Advertising Fund. Such fee is subject to an alternative funding formula suggested by Sylvan and agreed to by [REDACTED]. (See Exhibit 5 at Bates 15).
10. If PET does not pay a National Advertising Fund Fee in excess of [REDACTED], PET must pay a minimum monthly amount of [REDACTED], whichever is greater, on local advertising or other marketing and advertising materials approved by Sylvan (see Exhibit 5 at Bates 16).
11. Upon Sylvan's request, PET must pay [REDACTED] to a local or regional advertising cooperative established by Sylvan (see Exhibit 5 at Bates 16).
12. According to PET's 2014 federal tax returns, PET paid Sylvan [REDACTED] in "franchise royalties" and [REDACTED] in "Sylvan Sync" during that tax year. These payments were listed on the 2014 tax return as itemized deductions and taken together constitute more than [REDACTED] percent of PET's gross revenue for that year. (See Exhibit 5 at Bates 54, 64).

#### Operation of Business Enterprise

13. PET must participate in all Corporate Family Program agreements entered into by Sylvan on behalf of its franchise network and honor discounts negotiated by Sylvan, subject to a prescribed maximum discount (see Exhibit 5 at Bates 12).
14. PET must operate its business in accordance with the Confidential Operation Manual, use only Sylvan educational training programs that Sylvan licenses to it or courses which Sylvan approves in writing (see Exhibit 5 at Bates 13).
15. PET must comply with Sylvan's standards, specifications and other reasonable requirements that Sylvan may make concerning the business's decor, design and layout. Sylvan may also prescribe specific standards for signs identifying the business with which the licensee must comply subject to local ordinances. (See *id.*)
16. The license required Sylvan and PET to agree on the site location (see *id.* at Bates 14).

17. PET must purchase commercially available equipment and materials required by Sylvan as set forth the Confidential Operations Manual or otherwise in writing. Any equipment and materials used by PET must be consistent with the type, quantity, quality, and variety associated with the Sylvan image. (*See id.*)
18. PET must purchase certain furniture products that meet Sylvan's specifications. The furniture can be purchased directly from Sylvan or through another source subject to specifications provided by Sylvan. (*See Exhibit 5 at Bates 13.*)
19. PET may not purchase diagnostic tests, student record forms, parent information booklets, explanatory and promotional brochures, equipment, furniture items or other materials that do not meet Sylvan's specifications (*see id.*).
20. PET must have a certified or credentialed instructor responsible for testing, prescription writing, prescription updating and monitoring on the premises at all times during instructional hours and testing. PET must provide sufficient and competent management, staff personnel, and Sylvan-certified personal at its business and comply with student/instructor ratios established by Sylvan. All instructors must be trained and certified by Sylvan or adequately trained by PET through PET's Sylvan-trained personnel. (*See Exhibit 5 at Bates 14.*)
21. PET must use advertising materials provided by Sylvan without any modifications. PET cannot publish any advertising that has not been approved by Sylvan and cannot advertise in another licensee's territory. (*See Exhibit 5 at Bates 14.*)
22. PET must maintain a telephone answering service or an answering machine during all times when personnel are unavailable for answering the telephone. (*See Exhibit 5 at Bates 14.*)
23. Upon Sylvan's request, PET must install, update or replace any equipment (including computer equipment) and software designed to be used in connection with its business and to utilize equipment and software in such kind and such manner as specified by Sylvan and which is compatible with Sylvan's central accounting system. In addition, PET must provide Sylvan access to its database and send Sylvan original or duplicate copies of all diskettes used in the operation of PET (*See Exhibit 5 at Bates 16.*)
24. PET is subject to quality assurance inspections by Sylvan staff and must correct any deficiencies documented by Sylvan within specified time limits (*see Exhibit 5 at Bates 17.*)

25. A PET representative must attend national conferences and regional conferences designated as mandatory in the Confidential Operations Manual, or as otherwise required by Sylvan at PET's expense (*see id.*).
26. Sylvan may transfer the license at any time at its sole discretion to any person or legal entity which agrees to assume Sylvan's obligations. The licensee's obligations are personal and can only be transferred with the prior written consent of Sylvan. (*See id.*)
27. During the term of the license, PET must use its best efforts in operating the business and in recommending, promoting and encouraging patronage of all Sylvan System centers and not engage as an owner, operator, or in any managerial capacity in an educational business other than as a licensee of the Sylvan System (*see Exhibit 5 at Bates 27*).

## **DISCUSSION**

This report considers applicant's appeal from the Division's determination to deny certification of PET as a women-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter sets forth two bases for denial. First, the Division determined that applicant failed to satisfy the ownership criteria because a significant portion of the earnings of the business enterprise must be paid to Sylvan on a gross revenue basis before the woman owner can realize any profits, contrary to 5 NYCRR 144.2(c). Second, the Division determined that applicant failed to demonstrate that the woman owner can make business decisions without restriction as required by 5 NYCRR 144.2.

### **I. Ownership**

The Division's regulations require a WBE applicant to demonstrate that the woman owner has a "real, substantial and continuing" interest in the business seeking certification (5 NYCRR 144.2[c][2]). The purpose of this requirement is to ensure that the woman owner's interest in the business seeking certification is more than just a pro forma ownership. The ownership requirement has two components, the second of which is relevant to this proceeding: the woman owner must "enjoy the customary incidents of ownership and [] share in the risks and profits, in proportion with [her] ownership interest in the business enterprise" (5 NYCRR 144.2[c][2]). This provision ensures that the woman owner receives the benefits that accrue to a business as a result of State contracting preferences from a MWBE certification and that persons who are not members of a protected class do not receive a disproportionate share of such benefits. The Division determined that PET did not satisfy this ownership requirement because a significant portion of its earnings must be paid to Sylvan under the license agreement.



Counsel for the Division states that although the Department has not established a bright line test for when guaranteed payments to another party become a disproportionate allocation of the profits of the business, rather than an ordinary business expense, the Division’s regulations should be liberally construed to achieve the remedial purpose of the MWBE program (Division Response at 2). Counsel argues that for a MWBE program to pass constitutional muster, the program must be narrowly tailored to confer benefits exclusively to members of the protected class in order to redressing prior discrimination. (See Division Response at 2; *Richmond v J.A. Croson*, 488 US 469, 506 [1989].) Programs that do not adequately limit benefits to members of protected classes, according to counsel, are not narrowly tailored under the Fourteenth Amendment to the U.S. Constitution (*id.*).

Following the *Croson* decision, New York State undertook a comprehensive study to determine whether article 15-A and its implementing regulations were justified in light of the Supreme Court’s ruling. The Office of Minority and Women’s Business Development (OMWBD) ultimately determined that “based on factual evidence . . . it has a firm basis for believing that a compelling State interest exists for certified business enterprises . . . that are owned and controlled by members of . . . minority groups . . . or by women. . . (See *In Matter of Martin Associates, Inc. v New York City Health and Hospitals Corporation*, 160 Misc.2d 58 [Sup. Ct., NY County 1993] [citations omitted]). Although *Martin Associates* addressed a different question than what is at issue here, it documents the State’s finding in 1992 that Article 15-A serves a remedial purpose and, importantly, provides support for the Division’s contention that its regulations should be broadly construed to effectuate the remedial purpose of the MWBE program (*id.* at 65). Research fails to reveal case law calling into question the legislative objectives of article 15-A.

The license agreement imposes numerous financial obligations on PET. Most significant is PET’s obligation to pay Sylvan a monthly royalty fee [REDACTED] (*see* Exhibit 5 at Bates 10 and 36) and a monthly national advertising fee [REDACTED] (*see* Exhibit 5 at 15). PET must also make required purchases from Sylvan including propriety products such as training programs, materials, diagnostic tests, student record forms, parent information booklets, and explanatory and promotional brochures (*see* Exhibit 5 at Bates 12). In 2014, PET paid Sylvan [REDACTED] in “Franchise Royalties” and [REDACTED] in “Sylvan Sync,” which the Division estimated to be approximately [REDACTED] (*see* Exhibit 4 at Bates 64). As counsel points out, if PET is certified, Sylvan is guaranteed to receive approximately [REDACTED] through State contracts, whereas Ms. Steron’s [REDACTED].

It is well settled in New York that “[a]n administrative agency’s interpretation of the regulations it administers is entitled to deference, and must be upheld if reasonable” (*Matter of Benali v. Dept. Envtl. Conservation* \_\_ AD2d \_\_, 2017 Slip Op D52153 [2nd Dept 2017] [citing *Matter of Wilson v New York City Dept. of Hous. Preserv. & Dev.*, 145 AD3d 905, 907; *Matter*

of 427 W. 51st St. Owners Corp. v Division of Hous. &Community Renewal, 3 NY3d 337, 342; Matter of Gaines v New York State Div. of Hous. &Community Renewal, 90 NY2d 545, 548-549]). Here, the Division has proffered a reasonable interpretation of 5 NYCRR 144.2(c) to conclude that the contractual arrangement between Sylvan and PET does not allow Ms. Steron to share in the profits of PET commensurate with her ownership interest (see Exhibit 5 at 2). If PET is certified and is able to benefit from contracting preferences with the State and other government entities, Sylvan will receive a substantial portion of PET's gross earnings on these contracts before any expenses are taken into consideration.

Sylvan is a multinational company with more than 800 locations worldwide, including 49 states (see <https://www.sylvanlearning.com/locations>). Sylvan cannot qualify as a WBE, however, if PET is certified, Sylvan would be guaranteed to reap a significant financial benefit from PET's preferential contracts with State and local entities even if PET makes little or no profit. The Division's reading of its regulations is reasonable and its determination is supported by substantial evidence.

## II. Control

For a business to be certified as a WBE, the "[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit . . . women who claim ownership of the business enterprise to make [] decisions without restrictions" (5 NYCRR 144.2[b][2]). Division counsel asserts that if business agreements vest power to control the operations of the enterprise in individuals other than the woman owner, the business is not eligible for certification. In this case, the license agreement between PET and Sylvan restricts Ms. Steron's ability to make decisions for the operation and management of the business enterprise.

The license agreement, and the Confidential Operations Manual, which is incorporated therein, impose strict standards of operation on PET, including: the décor, design, and layout PET must use; the equipment and materials PET must use; the educational, explanatory, and promotional materials PET must use and quantities of materials which must be available to students; the manner in which PET's staff must be trained and who may train such staff; the ratio of instructors to students PET may employ; the advertising materials PET may use; the locations where PET is allowed to advertise; the recorded content of voicemail answering systems employed by PET; and the computer hardware and software that PET must utilize. The Division correctly observes that "[f]rom major decisions, such as physical investments and staff, to minutia, the license agreement and Confidential Operations Manual dictate how PET is to be operated and deprives Ms. Steron of control of PET." (See Exhibit 5 at Bates 5-13.)

On her appeal, Ms. Steron set forth a list of activities she asserts she can control (see Exhibit 4 at 3 [unnumbered pages]). Many of these activities, however, are subject to extensive oversight and control by Sylvan, or are not central to the core functions of PET's business --

educational tutoring and testing services. Ms. Steron claims that she can set the fees charged for PET'S services, however, the license agreement requires PET to provide any corporate discounts established by Sylvan (*see* Exhibit 4 at 3 [unnumbered page] and Exhibit 5 at Bates 12). Ms. Steron claims that she may select, and has financial responsibility for, purchasing furniture, fixtures, equipment and office supplies (*see* Exhibit 4 at 3 [unnumbered pages] and Exhibit 5 at Bates 13). Furniture purchases, however, must meet Sylvan's specifications and if PET purchases furniture from a source other than Sylvan that does not meet Sylvan's specifications, it cannot be used (*see* Exhibit 5 at Bates 13). PET must also purchase certain commercially available equipment and materials as set forth in the Confidential Operations Manual or required by Sylvan in writing. Such equipment and materials must come from an approved source and be consistent with the type, quantity, quality and variety associated with Sylvan's image (Exhibit 5 at Bates 13). In addition, while Ms. Steron is responsible for recruiting, hiring, managing, compensating and directing the activities of her employees, all instructors must be trained and certified by Sylvan or adequately trained by PET through PET's Sylvan-trained personnel (*see* Exhibit 5 at Bates 13-14).

Ms. Steron's financing of her business, management of accounts receivable, responsibility for paying bills, control over corporate bank accounts, management of the physical facility, management of employee compensation, and management of customer relations are ancillary to the core business functions of PET and insufficient to overturn the Division's determination (*see* Exhibit 4 at 3 [unnumbered page]). The Division reasonably concluded based on the terms of the license agreement and other application materials that Ms. Steron could not make business decisions related to the operation of PET without significant restriction (*see* 5 NYCRR 144.2.[b][2]).

## **CONCLUSION**

As discussed above, applicant has failed to meet its burden to demonstrate that the Division's determination that Ms. Steron does not share in the profits of PET in proportion to her ownership interest therein, and that the license agreement restricts her ability to make business decisions for PET is not supported by substantial evidence (*see* 5 NYCRR 144.2[c][2] and 5 NYCRR 144.2[b][2]).

## **RECOMMENDATION**

For the reasons set forth above, the Division's determination to deny PET's application for certification as a women-owned business enterprise should be affirmed.

**Matter of Personal Education Trainers, Inc. DBA Sylvan Learning and Technology Centers**  
**Exhibit Chart**

Exhibit No.	Description
1	Personal Educational Trainers, Inc. June 6, 2015 application
2	Division's Denial Letter dated November 25, 2015
3	Applicant's Notice of Appeal dated December 17, 2015
4	Applicant's Appeal dated March 21, 2016
5	Division's Response to Applicant's Appeal dated May 19, 2017